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JURISDICTIONAL PREREQUISITES TO PRIVATE ACTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

I. INTRODUCTION

The purpose of Title VII of the Civil Rights Act of 1964 is to eliminate discrimination in employment based on race, color, sex, religion, or national origin.¹ Congress selected cooperation and voluntary compliance as the preferred means for obtaining equality in employment opportunity.² To this end, Congress created the Equal Employment Opportunity Commission³ (EEOC) and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the EEOC, would have an opportunity to settle charges of discrimination through "conference, conciliation and persuasion."⁴ Additionally, the 1972 amendments to the Act gave the EEOC the power to institute civil actions against employers or unions named in a discrimination charge.⁵

Congress also gave private individuals a significant role in the enforcement process of Title VII. When, in the view of the complaining party, the EEOC has not pursued his complaint with satisfactory speed or has entered into a conciliation agreement that is unacceptable to him, he may initiate a private action in a federal district court.⁶ In so doing, the private litigant not only redresses his own injury but also furthers congressional policy against discriminatory employment practices. The private right of action is an essential means of obtaining judicial enforcement of Title VII.⁷

1. 42 U.S.C. § 2000e *et seq.* (1970), *as amended*, 42 U.S.C. § 2000e *et seq.* (Supp. III, 1973). For the legislative history of the Act and its amendments, see Vaas, *Title VII: Legislative History*, 7 B. C. IND. & COM. L. REV. 431 (1966); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

2. H.R. REP. NO. 914, 88th Cong., 1st Sess. 86 (1963).

3. 42 U.S.C. § 2000e-4(a) (Supp. III, 1973). The EEOC consists of five members appointed for five-year terms by the President, with the advice and consent of the Senate. The EEOC has regional and state offices as well as its headquarters in Washington, D.C.

4. 42 U.S.C. § 2000e-5 (1970). Title VII requires deferral to state proceedings in cases where there is "a state or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof." Several decisions have sought to determine when a state has established or authorized an agency to grant or seek relief from discrimination. *See, e.g.*, *Curry v. Continental Airlines*, 513 F.2d 691, 10 FEP Cases 625 (10th Cir. 1975); *General Ins. Co. of America v. EEOC*, 491 F.2d 133, 7 FEP Cases 106 (9th Cir. 1974).

5. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973). The EEOC may not sue a government, government agency, or political subdivision, but must refer the case to the Attorney General who may initiate suit.

6. *Id.*

7. *See generally* Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1970).

There are various jurisdictional prerequisites to a private action under Title VII designed to allow the EEOC as well as state and local agencies to perform their conciliatory function.⁸ Although conciliation inevitably delays prompt judicial vindication of Title VII rights, Congress apparently decided that the objectives of the Act could best be served by giving these informal measures a chance to work.⁹ From the statutory language, the congressional committee reports, and the statements of key legislators, it is clear that Congress intended that all persons claiming discrimination in employment first exhaust their remedies with the Commission created for that purpose.¹⁰ Accordingly, the federal courts of appeals have required an individual to exhaust his administrative remedies, both state and federal, before instituting court action against the employer.¹¹

The primary exhaustion requirement is the filing of a claim of em-

8. Title VII sets out the following procedural steps for processing a charge with the EEOC:

A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice. (If a charge is filed initially with a state or local agency within 180 days after the alleged unlawful employment practice occurred, the charge must be filed with the Commission within 300 days after the alleged practice occurred, or within 30 days after receiving notice that the state or local agency has terminated its proceedings, whichever occurs first.)

After a charge is filed (or once the state or local deferral is ended), EEOC must serve a notice of the charge on the respondent within 10 days.

EEOC must then investigate the charge to determine whether there is reasonable cause to believe that the charge is true.

The Commission must make its determination of reasonable cause as promptly as possible and, so far as practicable, within 120 days.

If it finds no reasonable cause, the Commission must dismiss the charge; if it finds reasonable cause, it will attempt to conciliate.

If the Commission is unable to secure a conciliation agreement that is acceptable to it within 30 days, it may bring a civil action in an appropriate U.S. district court.

If EEOC doesn't bring an action within 180 days, it must notify the aggrieved party, who then has 90 days to file a suit on his own behalf. [citations omitted]

BNA FAIR EMPLOYMENT PRACTICE MANUAL 431:11-12 (1975). See also the summary of procedures by Representative Dent in the *Congressional Record*, March 8, 1972, reprinted in BNA, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 297 (1973).

9. Comment, *supra* note 7, at 1199-1200.

10. Mickel v. South Carolina State Employment Service, 377 F.2d 239, 1 FEP Cases 182 (4th Cir. 1967). See also H.R. REP. NO. 914, 88th Cong., 1st Sess. 86 (1963).

11. Olson v. Rembrandt Printing Co., 511 F.2d 1228, 10 FEP Cases 27 (8th Cir. 1975); Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118, 5 FEP Cases 1134 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 1 FEP Cases 328 (5th Cir. 1968); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968); Stebbins v. Nationwide Mutual Ins. Co., 382 F.2d 267, 1 FEP Cases 235 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968); Mickel v. South Carolina State Employment Service, 377 F.2d 239, 1 FEP Cases 182 (4th Cir. 1967). The Supreme Court has described the jurisdictional prerequisites to a Title VII suit as including filing timely charges of employment discrimination with the EEOC. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973).

ployment discrimination with the EEOC. Absent such a filing, a federal court is precluded from considering a claimant's Title VII claim. Under no circumstances may a person seek federal court relief from employment discrimination without first going to the EEOC.¹² As a jurisdictional prerequisite to suit, this filing requirement is uncomplicated. Yet various collateral requirements have created complex problems for the potential litigant under Title VII. These additional requirements are the subject of this comment.

II. FILING A CHARGE OF EMPLOYMENT DISCRIMINATION

As a general rule, all claims must be filed with the EEOC within 180 days following the occurrence of an alleged unlawful employment practice.¹³ Charges may be filed by a member of the EEOC, an aggrieved party, or any person on his behalf.¹⁴ A timely filing with the EEOC is a jurisdictional prerequisite to suit under Title VII.¹⁵ In addition to Title VII, many state statutes and local ordinances also forbid discrimination in employment. Those states having authority to grant or seek relief from unlawful employment practices through existing state or local fair employment practice agencies are known as "deferral states."¹⁶

A. Deferral Period

A charging party must give an existing state or local agency a meaningful opportunity to resolve charges of discrimination in employment. To this end, Title VII provides that no charge may be filed with the EEOC before the expiration of 60 days after proceedings have been commenced under state or local law, or after the termination of such proceedings, whichever occurs first.¹⁷ Compliance with this procedure has been held to be a jurisdictional prerequisite to the initiation of a suit in district

12. See cases cited note 11 *supra*.

13. 42 U.S.C. § 2000e-5(e) (Supp. III, 1973), amending 42 U.S.C. § 2000e-5(d) (1970). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973); *Revere v. Tidewater Tele. Co.*, 485 F.2d 684, 6 FEP Cases 891 (4th Cir. 1973); *Genovese v. Shell Oil Co.*, 488 F.2d 84, 6 FEP Cases 1139 (5th Cir. 1973); *Harris v. National Tea Co.*, 454 F.2d 307, 4 FEP Cases 103 (7th Cir. 1971); *Goodman v. City Products Corp.*, 425 F.2d 702, 2 FEP Cases 608 (6th Cir. 1970); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968). Although these cases dealt with the 90-day filing period of section 2000e prior to the 1972 amendments, their current applicability is unquestioned.

14. 42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

15. *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 10 FEP Cases 27 (8th Cir. 1975); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 4 FEP Cases 454 (7th Cir. 1972); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968). Cf. *Pacific Maritime Ass'n v. Quinn*, 491 F.2d 1294, 7 FEP Cases 482 (9th Cir. 1974).

16. 42 U.S.C. § 2000e-5(c) (Supp. III, 1973). See note 4 *supra*.

17. 42 U.S.C. § 2000e-5(c) (Supp. III, 1973).

court.¹⁸ Although the law states that no charge may be filed with the EEOC without first going to the state or local agency, the Supreme Court has approved the EEOC's practice of accepting a charge, orally referring it to the state or local agency involved, and then processing it upon the lapse of the 60-day deferral period without requiring a second filing.¹⁹

The failure to defer a charge to an existing state or local agency constitutes a bar to further action by the charging party in federal court. Dismissal of the action, however, is not warranted. In such circumstances, the district court will retain jurisdiction for a time sufficient to allow the state or local agency the statutory deferral period in which to act before continuing the case.²⁰ However, in *Corne v. Bausch & Lomb, Inc.*²¹ the District Court of Arizona declined to follow this procedure on the grounds that the applicable state period of limitation for filing a charge with the state had already run when the case was presented to it. Instead of deferring the charge to the state agency previously by-passed by the plaintiff, the court dismissed the charge for lack of jurisdiction. In doing so, the court pointed out that it is to the advantage of all concerned that civil rights complaints involving employment discrimination be simply and expeditiously handled at the local administrative level.²² According to the court, any arrangement which provides for less than the requisite state deferral will inevitably detract from the state agency's effectiveness. Consequently, the parties will feel free to ignore the state agency so long as they know there is parallel machinery to which they can turn.²³

B. EEOC's Extended Filing Period

The sole statutory exception to the 180-day EEOC filing limitation period is activated if a charge is filed initially with a state or local agency following the occurrence of an alleged unlawful employment practice.²⁴ In these cases, a subsequent filing with the EEOC may be made within 300 days of the alleged unlawful employment practice or within 30 days after receiving notice that the state or local agency has terminated its proceed-

18. *EEOC v. Union Bank*, 408 F.2d 867, 1 FEP Cases 429 (9th Cir. 1968); *Electrical Workers Union Local 5 v. EEOC*, 398 F.2d 248, 1 FEP Cases 335 (3d Cir. 1968), cert. denied, 393 U.S. 1021 (1969).

19. *Love v. Pullman Co.*, 404 U.S. 522, 4 FEP Cases 150 (1972). See also *Vigil v. A.T.&T. Co.*, 455 F.2d 1222, 4 FEP Cases 345 (10th Cir. 1972).

20. *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 6 FEP Cases 171 (9th Cir. 1973); *Motorola, Inc. v. EEOC*, 460 F.2d 1245, 4 FEP Cases 755 (9th Cir. 1972); *Mitchell v. Mid-Continent Spring Co.*, 466 F.2d 24, 4 FEP Cases 1144 (6th Cir. 1972); *Lewis v. FMC Corp.*, 11 FEP Cases 31 (N.D. Cal. 1975).

21. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 165, 10 FEP Cases 289, 292 (D.C. Ariz. 1975). See also *Padilla v. Stringer & City of Albuquerque*, 395 F. Supp. 495, 10 FEP Cases 575 (D.N.M. 1974); *Rucker v. Great Scott Supermarkets, Inc.*, 11 FEP Cases 473 (E.D. Mich. 1974).

22. 390 F. Supp. at 165.

23. *Id.*

24. 42 U.S.C. § 2000e-5 (e) (Supp. III, 1973).

ings, whichever occurs first. The purpose of this extended filing period in a "deferral state" is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right.²⁵

While the Act requires initial resort to an available state or local remedy, it is uncertain whether a timely filing under state law is required to obtain the benefit of the extended filing period with the EEOC. In *Olson v. Rembrandt Printing Co.*²⁶ the Eighth Circuit held that Congress did not intend to allow states to frustrate the federal remedy by imposing limitation periods shorter than 180 days. Under the *Olson* approach, a charge of employment discrimination must simply be filed within 180 days of the alleged occurrence.²⁷ In a deferral state, such as Missouri,²⁸ a complainant must file with the state or local agency within 180 days, notwithstanding the presence of a shorter state limitations period. The complainant is then given the benefit of the extended filing period, the lesser of 300 days since the alleged violation or 30 days after the state or local agency terminates its action, to allow him to pursue the local claim without prejudice to any possible federal rights.²⁹ In this context, the present 90-day limitation period of the Missouri Human Rights Commission is not controlling. The Eighth Circuit's ruling has no effect, however, on this limitation period as it applies to claims under state law.³⁰

In contrast to the *Olson* position, the Tenth Circuit in *Dubois v. Packard-Bell Corp.*³¹ held that a state fair employment commission's refusal to process a charge of employment discrimination on the ground that the

25. *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 10 FEP Cases 27 (8th Cir. 1975).

26. *Id.*

27. *Id.* at 1232, 10 FEP Cases at 29. See also Case No. KC7-5-315, 1973 CCH EEOC DEC. ¶ 6024, 2 FEP Cases 80 (1969), where the Commission concluded that compliance with state statutes of limitation is not a prerequisite to its jurisdiction. However, the Commission interprets section 2000e-5(e) as giving a person in a deferral state 300 days or 30 days after termination of state proceedings in which to file with the EEOC.

Since the Act does not make commencement of proceedings with the Commission dependent in any way upon the substance of State or local action or inaction, the latter provision [2000e-5(e)] is a limitation upon the extent of the primary jurisdiction granted by [§ 2000e-5(c)]. Both Sections cannot be read as granting primary exclusive jurisdiction to the extent that the operations of a State or local statute of limitations could oust the Commission of jurisdiction entirely, since such a reading is refuted absolutely by the plain terms of the Act.

Case No. KC7-5-315, 1973 CCH EEOC DEC. at 4047, 2 FEP Cases at 80. Accord, Case No. KC7-3-187, 1973 CCH EEOC DEC. ¶ 6058 (1969). Cf. 29 C.F.R. § 1601.12 (b) (1) (v). The Eighth Circuit found such a position cannot be supported by the statute or its legislative history.

28. 29 C.F.R. § 1601.12 (1975). The Missouri Commission on Human Rights has received provisional approval from the EEOC to exercise authority in the area of unlawful employment practices. See also § 296.010 et seq., RSMo 1969; Whittier & Whittier, *Employment Discrimination: Alternative Remedies to Title VII*, 43 U.M.K.C. L. REV. 296 (1975).

29. 511 F.2d at 1232, 10 FEP Cases at 29.

30. *Id.*

31. 470 F.2d 973, 5 FEP Cases 265 (10th Cir. 1972).

charge was not filed with the state agency within the state's limitation period did not constitute a "termination of [state] proceedings" within the meaning of section 2000e-(5)(e) of Title VII.³² Therefore, the complainant could not invoke the extended limitations period for filing a grievance with the EEOC. Under this view, failure to satisfy state filing limitation requirements will result in complete foreclosure of Title VII relief. The effect of this decision is to deny a plaintiff any possibility of by-passing state proceedings in favor of a federal remedy by simply waiting until the state is prevented by statute or regulation from considering the claim before filing a charge with the EEOC.

The *Dubois* decision is based upon the acknowledged purpose of the deferral period to allow state and local agencies an effective opportunity to resolve a charge of discrimination in employment.³³ The court stated that the legislative history of the Act is so "manifestly clear as to remove all doubt" that one of its purposes was to insure that states will be able to process employment discrimination charges under local law before the plaintiff resorts to federal remedies.³⁴ The court noted that a contrary result "[would fly] in the face of the congressional intent"³⁵ to accord a preference for the voluntary settlement of grievances at the local level.

It is noteworthy that at the time of the *Dubois* case the limitations period for filing a charge with the EEOC was limited to 90 days.³⁶ That is, the charge in *Dubois* was filed with the EEOC after both the state statute of limitations and the then 90-day federal limitation period had run. The plaintiff in *Dubois* was not allowed to invoke the extended filing period with the EEOC, then 180 days. However, *Dubois* is not expressly limited to its facts³⁷ and, under current law, the situation could arise in which the basic federal filing period of 180 days was satisfied by the complainant, but the shorter state filing period was not. Under the *Dubois* approach, the absence of a timely filing under state law would preclude redress in either state or federal court.

However, in this situation the Ninth Circuit reached the opposite re-

32. *Id.* at 975, 5 FEP Cases at 266.

33. *Id.*

34. *Id.*

35. *Id.*

36. 470 F.2d at 974, 5 FEP Cases at 266. The original Act, under which the case was decided provided that a claim of employment discrimination must be filed with the EEOC within 90 days following its occurrence. The New Mexico Human Rights Commission also provided for a 90-day filing limitation period. The charging party filed no charge with the state, yet filed with the EEOC 144 days after the alleged discriminatory occurrence. Failure to file with the state within the prescribed period of 90 days precluded application of the extended filing period, 210 days total under the original statute. The present 180-day filing limitation period of the EEOC probably does not affect the validity of *Dubois*. See Note, *Dubois v. Packard Bell Corp.: Compliance with the State Procedures as a Condition Precedent to Relief Under Title VII*, 1973 DUKE L.J. 749.

37. See Note, *supra* note 36, at 757. This position has not been shared by all. See, e.g., *Davis v. Valley Dist. Co.*, 522 F.2d 827, 10 FEP Cases 1473 (9th Cir. 1975).

sult in *Davis v. Valley Distributing Co.*³⁸ The *Davis* court said that the state remedy may be significantly different in kind or scope from the federal remedies afforded by Title VII, and therefore a state period of limitation cannot control a federal remedy.³⁹ The court found it unlikely that Congress intended that its judgment about the period within which a claim of employment discrimination affecting interstate commerce might be made could be displaced by state legislatures.

As an additional basis for its decision, the court could not find a significant reason why a complainant would wish to by-pass a state remedy altogether, as feared by the Tenth Circuit in *Dubois*.⁴⁰ It is well established that an adverse ruling in a state or local fair employment commission proceeding is not a bar to subsequent Title VII action.⁴¹ These two remedies were intended by Congress to be separate and distinct, not mutually exclusive. Nevertheless, under the 1972 amendments to the Act, the EEOC is required, in determining whether there is reasonable cause to believe that a violation has occurred, to accord "substantial weight" to these findings and orders made by state and local agencies.⁴² It is submitted that this factor, although apparently overlooked by the Ninth Circuit, may be good reason why a complainant may strive to avoid a state agency's disposition on the merits.

It is possible that a state limitation period for filing a charge of employment discrimination may be *longer* than the 180-day period provided for filing Title VII complaints.⁴³ In this situation a charging party could file with the state agency within its limitation period, but more than 180 days after the alleged discrimination. The issue that would then arise is whether he may invoke the extended period of 300 days to file with the EEOC. The language of *Olson*, requiring a complainant to file a charge with a state agency within 180 days after the alleged discrimination in order to have 300 days to file with the EEOC, would mandate dismissal of the charge.⁴⁴ However, in *Williamson v. Chevron Research Co.*⁴⁵ the District Court for the Northern District of California found nothing in the statutory language or its legislative history to support this requirement. The court held that when the state allows more than 180 days

38. 522 F.2d 827, 10 FEP Cases 1473 (9th Cir. 1975).

39. *Id.* at 833, 10 FEP Cases at 1476. "The court did not reach the issue whether the longer federal limitations period would be available to a complainant whose state filing is untimely.

40. *Id.*

41. *Batiste v. Furnco Construction Corp.*, 503 F.2d 447, 8 FEP Cases 746 (7th Cir. 1974); *Cooper v. Philip Morris, Inc.*, 464 F.2d 9, 4 FEP Cases 943 (6th Cir. 1972); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 4 FEP Cases 74 (2d Cir. 1971). The same rule would apply if the state agency fails to give a timely ruling.

42. 42 U.S.C. § 2000e-5 (b) (Supp. II, 1972).

43. *See, e.g.*, CAL. LABOR CODE § 1422 (West 1971).

44. 511 F.2d at 1233, 10 FEP Cases at 29.

45. 12 FEP Cases 95 (N.D. Cal. 1976). *Contra*, *Roberts v. Lockheed Aircraft Corp.*, 11 FEP Cases 1440 (C.D. Cal. 1975).

in which to file a charge, a timely state filing will invoke the 300-day limitation period for filing with the EEOC.⁴⁶

III. TOLLING OF THE EEOC FILING LIMITATION PERIOD

A. Continuing Discrimination

It is well settled that the 180-day limitation period for filing a charge of employment discrimination with the EEOC is no bar when the discrimination being challenged is a continuing practice, rather than a single, isolated discriminatory act. A general rule has evolved in the circuits that a plaintiff alleging a continuing violation of Title VII may file charges with the EEOC at any time during which the alleged continuing violation has taken place.⁴⁷ The rationale is to provide a remedy for past actions which operate to discriminate against the complainant at the present time. However, insertion of the word "continuing" in an EEOC complaint, without more, does not raise a per se claim of continuing discrimination.⁴⁸ A decision as to the continuing nature of the charge is made by the EEOC in the investigative stage based on all relevant information.⁴⁹

B. Title VII and Collective Bargaining Contracts

The tolling of the 180-day limitation period during the time spent in a collective bargaining grievance-arbitration process pursuant to the nondiscrimination clause of a union contract is a matter of continuing concern and disagreement. The problem arises when a complainant pursues his or her contractual grievance remedies prior to the institution of a civil suit under Title VII. The Act does not speak expressly to the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements. However, in *Alexander v. Gardner-*

46. 12 FEP Cases at 96. In an amicus brief, the EEOC pointed out that all of the states in the Eighth Circuit require that a charge be filed with the state agency within 180 days or less. The *Olson* court's dictum requiring that a charge be filed either with a state agency or with the EEOC within 180 days is thus in accord with the practice in the Eighth Circuit. The *Williamson* court distinguished *Olson* because it did not consider a factual situation where the state allows more than 180 days in which to file a timely charge. *Id.*

47. *Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118, 5 FEP Cases 1134 (9th Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 5 FEP Cases 994 (D.C. Cir. 1973); *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249, 5 FEP Cases 251 (8th Cir. 1972); *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443, 4 FEP Cases 590 (5th Cir. 1972); *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 3 FEP Cases 795 (7th Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971).

48. *See Stroud v. Delta Airlines, Inc.*, 392 F. Supp. 1184, 10 FEP Cases 314 (N.D. Ga. 1975).

49. Courts differ widely regarding the degree of deference which should be afforded to a decision by the EEOC to consider the complaint as timely. *See, e.g.*, *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 5 FEP Cases 994 (D.C. Cir. 1973); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 4 FEP Cases 454 (7th Cir. 1972).

*Denver Co.*⁵⁰ the Supreme Court construed the legislative history of the Act to mean that Title VII was intended "to supplement, rather than supplant," existing laws and institutions relating to employment discrimination. Therefore, an employee's statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.⁵¹

Prior to *Gardner-Denver* the courts agreed that the EEOC filing limitation period is tolled while the grievance-arbitration process functions.⁵² These cases recognized that although the time limit for filing with the Commission is jurisdictional,⁵³ the alleged unlawful employment practice cannot be said to have occurred completely until the contractual remedies provided by the collective bargaining agreement have been exhausted. The courts emphasized that statutes of limitations are directed at those who sleep on their rights and not those who invoke familiar and informal remedies established by the "rules of the shop."⁵⁴ Accordingly, the limita-

50. 415 U.S. 36, 7 FEP Cases 81 (1974). See generally Coulson, *The Emerging Role of Title VII Arbitration*, 26 LAB. L.J. 263 (1975); Note, 24 DRAKE L. REV. 236 (1974); Note, 24 CATHOLIC U. L. REV. 126 (1974).

51. 415 U.S. at 59, 7 FEP Cases at 90. According to the Court neither election of remedies, waiver, nor the federal labor policy respecting arbitration bars the employee, whose claim of racial discrimination was rejected by an arbitrator, from bringing an action under Title VII.

In the Court's desire to promote the national policy favoring the elimination of discriminatory employment practices, it has created a situation whereby grievance-arbitration procedures may be used by employees to prove the existence of discrimination, but not by employers to rebut such allegations. Thus, the adoption of this approach virtually nullifies an employer's possibilities of favorably settling claims of discrimination in the grievance-arbitration procedure.

52. *Moore v. Sunbeam Corp.*, 459 F.2d 811, 4 FEP Cases 454 (7th Cir. 1972); *Malone v. North American Rockwell Corp.*, 457 F.2d 779, 4 FEP Cases 544 (6th Cir. 1972); *Hutchings v. U.S. Industries*, 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970); *Phillips v. Columbia Gas Co.*, 347 F. Supp. 533, 5 FEP Cases 240 (S.D. W. Va. 1972), *aff'd*, 474 F.2d 1342, 5 FEP Cases 859 (4th Cir. 1973). Private attempts at settlement or conciliation not within the confines of the grievance procedure under the labor contract do not suspend the time limits of the statute. *Moore v. Sunbeam Corp.*, *supra* at 827, 4 FEP Cases at 465.

53. *But see* *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 11 FEP Cases 235 (5th Cir. 1975).

54. *Culpepper v. Reynolds Metals, Co.*, 421 F.2d 888, 892, 2 FEP Cases 377, 379 (5th Cir. 1970).

Culpepper suggests another interesting question, the converse of the one involved in that case. Suppose an employee with a complaint cognizable under both the grievance-arbitration procedure and Title VII utilizes his statutory remedy and then seeks to invoke the grievance procedure after the running of the limitation period prescribed in the contract. Should the running of the contractual period be suspended for the period in which statutory remedies were invoked? That result plainly could not be supported as a means of encouraging resort to arbitration or on the ground that there were special difficulties in utilizing the statutory procedures where racial discrimination was involved. Such a suspension could, however, be defended on two other grounds invoked in *Culpepper*. First, the employee had not slept on his rights and thus had warned the

tion period does not begin to run until the grievance procedures have been completed.

Since *Gardner-Denver* the courts have disagreed on the issue. The Tenth Circuit has recognized and affirmed the validity of the existing authority in the area.⁵⁵ In *Guy v. Robbins & Myers, Inc.*,⁵⁶ however, the Sixth Circuit held that an employee's filing of a grievance with respect to her allegedly discriminatory discharge did not toll the running of the EEOC filing limitation period. The court said this result was dictated by two recent Supreme Court cases. The court noted that in view of *Gardner-Denver* and the Supreme Court's subsequent ruling in *Johnson v. Railway Express Agency*,⁵⁷ it would be inconsistent to hold that the pursuit of any remedies under the Taft-Hartley Act, federal, state, or local fair employment practice statutes, or a collective bargaining contract operate to toll other remedies which the employee has a right to resort to concurrently.⁵⁸

In *Gardner-Denver* the Court emphasized that rights under Title VII and the rights under a collective bargaining contract have legally independent origins and are equally available. These coexisting rights are distinctly separate by nature. An employee submitting a grievance to arbitration seeks to vindicate his contractual rights, whereas his Title VII action concerns statutory rights afforded by Congress.⁵⁹ In *Johnson* the Supreme Court, fifteen months after *Gardner-Denver*, stressed that remedies available under the 1866 Civil Rights Act and those available under Title VII are separate, distinct, and independent.⁶⁰ Accordingly, if an individual files a complaint with the EEOC and later sues under the 1866 Act, the statute of limitations on the 1866 Act claim is not tolled by the filing of the complaint.⁶¹

The Sixth Circuit observed that to hold that the federal filing period is tolled by the mere filing of a grievance under a collective bargaining

employer of the need to preserve pertinent evidence. Second, limitation periods should be subordinated to the requirements of "justice," which might in this context mean preserving all available remedies and giving an employee whose statutory claim is denied an opportunity to pursue his contractual remedies. Arbitrators may, however, find these considerations an insufficient basis for enlarging contractually prescribed limitation periods.

Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 49 (1971).

55. *Sanchez v. T.W.A.*, 499 F.2d 1107, 8 FEP Cases 627 (10th Cir. 1974).

56. 525 F.2d 124, 11 FEP Cases 641 (6th Cir. 1975).

57. 421 U.S. 454, 10 FEP Cases 817 (1975).

58. 525 F.2d at 126, 11 FEP Cases at 643. The *Guy* court noted that all earlier cases upholding the tolling of the 180-day limitation period during the time spent in arbitration were decided prior to *Gardner-Denver* and hence were inapposite.

59. 415 U.S. at 49, 7 FEP Cases at 86.

60. 95 S. Ct. at 1721, 10 FEP Cases at 820.

61. *Id.* at 1722-23, 10 FEP Cases at 821-22. Actually, the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), contains no stated limitations period. The federal courts, therefore, apply whichever state limitation period would be applicable to the state action most clearly resembling the suit based on the 1866 Act. *Franks v. Bowman Trans. Co.*, 495 F.2d 398, 8 FEP Cases 66 (5th Cir. 1974).

contract would mean that the exercise of rights under Title VII could be delayed indefinitely while an individual is pursuing other remedies.⁶² This contention conflicts with congressional intent made manifest by the short periods of time provided in the Act as prerequisites for the exercise of the rights.⁶³

C. Equity and the Filing Limitation Period

The Fifth Circuit has recently carved out yet another exception to the 180-day filing limitation period. *Reeb v. Economic Opportunity Atlanta, Inc.*⁶⁴ held that the EEOC filing limitation period does not begin to run until facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonable, prudent regard for his rights. If there are no indications that the basis of a charge of discrimination was unknown to the plaintiff until after the alleged discriminatory incident took place, the regular filing period is applicable.⁶⁵

The impact of *Reeb* lies in the court's decision that the requirement of a timely filing with the EEOC is not a jurisdictional prerequisite to suit in the sense that strict compliance determines the jurisdiction of a district court, without respect to any of the other circumstances in a particular case.⁶⁶ By treating the filing requirement as a statute of limitations, the Fifth Circuit has apparently sanctioned the use of equitable doctrines such as tolling and estoppel. That is, although the filing of a complaint with the EEOC is a jurisdictional prerequisite to a private action under Title VII, the filing limitation period itself is to be construed as a statute of limitations.⁶⁷

The terminology used to describe the 180-day filing limitation period has not been consistent. Historically, confusion arose from a court's describing the limitation period as "jurisdictional" but then analyzing it

62. 525 F.2d at 128, 11 FEP Cases at 642.

63. The argument that the *Johnson* rationale supports the view that the EEOC filing limitation period is not to be tolled while the employee seeks contractual remedies has been refuted by a district court. *See Bush v. Wood Bros. Transfer, Inc.*, 398 F. Supp. 1030, 11 FEP Cases 113 (S.D. Tex. 1975).

64. 516 F.2d 924, 11 FEP Cases 235 (5th Cir. 1975).

65. *East v. Romine, Inc.*, 518 F.2d 332 at 336 n.3, 11 FEP Cases 300 at 302 n.3 (5th Cir. 1975).

66. 516 F.2d at 928, 11 FEP Cases at 238. The Act contemplates that complaints initiating EEOC proceedings will be brought by laymen. The court found that it is reasonable, therefore, for courts to refuse to apply technical rules of common law to charges initially filed with the EEOC. Remedial legislation, such as Title VII, is entitled to the benefit of liberal construction. *See, e.g., Love v. Pullman Co.*, 404 U.S. 522, 4 FEP Cases 150 (1972); *Georgia Power Co. v. EEOC*, 412 F.2d 462, 1 FEP Cases 787 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 1 FEP Cases 364 (5th Cir. 1968); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968).

67. 516 F.2d at 928, 11 FEP Cases at 238. The view that the 90-day requirement is not jurisdictional finds support in a Supreme Court decision. *See Love v. Pullman Co.*, 404 U.S. 522, 4 FEP Cases 150 (1972).

as if it were a statute of limitations.⁶⁸ This characterization has often been employed in cases involving continuing discriminatory practices which are said to "toll" the running of the 180-day period, as well as in cases involving the "tolling" of the period during the time spent in a collective bargaining grievance-arbitration process. In the context of the latter situation, the court in *Guy v. Robbins & Myers, Inc.* has expressly referred to the filing limitation period as a jurisdictional prerequisite.⁶⁹ According to the Sixth Circuit, the filing limitation in Title VII is more than a mere statute of limitations, and should not be treated as such.

IV. REJECTED PREREQUISITES TO SUIT

At one time or another virtually every step in the conciliation process of the EEOC has been asserted as an essential element of the private enforcement scheme, observance of which was arguably necessary to the trial court's jurisdiction.⁷⁰ It has been submitted, for instance, that because a complainant failed to pursue contractual grievance procedures readily available to him, he has failed to exhaust all administrative remedies and thus is barred from bringing suit under Title VII. This argument conflicts with the rationale of *Gardner-Denver* and has been refuted by the courts.⁷¹

An additional jurisdictional objection that has been made is that the absence of an EEOC determination of reasonable cause bars a subsequent private action under Title VII. Clearly such a determination is a prerequisite to the Commission's initiation of conciliation efforts.⁷² However, to engraft such a requirement onto the jurisdictional prerequisites to private action would inhibit the review of claims of employment discrimination in the federal courts.⁷³ *McDonnell Douglas, Inc. v. Green*⁷⁴ stands for the

68. See, e.g., *Cox v. U.S. Gypsum Co.*, 409 F.2d 289, 1 FEP Cases 714 (7th Cir. 1969). Cases such as *Cox* have referred to the filing limitation period itself as a "jurisdictional" prerequisite to suit, yet, at the same time, ruled that the time period was "tolled" in the presence of appropriate circumstances. Virtually all courts say that lack of subject matter jurisdiction may not be waived and, in fact, must be raised by the court itself if the parties fail to raise it. In light of this fact and the overwhelming authority which exists to the effect that the filing limitation period will be tolled or modified in certain instances, it is only fitting that such limitation period be correctly designated as a statute of limitations. Proper delineation of the issues here, however, does not alter the basic substantive law relating to a particular set of circumstances.

69. 525 F.2d at 127, 11 FEP Cases at 642.

70. For a thorough discussion of cases to date involving prerequisites to suit, see Comment, *supra* note 7, at 1199-1216.

71. *Hardison v. T.W.A.*, 375 F. Supp. 877, 10 FEP Cases 502 (W.D. Mo. 1974). See also *Bowe v. Colgate-Palmolive, Co.*, 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969); text accompanying note 51, *supra*.

72. 42 U.S.C. § 2000e-5(a) (Supp. III, 1973).

73. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). See also *Robinson v. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971); *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 3 FEP Cases 74 (5th Cir. 1971); *Flowers v. Laborers Local 6*, 431 F.2d 205, 2 FEP Cases 881 (7th Cir. 1970); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 2 FEP Cases 540 (3d Cir. 1970).

74. 411 U.S. 792, 5 FEP Cases 965 (1973).

proposition that Title VII does not restrict a complainant's right to sue to those charges on which the EEOC has made findings of reasonable cause.

Title VII provides that when the EEOC has made a finding of reasonable cause, it "shall endeavor to eliminate any such alleged unlawful employment by informal methods of conference, conciliation and persuasion."⁷⁵ Several appellate courts have held that no actual effort on the part of the EEOC to conciliate is required before a federal court may entertain a Title VII action.⁷⁶ Title VII merely requires that the Commission have an *opportunity* to persuade the employer or union before a private action can be brought. To hold otherwise would be to require a complainant to pursue an administrative remedy, which may be impossible to achieve, at the sacrifice of any effective judicial remedy.⁷⁷

Title VII, as amended, expressly provides that the EEOC "shall serve notice of the charge on such employer . . . within ten days" after it has been filed.⁷⁸ Nevertheless, failure by the EEOC to serve such notice of the charge is not jurisdictional and will not defeat a private action in federal court.⁷⁹ Although the administrative procedures directed towards conciliation of the discrimination charges are a central part of the Title VII scheme, the courts have reasoned that the individual's prerogative to bring a statutorily conferred right of action should not depend upon acts beyond his knowledge or control.

V. STATUTORY NOTICE OF RIGHT TO SUE

A. Requirement of Receipt of "Notice"

As seen above, a filing with the EEOC is a jurisdictional prerequisite to subsequent judicial consideration of a charge of employment discrimination under Title VII. If the Commission is not able to process a complaint with satisfactory speed or enters into a conciliation agreement that

75. 42 U.S.C. § 2000e-5 (a) (Supp. III, 1973).

76. See, e.g., *Dent v. St. Louis-S.F. R.R.*, 406 F.2d 399, 1 FEP Cases 583 (5th Cir. 1969); *Johnson v. Seaboard Coast Line R.R.*, 405 F.2d 645, 1 FEP Cases 456 (4th Cir. 1968), cert. denied, 394 U.S. 918 (1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968); *Electrical Workers Local 5 v. EEOC*, 398 F.2d 248, 1 FEP Cases 335 (3d Cir.), cert. denied, 393 U.S. 1021 (1968).

77. Comment, *supra* note 7, at 1207.

78. 42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

79. See *EEOC v. Airguide Corp.*, 395 F. Supp. 600, 10 FEP Cases 1229 (S.D. Fla. 1975); *Escamilla v. Mosher Steel Co.*, 386 F. Supp. 101, 9 FEP Cases 49 (S.D. Tex. 1975); *Padilla v. Stringer*, 395 F. Supp. 495, 10 FEP Cases 575 (D.N.M. 1974); *Veazie v. Southern Greyhound Lines*, 374 F. Supp. 811, 7 FEP Cases 999 (E.D. La. 1974); *Healen v. Eastern Airlines, Inc.*, 8 FEP Cases 917 (N.D. Ga. 1973); *Johnson v. ITT Thompson Inds.*, 323 F. Supp. 1258, 3 FEP Cases 225 (N.D. Miss. 1971); *Logan v. General Fireproofing Co.*, 309 F. Supp. 1096, 2 FEP Cases 107 (W.D.N.C. 1969).

Also, a charge need not be sworn to in order for a federal court to obtain jurisdiction over the matter. *Russell v. American Tobacco Co.*, _____ F.2d _____, 11 FEP Cases 395 (4th Cir. 1975); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968).

is not acceptable to the aggrieved party, the complainant may then seek his own federal court remedy. More specifically, if the Commission dismisses a charge, or if, within 180 days of the filing of the charge, it has neither issued a complaint nor entered into a conciliation or settlement acceptable to both the aggrieved party and the Commission, the Commission is required to so notify the charging party.⁸⁰ Although this notification by the EEOC is commonly referred to as a "notice of right to sue," the Act nowhere speaks in such terms. The phrase is simply a label employed by the courts and the Commission to describe the statutory notice given by the Commission which triggers the complainant's right to sue in a Title VII action.⁸¹

The courts have insisted that the complainant receive this "notice of right to sue" from the EEOC before bringing suit.⁸² The Act provides that a Title VII suit be filed within 90 days following the receipt of the notice of right to sue⁸³ and the federal courts of appeals which have considered the issue have uniformly held that this 90-day period is jurisdictional and mandatory.⁸⁴ The failure of a charging party to bring a civil action in his own name within 90 days after the receipt of the statutory notice deprives a federal district court of subject matter jurisdiction.

B. Notification of Dismissal of a Charge

The requirement of receipt of the statutory notice of right to sue applies only to the dismissal of charges or other termination of the adminis-

80. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973).

81. The courts have frequently referred to the statutory notification given by the EEOC which triggers the complainant's right to sue in a Title VII action as a "right to sue" letter. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 5 FEP Cases 965, 967 (1973); *EEOC v. Missouri Pac. R.R.*, 493 F.2d 71, 75, 7 FEP Cases 177, 178 (8th Cir. 1974); *United Textile Workers v. Federal Paper Stock Co.*, 461 F.2d 849, 850-51, 4 FEP Cases 907, 908 (8th Cir. 1972). The Commission regulations have also referred to these notifications as "notices of right to sue." 29 C.F.R. § 1601.25 (1975).

82. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 5 FEP Cases 965, 967 (1973); *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 10 FEP Cases 1423 (8th Cir. 1975); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 2 FEP Cases 519 (7th Cir. 1969). *See also Thornton v. East Texas Motor Freight*, 497 F.2d 416, 424, 7 FEP Cases 1245, 1252 (6th Cir. 1974).

83. The Equal Employment Opportunity Act of 1972 provides for a 90-day filing period following receipt of the right to sue letter. Originally the time period was 30 days. 42 U.S.C. § 2000e-5 (f) (1) (Supp. III, 1973), *amending* 42 U.S.C. § 2000e-5 (e) (1970).

84. *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 10 FEP Cases 1423 (8th Cir. 1975); *Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027, 10 FEP Cases 192 (9th Cir. 1975); *Genovese v. Shell Oil Co.*, 488 F.2d 84, 6 FEP Cases 1139 (5th Cir. 1973); *Archuleta v. Duffy's Inc.*, 471 F.2d 33, 5 FEP Cases 347 (10th Cir. 1973); *Stebbins v. Nationwide Mut. Ins. Co.*, 469 F.2d 268, 5 FEP Cases 154 (4th Cir. 1972), *cert. denied*, 410 U.S. 939 (1973); *Harris v. National Tea Co.*, 454 F.2d 307, 4 FEP Cases 103 (7th Cir. 1971); *Goodman v. City Products Corp.*, 425 F.2d 702, 2 FEP Cases 608 (6th Cir. 1970). *See also* Annot., 4 A.L.R. FED. 833, § 12 (a) (1970). More specifically, this filing limitation period is not a statute of limitations which can be tolled on equitable principles.

trative proceedings which took place *after* an effort at conciliation, and only in those cases in which the EEOC had found there was reasonable cause to believe that the charges were true.⁸⁵ Dismissal of a charge prior to conciliation brings into play different provisions of Title VII with respect to notice than does a failure to obtain a conciliation agreement.⁸⁶ If the Commission determines after investigation that there is not reasonable cause to believe that a charge is true and dismisses the charge, it must promptly notify the charging party of its action.⁸⁷ Under these circumstances, issuance of a formal notice of right to sue is irrelevant.⁸⁸ In this situation the 90-day limitation period is activated upon receiving notice of dismissal.⁸⁹ The result here is that the 90-day limitation period cannot be extended indefinitely until the charging party, weeks or months after the receipt of the dismissal notice, asks the Commission to issue him a second, or "right to sue," notice.

C. Right to Demand a Notice of Right to Sue

The complainant may demand the statutory "notice of right to sue" any time after the passage of 180 days from the date a charge was filed with the EEOC, or from the date the EEOC first had jurisdiction to investigate the charge after deferral to a state or local authority, whichever is later.⁹⁰ The right to demand a notice of right to sue exists, provided the Commission has not dismissed the complaint, achieved a conciliation agreement, or filed a civil action prior to that time.⁹¹ The Commission

85. *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 10 FEP Cases 929 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 10 FEP Cases 153 (2d Cir. 1975); *Barfield v. A.R.C. Security, Inc.*, 10 FEP Cases 789 (N.D. Ga. 1975).

86. 42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

87. *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1309, 10 FEP Cases 929, 934 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976). *See also DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 310, 10 FEP Cases 153, 156 (2d Cir. 1975).

88. 517 F.2d at 1310, 10 FEP Cases at 935. "Dismissal," under 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), precedes and is not dependent upon the aggrieved party's application for notice thereof. Although the section does not specify how soon after "dismissal" the Commission must notify the party, it is clear that the duty to provide the notice which commences the running of the period of limitation arises automatically and without any action by the claimant.

89. *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1309, 10 FEP Cases 929, 935 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976).

90. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973), provides that the Commission "shall so notify the person aggrieved" if within 180 days it has neither conciliated the dispute nor brought suit. In its regulations, the Commission has construed this language to require the issuance of the statutory notice on demand of the charging party after 180 days have elapsed from the filing of the charge. 29 C.F.R. § 1601.25b(c) (1975).

91. *See Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 10 FEP Cases 929 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 10 FEP Cases 153 (2d Cir. 1975); *Patton v. Conrad Area School District*, 388 F. Supp. 410, 10 FEP Cases 764 (D. Del. 1975). When any of the three sets of circumstances referred to in subsection (f)(1) of 42 U.S.C. § 2000e-5 [other than dismissal under subsection (b)] has occurred after some efforts at

need not have completed its investigation of the charge nor have completed conciliation efforts at the moment of issuance of the notice.⁹² The receipt of the notice letter, not the exhaustion of conciliation efforts, constitutes a jurisdictional prerequisite to suit.⁹³ The effect of allowing a complainant to request a notice of right to sue from the EEOC, other than in the situation of a dismissal based on lack of reasonable cause, is to place in the hands of the charging party the ability to select the approximate time he wants the notice to be issued and the 90-day limitation period to begin to run.

In several cases the defendant-employer has sought to have this 180-day waiting period construed as a statute of limitations which automatically starts the 90-day limitation period. The courts have found the 180-day period to be directory and not mandatory. The result is that the courts have refused to cut off a complainant's right to sue because the Commission had not notified the plaintiff that conciliation efforts had failed upon reaching the one hundred-eightieth day following receipt of the charge by the EEOC.⁹⁴

While it is clear that no right to demand a right to sue letter accrues to the charging party before the expiration of the 180-day period, it is unclear whether a notice to sue letter *may* be issued before then.⁹⁵ In cases where investigation cannot be completed by the Commission in any event within 180 days, the EEOC practice is to issue, upon request, a right to sue letter within the 180-day period.⁹⁶ This period is a time within which the EEOC has the power and the duty to conciliate a case. Nevertheless, a lack of resources and a backlog of charges may prevent the EEOC from instituting any action before the 180-day period from the filing of the charge expires. Accordingly, the majority of the courts considering the issue have decided that as long as the EEOC had the opportunity to investigate and conciliate within the 180-day period, a notice of right to sue issued during that time is not defective.⁹⁷ However, other

conciliation have been made, the EEOC has the statutory duty to inform the charging party of the status of his case.

92. See *Jefferson v. Peerless Pumps Hydrodynamic*, 456 F.2d 1359, 4 FEP Cases 512 (9th Cir. 1972); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 3 FEP Cases 858 (5th Cir. 1971); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 2 FEP Cases 540 (3d Cir. 1970); *Miller v. International Paper Co.*, 408 F.2d 283, 1 FEP Cases 647 (5th Cir. 1969).

93. See *Dent v. St. Louis-S.F. R.R.*, 406 F.2d 399, 1 FEP 583 (5th Cir. 1969), *cert. denied*, 403 U.S. 912 (1971).

94. See *Cunningham v. Litton Indus.*, 413 F.2d 887, 1 FEP Cases 861 (9th Cir. 1969); *Howard v. Mercantile Trust Co.*, 10 FEP Cases 158 (E.D. Mo. 1974).

95. Issuance may be by the Attorney General or the EEOC. 42 U.S.C. § 2000e-5 (f) (1) (Supp. III, 1973).

96. Cf. 29 C.F.R. § 1601.25b (1975).

97. *Weise v. Syracuse Univ.*, 522 F.2d 397, 10 FEP Cases 1331 (2d Cir. 1975); *Westerlund v. Fireman's Fund Ins. Co.*, 11 FEP Cases 744 (N.D. Cal. 1975); *Lewis v. FMC Corp.*, 11 FEP Cases 31 (N.D. Cal. 1975); *Howard v. Mercantile Trust Co.*, 10 FEP Cases 158 (E.D. Mo. 1974); *Bauman v. Union Oil Co.*, 6 FEP Cases 212 (N.D. Cal. 1973).

courts have considered the EEOC to have exclusive jurisdiction during the 180-day period, precluding the charging party from bringing suit in that time.⁹⁸

D. Termination of EEOC Proceedings

Even absent a demand from a charging party, official notice of right to sue must issue to the complainant upon a determination by the EEOC not to file suit. At that time, the 90-day limitation period will begin to run.⁹⁹ In reaching this decision, the Eighth Circuit in *Tuft v. McDonnell Douglas Corp.*¹⁰⁰ noted that the purpose of the notice of right to sue provision is to fix the time when the administrative remedies of the EEOC have ended. The court conceded the fact that prior to the 1972 amendments the EEOC administrative procedures ended with the termination of conciliation efforts. However, the court found that under current law, these administrative procedures end with the determination that the Commission will not file suit against the party named in the charge.¹⁰¹ Furthermore, the court stated that requiring the EEOC to issue a notice of right to sue upon termination of the administrative procedures comports with the expressed congressional desire to place the primary burden of enforcing Title VII on the Commission, rather than on the private complainant.¹⁰²

VI. THE EEOC'S "TWO LETTER" PROCEDURE

After the EEOC has decided that reasonable cause exists to believe that a charge of discrimination is true, the Commission will commence conciliation with the party named in the charge. If conciliation efforts fail, it has been the practice of the EEOC to send two formal communications to charging parties.¹⁰³ The first letter informs them that conciliation efforts by the EEOC have failed and that the charging party could, if so desired, request a formal notice of right to sue from the Commission. The second letter, when so requested, tells them that they can sue the employer

98. See *EEOC v. Duval Corp.*, _____ F.2d _____, 11 FEP Cases 1313 (10th Cir. 1976); *EEOC v. Wilson & Co.*, 387 F. Supp. 1224, 10 FEP Cases 946 (D. Colo. 1975); *Jones v. P.I.E.*, 10 FEP Cases 914 (N.D. Cal. 1975); *EEOC v. Mobil Oil Corp.*, 362 F. Supp. 786, 6 FEP Cases 722 (W.D. Mo. 1973).

The procedural scheme established by the Act for the EEOC, according to these courts, is simple. First, no one may sue within the first 30 days after a charge is filed. Secondly, between the 30th day and the 180th day only the EEOC may sue. Thirdly, after the 180th day, if notice is given to the charging party, both the EEOC and the complainant may sue. 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

99. *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 10 FEP Cases 929 (8th Cir. 1975), cert. denied, 96 S. Ct. 782 (1976).

100. *Id.*

101. *Id.* at 1039, 10 FEP Cases at 934.

102. *Id.*

103. The EEOC's amicus brief filed in *Tuft* indicated that a two letter procedure has been followed in approximately 200 cases under the jurisdiction of the Commission's St. Louis district office.

within 90 days of receipt.¹⁰⁴ This procedure was devised by the EEOC prior to the 1972 revision of the Act in order to overcome the problems faced by many charging parties in obtaining counsel and filing an action before the then 30-day period expired. By alerting the charging party to the fact that his case was almost ready for litigation and making the sending of the notice of right to sue dependent upon his request, the EEOC sought to prevent charging parties from missing the limitations period.¹⁰⁵

The cases involving this procedure have arisen in the context of a filing of a Title VII action in federal court by an employee more than 90 days after receipt of notice from the EEOC of failure of conciliation (first letter), but less than 90 days after receipt of the notice of right to sue (second letter). The issue presented is whether the 90-day limitation period of Title VII for filing a private action in a federal district court is triggered by the notice from the EEOC to the charging party of failure of conciliation or if the running of the limitation period is delayed until such time as the charging party requests and receives a formal notice of right to sue.¹⁰⁶ Deciding that the date of the second notice is the controlling one would have the effect of continuing the plaintiff's action. Deciding that the date of notice of non-conciliation is controlling would oust the plaintiff's Title VII claim from the district court's jurisdiction, the 90-day time limit having elapsed.

Only two appellate courts have directly considered this issue. In *Tuft v. McDonnell Douglas Corp.*¹⁰⁷ the Eighth Circuit concluded that the notice of right to sue cannot issue until the completion of the administrative process. Absent dismissal of the charge or the filing of an action by the EEOC itself, the court found that the process is completed when the Commission decides not to sue.¹⁰⁸ Because the first notice did not mention whether the EEOC had decided not to sue, but only informed the charging party that the conciliation had failed, the court found no basis for construing the first notice as initiating the 90-day limitation period. The

104. The exact text of the letters involved in *Tuft* are set forth in the opinion. 517 F.2d at 1303 nn.4, 5, 10 FEP Cases at 930 nn.4, 5.

105. BNA, 89 LABOR RELATIONS REPORTER ANALYSIS 25 (1975).

106. See *Williams v. Southern Union Gas Co.*, ____ F.2d ____, 12 FEP Cases 5 (10th Cir. 1976).

107. 517 F.2d 1301, 10 FEP Cases 929 (8th Cir. 1975). See also *Lacy v. Chrysler Corp.*, ____ F.2d ____, 12 FEP Cases 471 (8th Cir. 1976).

108. 517 F.2d at 1309, 10 FEP Cases at 934. The court found that such a reading of the Act would comport with the expressed congressional desire to place the primary burden of enforcing Title VII on the Commission rather than the private complainant.

If the statute required the issuance of notice at some intermediate stage of the administrative process, an aggrieved person would be required to either sue within 90 days or lose his right to sue without knowing whether or not the Commission would file suit on his behalf. Moreover, this construction remains consistent with pre-1972 procedures which geared the issuance of notice to exhaustion of administrative remedies.

Id.

Tenth Circuit has expressly adopted this interpretation of the Act by the *Tuft* court and subscribed to its rationale.¹⁰⁹

Numerous district courts have disagreed with the Eighth Circuit's analysis and taken the position that the EEOC's first letter is really a notice of right to sue.¹¹⁰ These courts have concluded that the statutory notice need only inform the complainant that conciliation efforts have failed. Thus, the EEOC's first letter satisfied this requirement. The major objection that has been raised alleges that the effect of the "two letter" procedure is to abolish any limitation period whatsoever, thereby frustrating the legislative intent to provide for expediting suits filed under this Act.¹¹¹ That is, the "two letter" procedure affords charging parties complete control over commencement of the filing period. The result of allowing a complainant to wait an indefinite period of time to file an action would be to allow the EEOC, in effect, to "repeal" the limitations portion of the Act.¹¹² This line of cases stresses the inconsistency of encouraging inordinate delays in Title VII proceedings prior to the institution of civil proceedings while attaching a sense of urgency to a case after such a suit is filed. Additionally, these courts have found that the 1972 amendments to Title VII did not alter the fact that it is the notice of failure of conciliation, not exhaustion of Commission procedures, which triggers the running of the 90-day limitation period.¹¹³

109. *Williams v. Southern Union Gas Co.*, ____ F.2d ____, 12 FEP Cases 5 (10th Cir. 1976).

110. *Clark v. Delta Refining Co.*, 11 FEP Cases 1372 (W.D. Tenn. 1975); *Williams v. Sheraton Corp. of America*, 11 FEP Cases 897 (E.D. La. 1975); *McGuire v. Aluminum Co. of America*, 11 FEP Cases 858 (S.D. Ind. 1975); *Turner v. Texas Instruments, Inc.*, 401 F. Supp. 1179, 11 FEP Cases 748 (N.D. Tex. 1975); *Keeling v. St. Louis-S.F. R.R.*, 11 FEP Cases 700 (W.D. Tenn. 1975); *Kirkwood v. Pidgeon Thomas Iron Co.*, 11 FEP Cases 699 (W.D. Tenn. 1975); *Pope v. North Hills Passavant Hospital*, 11 FEP Cases 590 (W.D. Pa. 1975); *Taylor v. Lockheed Georgia Co.*, 11 FEP Cases 575 (N.D. Ga. 1975); *Bottoms v. St. Vincent's Hospital*, 11 FEP Cases 392 (S.D. Ind. 1975); *Wilson v. Sharon Steel Corp.*, 399 F. Supp. 403, 11 FEP Cases 145 (W.D. Pa. 1975); *Mungen v. Choctaw, Inc.*, 402 F. Supp. 1349, 10 FEP Cases 1345 (W.D. Tenn. 1975); *Kelly v. Southern Products Co.*, 10 FEP Cases 1221 (N.D. Ga. 1975); *Whitton v. ITT Cannon Elec.*, 395 F. Supp. 492, 10 FEP Cases 1207 (D. Ariz. 1975); *Bradshaw v. Zoological Society*, 10 FEP Cases 1268 (S.D. Cal. 1975); *Barfield v. A.R.C. Security, Inc.*, 10 FEP Cases 789 (N.D. Ga. 1975). See also *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 10 FEP Cases 153 (2d Cir. 1975); *Cleveland v. Douglas Aircraft Corp.*, 509 F.2d 1027, 10 FEP Cases 192 (9th Cir. 1975), citing *Harris v. Sherwood Medical Industries*, 386 F. Supp. 1149, 8 FEP Cases 1142 (E.D. Mo. 1974).

111. See, e.g., *Turner v. Texas Instruments, Inc.*, 401 F. Supp. 1179, 11 FEP Cases 748 (N.D. Tex. 1975); *Wilson v. Sharon Steel Corp.*, 399 F. Supp. 403, 11 FEP Cases 145 (W.D. Pa. 1975); *Kelly v. Southern Products, Co.*, 10 FEP Cases 1221 (N.D. Ga. 1975). See also *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 10 FEP Cases 153 (2d Cir. 1975).

112. From the Commission's files, it has been found that at times charging parties have waited almost a year (337 days) before requesting a formal "notice to sue" letter. *Whitfield v. Certain-Teed Products Corp.*, 389 F. Supp. 274, 276 n.2, 9 FEP Cases 5, 6 n.2 (E.D. Mo. 1974), *rev'd sub nom.*, *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 10 FEP Cases 929 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976).

113. See, e.g., *Bottoms v. St. Vincent's Hospital*, 11 FEP Cases 392 (S.D. Ind.

A third approach to the issue has been taken by several district courts.¹¹⁴ This view agrees with the majority of the decisions that in Title VII cases the 90-day limitation period begins to run once the charging party receives notice that conciliation efforts have either terminated or have failed. However, these courts have reasoned that, as a matter of equity, they should not penalize a plaintiff for defects in EEOC procedure.¹¹⁵ The *Tuft* court also utilized this rationale as an alternative basis for its decision.¹¹⁶ That is, even if the Act could be construed to require the issuance of the notice of right to sue upon the failure of conciliation efforts, the first letter explicitly informed the complainant that the 90-day limitation period would not begin to run until receipt of the second notice. Accordingly, the Eighth Circuit noted that because the complainant did not receive effective notification of the requirement of suit within 90 days after receipt of the first letter, in the absence of prejudice to the defendant, the complainant should not suffer because of errors or omissions on the part of the Commission.¹¹⁷ Nonetheless, the majority of courts have refused to apply this equitable concept. They have held that reliance upon the EEOC does not excuse the failure to comply with a jurisdictional prerequisite.¹¹⁸

VII. BRINGING A SUIT

There is general agreement that if a plaintiff files no papers whatsoever with a federal district court within the 90-day time period following receipt of notice of right to sue, his claim is barred. However, the law is by no means clearly settled on whether an action is timely commenced where the plaintiff has filed his notice of right to sue letter as well as a request for appointment of counsel¹¹⁹ within the 90-day time limit, but has not filed a formal complaint.¹²⁰

Some courts have held that merely filing the right to sue letter in

1975); *Whitton v. ITT Cannon Elec.*, 395 F. Supp. 492, 10 FEP Cases 1207 (D. Ariz. 1975); *Barfield v. A.R.C. Security, Inc.*, 10 FEP Cases 789 (N.D. Ga. 1975).

114. *Roberts v. Ivey Construction Co.*, 11 FEP Cases 697 (N.D. Ga. 1975); *Diaz v. Food Fair Stores*, 11 FEP Cases 920 (D. Colo. 1975); *Stansell v. Sherwin-Williams Co.*, 11 FEP Cases 928 (N.D. Ga. 1975); *Taylor v. P.I.E.*, 394 F. Supp. 72, 10 FEP Cases 826 (N.D. Ill. 1975).

115. *Id.* See also *Gates v. Georgia Pacific Corp.*, 492 F.2d 292, 7 FEP Cases 416 (9th Cir. 1974); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 1 FEP Cases 431 (7th Cir. 1968).

116. 517 F.2d at 1310, 10 FEP Cases at 935.

117. *Id.*

118. See, e.g., *McGuire v. Aluminum Co. of America*, 11 FEP Cases 858 (S.D. Ind. 1975); *Barfield v. A.R.C. Security, Inc.*, 10 FEP Cases 789 (N.D. Ga. 1975); *Kelly v. Southern Products Co.*, 10 FEP Cases 1221 (N.D. Ga. 1975); *Wilson v. Sharon Steel Co.*, 399 F. Supp. 403, 11 FEP Cases 145 (W.D. Pa. 1975).

119. Courts are authorized to appoint attorneys for the aggrieved individual "in such circumstances as the court may deem just," and they may permit the commencement of the suit without payment of fees, costs, or security. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973).

120. "A civil action is commenced by filing a complaint with the Court." Fed. R. Civ. P. 3.

the district court within the specified time period is an initiation of an action. This filing is found to satisfy the 90-day limitation period despite the fact that it does not comply with the requirements for pleading found in the Federal Rules of Civil Procedure.¹²¹ Proponents of this view argue that such an interpretation comports with the remedial nature of the statute.

A second line of cases, led by the Sixth Circuit, have construed the filing of the notice of right to sue or request for appointment of counsel to be a sufficient compliance with the filing requirement.¹²² However, rather than hold that the limitation period is satisfied irrespective of a subsequent delay in filing, this view requires that a formal complaint be filed within a reasonable time following the appointment of counsel.¹²³

A third appellate court has decided that the filing of such papers merely tolls the running of the limitation period until counsel is appointed.¹²⁴ After the charging party obtains an attorney, the period continues to run.

The decisions of all three of these courts were made in the setting of the pre-1972 amendments 30-day filing limitation period, a factor which obviously influenced the outcomes. In view of the present 90-day limitation period and the notice-type pleading requirements of the Federal Rules of Civil Procedure, strict compliance with normal federal pleading standards seems appropriate, absent circumstances where the court itself was responsible for a delay in filing a complaint.

VIII. CONCLUSION

The litigation surrounding Title VII has largely clarified the jurisdictional prerequisites to bringing a private action in a federal district court. In doing so, the courts have disposed of a myriad of jurisdictional "prerequisites" interposed by employer-defendants as a bar to judicial enforcement of the statute. Moreover, the courts have held that there are only two jurisdictional prerequisites to commencing a private action under Title VII: the filing of a charge with the EEOC and the institution of a suit within 90 days after the receipt of the statutory notice from the EEOC.

In addition, these two prerequisites have been liberalized by a loose interpretation of the state deferral requirement, by the application of tolling in various circumstances, by a broad definition of what constitutes a

121. *Huston v. General Motors Corp.*, 477 F.2d 1003, 5 FEP Cases 1032 (8th Cir. 1973). See also *Reyes v. Missouri-Kansas-Texas R.R. Co.*, 53 F.R.D. 293, 3 FEP Cases 121 (D. Kan. 1971).

122. *Harris v. Walgreen's Dist. Center*, 456 F.2d 588, 4 FEP Cases 342 (6th Cir. 1972); *Guy v. Robbins & Meyers, Inc.*, 8 FEP Cases 309 (W.D. Tenn. 1974).

123. Even the *Huston* court stated: "In ruling on such application [for appointment of attorney and payment of fees], the district court should specify a reasonable period of time for the filing of a formal complaint against the employer." 477 F.2d at 1008, 5 FEP Cases at 1032.

124. *Harris v. National Tea Co.*, 454 F.2d 307, 4 FEP Cases 103 (7th Cir. 1971).