Missouri Law Review

Volume 44
Issue 2 *Spring 1979*

Article 6

Spring 1979

Age Discrimination in Employment Act--Resort to State Remedies As a Prerequisite to Federal Action--Holliday v. Ketchum, MacLeod & Grove, Inc.

Daniel Engle

RECENT CASES

AGE DISCRIMINATION IN EMPLOYMENT ACT—RESORT TO STATE REMEDIES AS A PREREQUISITE TO FEDERAL ACTION

Holliday v. Ketchum, MacLeod & Grove, Inc.[1]

In 1957 James Holliday began work at Ketchum, MacLeod & Grove, Inc., an advertising agency. He worked there as a production manager until 1976, when he was dismissed from employment at age 57. Claiming illegal age discrimination,[2] he sought redress from Ketchum.[3] Initially he filed a timely notice of intent to commence a civil action with the Secretary of Labor,[4] pursuant to the Age Discrimination in Employment Act of 1967 (ADEA).[5] Three weeks later later Holliday filed a complaint with the Pennsylvania Human Relations Commission.[6] Under state law, the complaint was untimely and was dismissed by the Commission.[7] He then filed suit in the federal district court for the Western District of Pennsylvania.

---

1. 584 F.2d 1221 (3d Cir. 1978).

2. Age Discrimination in Employment Act of 1967 § 14(a), 29 U.S.C. § 623(a) (1970), provides that "it shall be unlawful for an employer—(1) to fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."

3. Four officers of the corporation were also named defendants. 584 F.2d 1221 (3d Cir. 1978).

4. Prior to the 1978 amendment, 29 U.S.C. § 626(d) (1970) provided in relevant part:

> (d) No civil action may be commenced by any individual . . . until the individual has given the Secretary not less than sixty days notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred. . . .

Section 626(d), *as amended by* Pub. L. No. 95-256, 92 Stat. 189, 190 (1978) (reprinted in 46 U.S.L.W. 51 (1978)), requires that a litigant file a "charge" rather than a "notice of intent" with the Secretary.

5. Age Discrimination in Employment Act of 1967, §§ 1-16, 29 U.S.C. §§ 621-34 (1970). *See generally* Note, *The Age Discrimination In Employment Act of 1967*, 90 HARV. L. REV. 380 (1976); Comment, *Age Discrimination in Employment*, 50 N.Y.U.L. REV. 924 (1975).

6. The Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-63 (Purdon 1964), prohibits among other things age discrimination in employment and established the Pennsylvania Human Relations Commission as the agency to act upon such complaints. *Id.* §§ 952, 953, 957.

7. Under Pennsylvania law, 43 PA. CONS. STAT. ANN. § 959 (Purdon 1964), an age discrimination complaint must be filed with the Pennsylvania

The district court followed Third Circuit precedent[8] and granted Ketchum's motion to dismiss citing section 633 of the ADEA[9] as depriving the court of jurisdiction over the matter.[10] The court held that "by failing to timely file with the [Commission] the plaintiff has not afforded the state agency a reasonable opportunity to resolve the matter. . . and his [federal] suit is jurisdictionally defective."[11] Holliday appealed to the Third Circuit, asking the court to overrule the precedent it had established four years earlier[12] and hold that a private plaintiff who charges employment discrimination in violation of the federal ADEA is not required to resort to state age discrimination remedies before filing a suit in federal court. The court unanimously[13] agreed, and expressly overruled its prior decision.[14] The district court order was reversed and the case remanded.

Resolution of the issue before the court was dependent upon the judicial construction given section 633(b) of the ADEA.[15] Section 633(b) gives state officials a sixty-day period in which to attempt to resolve an age discrimination in employment complaint before they can be preempted by a federal suit.[16] The language of section 633(b) is ambiguous, however, as

---

Human Relations Commission "within ninety days after the alleged act of discrimination." Holliday filed 189 days following his discharge.

8. In 1974, the Third Circuit decided that initial resort to state remedies by an individual was required under § 14(b) of the ADEA, 29 U.S.C. § 633(b) (1970). Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974). *But see id.* at 17 (Garth, J., concurring) (initial resort to state remedies not required).

9. Age Discrimination in Employment Act of 1967, § 14(b), 29 U.S.C. § 633(b) (1970). For the text of the section, see note 15 *infra*.

10. 17 Fair Empl. Prac. Cas. 1075 (W.D. Pa. 1977). Order dated May 6, 1977.

11. *Id.* at 1076.

12. Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974).

13. The case was argued on February 24, 1978 before a panel of three judges who ordered it reargued before the court *en banc*. It was re-argued on May 11, 1978, and decided on July 14, 1978.

14. Overruled was Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974).

15. 29 U.S.C. § 633 (1970) provides:

> Federal—State relationship
>
> (a) Nothing in this chapter shall affect the jurisdiction of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law unless such proceedings have been earlier terminated. . . .

16. Missouri has no law prohibiting discrimination in employment because of age. *See* Missouri Fair Employment Practices Act §§ 1-7, RSMo §§ 296.010-.070 (1969) (prohibiting discrimination on the basis of race, creed, color, religion, national origin, sex, or ancestry). Missouri residents therefore have

to whether an aggrieved individual *must* resort to the appropriate state agency before proceeding under the ADEA.[17] It might also be interpreted to mean only that if an individual does file a claim with a state authority, then the state authority should be given sixty days to resolve the dispute without federal interference.[18] Conflicting judicial interpretations of section 633(b)[19] have created a vexatious procedural snarl for the unwary individual.[20] *Holliday* resolved the confusion in a manner consistent with the legislative history of the ADEA and its statutory purpose.

The same Third Circuit was the first appellate court, four years earlier, to judicially construe the language of section 633(b). In that case, *Goger v. H.K. Porter Co.*,[21] the court declared that section 633(b) required an individual to resort to state remedies as a condition precedent to federal suit;[22] it based the decision primarily on the close similarity of language between section 633(b)[23] of the ADEA and section 2000e-5(c)[24] (the state deference provision) of Title VII of the Civil Rights Act of 1964.

---

no available state remedy for age discrimination and may automatically file suit in federal court, thus avoiding the procedural problem raised by the plaintiff in this case. The neighboring states of Illinois, Iowa, Kentucky and Nebraska all have state age discrimination in employment laws and thus are affected by the resolution of the issue here before the court.

17. *See generally* Annot., 24 A.L.R. Fed. 808 (1975).

18. *See* note 32 *infra* for courts so holding.

19. In the Eastern District of Michigan alone eight opinions on the subject have been issued by six judges without reaching a consensus. *Compare* Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974); Rucker v. Great Scott Supermarkets, Inc., 11 Fair Empl. Prac. Cas. 473 (E.D. Mich. 1974), *aff'd* 528 F.2d 393 (6th Cir. 1976); McGhee v. Ford Motor Co., 15 Fair Empl. Prac. Cas. 869 (E.D. Mich. 1976); Graham v. Chrysler Corp., 15 Fair Empl. Prac. Cas. 876 (E.D. Mich. 1976) (all indicating that an individual must utilize state remedies first); *with* Gabriele v. Chrysler Corp., 573 F.2d 949 (6th Cir. 1978); Bertsch v. Ford Motor Co., 415 F. Supp. 619 (E.D. Mich. 1976); Magalotti v. Ford Motor Co., 418 F. Supp. 430 (E.D. Mich. 1976); and Nickel v. Shatterproof Glass Corp., 424 F. Supp. 884 (E.D. Mich. 1976) (not requiring prior resort to state remedies).

20. A plaintiff who is dismissed from federal court for failing to seek state relief often finds his subsequent state claim dismissed as untimely. The aggrieved individual is thus effectively barred from all judicial tribunals. *See* Comment, *Procedural Aspects of the Age Discrimination in Employment Act of 1967*, 36 U. PITT. L. REV. 914 (1975).

21. 492 F.2d 13 (3d Cir. 1974).

22. *Id.* at 16. However the court permitted Goger's federal action to proceed on the basis of equitable considerations and in view of the remedial purpose of the ADEA.

23. 29 U.S.C. § 633(b) (1970), set out at note 15 *supra*.

24. 42 U.S.C. § 2000e-5(c) (1976) (denominated § 2000e-5(b) before the 1972 amendments to Title VII) provides:

> (c) In case of an alleged unlawful employment practice occurring in a State . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . . no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings

Section 2000e-5(c) of Title VII has been construed to require individuals to file complaints with appropriate state authorities,[25] an interpretation strongly supported by its legislative history.[26] The concurring opinion,[27] however, refused to accept that the similar language in the two sections implied that they should be subject to the same construction[28] and interpreted section 633(b) as allowing, but not requiring, a plaintiff to utilize state remedies before filing suit under the ADEA.[29]

Decisions interpreting section 633(b) after *Goger* have generally taken one of three positions. A few courts have held that filing with the state is a jurisdictional prerequisite.[30] A significantly greater number of courts have

---

have been commenced under the State . . . law, unless such proceedings have been earlier terminated, . . .

See also Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 NOTRE DAME LAW. 492 (1976).

25. Love v. Pullman Co., 404 U.S. 522 (1972) (Title VII requires initial resort to state remedies); Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028 (9th Cir. 1970), *vacated*, 400 U.S. 1004 (1971); EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968).

26. *See, e.g.*, 110 CONG. REC. 12721 (1964). Senator Humphrey therein remarked:

> If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them . . . the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under State or local law. However, after the agency has had 60 days to adjust the complaint, or after it terminates proceedings on it, the complainant may go to the Federal Commission.

27. Judge Garth concurred with the court's holding that Goger's federal action should be permitted to proceed because of equitable considerations. He disagreed with the majority's statutory analysis of § 633(b). 492 F.2d at 17.

28. *See* Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) (cautions against blindly applying Title VII reasoning and results to ADEA cases).

29. The concurring opinion in *Goger* noted that § 633(a) has no counterpart in Title VII, and that § 633 unlike § 2000e-5(c) does not deal with jurisdictional prerequisites for filing suit but rather is concerned with federal-state relationships. Section 633 is also separated from the jurisdictional requirements of the Act which are set out in § 626. Thus, even though the language of § 633(b) is similar to that of § 2000e-5(c), its purpose and thrust are different.

30. *E.g.*, Rogers v. Exxon Research & Eng'r Corp., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Curry v. Continental Airlines, 513 F.2d 691 (9th Cir. 1975) (utilizes the analogy of Title VII law to find jurisdictional import in § 633(b)); Enos v. Kaiser Indus. Corp., 16 Fair Empl. Prac. Cas. 725 (D.D.C. 1978); McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975); Smith v. Crest Communities, Inc., 8 Fair Empl. Prac. Cas. 1328 (W.D. Ky. 1974) (indicating that an exhaustion of state remedies is also required). *Cf.* Magalotti v. Ford Motor Co., 418 F. Supp. 430 (E.D. Mich. 1976) (noting that many courts that state that prior resort to state remedies is a jurisdictional prerequisite under § 633(b) show a lack of understanding of the term "jurisdictional" because they proceed to grant equitable relief. If § 633(b) were really "jurisdictional", a court would be deprived of the power to act).

held that seeking state relief is only a statutory prerequisite, which may be excused under equitable circumstances.[31] Still other courts have held that section 633(b) does not require an aggrieved person to file with the state at all.[32] The court in *Holliday* adopted this last position. It was influencd by the emergence of two additional interpretations of section 633(b). The Supreme Court decision of *Lorillard v. Pons*[33] provided the first; the Senate committee report accompanying the 1978 legislative amendments to the ADEA supplied the second.[34] These two sources persuaded the court to reject its earlier statutory analysis of section 633(b).

In *Lorillard* the Supreme Court had analyzed congressional intent underlying the ADEA. It declared that while the substantive prohibitions of the ADEA and Title VII were analogous,[35] there were significant pro-

---

31. *See, e.g.,* Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978) (deference to state procedures where they exist is fundamental to the ADEA structure); Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1977) (deference to state remedies is not "jurisdictional"); Garces v. Sanger Int'l, Inc., 534 F.2d 987 (1st Cir. 1976); Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975); Davis v. RJR Foods, Inc., 420 F. Supp. 930 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 555 (2d Cir. 1977); Arnold v. Hawaiian Tel. Co., 12 Fair. Empl. Prac. Cas. 400 (D. Hawaii 1975); Griffin v. First Pennsylvania Bank, 17 Fair Empl. Prac. Cas. 54 (E.D. Pa. 1977). *Cf.* Hadfield v. Mitre Corp., 562 F.2d 84 (1st Cir. 1977) (refusing to confront the issue directly).

32. Many jurists, the administrative agency charged with the enforcement of the ADEA, a joint congressional committee and other commentators have all agreed with this latter position. *See* Holliday v. Ketchum, MacLeod & Grove, Inc., 17 Fair Empl. Prac. Cas. 1175, 1177 nn.18-21 (3d Cir. 1978).

See, e.g., Simpson v. Whirlpool Corp., 573 F.2d 957 (6th Cir. 1978); Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978) (dissenting opinion); Gabriele v. Chrysler Corp., 416 F. Supp. 666 (E.D. Mich. 1976) (holding that prior resort to state remedies was a statutory prerequisite to federal action), *rev'd*, 573 F.2d 949 (2d Cir. 1978) (no necessity to file with state at all); Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975) (well articulated arguments advocating no prerequisite of filing with a state agency); Smith v. Jos. Schlitz Brewing Co., 584 F.2d 1231 (3d Cir. 1978) (§ 633(b) does not require an individual to initially seek state relief); Magalotti v. Ford Motor Co., 418 F. Supp. 430 (E.D. Mich. 1976); Evans v. Oscar Mayer & Co., 17 Fair Empl. Prac. Cas. 1119 (8th Cir. 1978). *Cf.* Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976) (Illinois law does not provide the remedy contemplated by the Act; therefore the court did not reach the question presented), *reaff'd*, 432 F. Supp. 952 (N.D. Ill. 1977).

33. 434 U.S. 575 (1978). The holding in *Lorillard*, that claimants under the ADEA are entitled to a jury, is not relevant to the discussion here. Highly relevant, however, was the Court's discussion concerning the proper interpretation of the entire ADEA.

34. S. REP. NO. 493, 95th Cong., 1st Sess. 6-7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 976, 981-82, adopted in "Joint Explanatory Statement of the Committee of Conference," H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 7, 12, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1000, 1006.

35. The prohibitions of the ADEA were derived *in haec verba* from Title VII of the Civil Rights Act of 1964. Title VII with respect to race, color, religion, sex or national origin and the ADEA with respect to age make it unlawful for an

cedural differences between the two acts.[36] A unanimous court[37] ruled that subject to specific exceptions contained in the ADEA, Congress "intended to incorporate fully [into the ADEA] the remedies and procedures of the Fair Labor Standards Act."[38] The Fair Labor Standards Act (FLSA) procedures do not require an individual to resort to state remedies as a prerequisite to federal suit.[39] The Court therefore explicitly rejected the relevance of Title VII procedures to lawsuits that allege age discrimination.[40] The Court also noted the selectivity which Congress exhibited in incorporating provisions from the FLSA into the ADEA, stating that these modifications were another indicator that the ADEA was to incorporate the procedural aspects of the FLSA and not of Title VII.[41] As a result, lower courts which had found a need for prior resort to state remedies based on the similarity in language between section 633(b) and section 2000e-5(c) were left with a rule without a basis.

The second significant factor which persuaded the court in *Holliday* to reverse the district court decision was the Senate committee report discussing the 1978 amendments to the ADEA.[42] Although section 633(b) was not affected by those amendments, the Senate Report directly addressed the problem of interpreting the congressional intent underlying section 633(b) and expressed the committee's view that "an individual who has been discriminated against because of age is free [under section 633(b)] to proceed either under state law or under federal law."[43] The committee further

---

employer "to 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," on any of those bases. 42 U.S.C. § 2000e-2(a)(1) (1964); 29 U.S.C. § 623(a)(1) (1970). *Compare* 42 U.S.C. § 2000e-2(a)(2) (1964) *with* 29 U.S.C. § 623(a)(2) (1970).

36. 434 U.S. at 580.

37. Justice Blackmun did not participate in the decision.

38. 434 U.S. at 582.

39. 29 U.S.C. § 216(b) (1966) states, "An action . . . may be maintained against any employer in any Federal or State court of competent jurisdiction by any one or more employees. . . ." *See* Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (D. Tenn. 1955); Adams v. Long, 65 F. Supp. 310 (W.D. Mo. 1943) (suit may be filed in either state or federal court).

40. 434 U.S. at 581. *Accord*, Note, *supra* note 24, at 495.

41. 434 U.S. at 580. *See* Charme, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J.L. SOC. PROB. 281 (1975).

42. S. REP. NO. 493, *supra* note 34.

43. The relevant section of the senate report adopted in the joint conference report reads as follows:

> Section 14(b) of the Act [29 U.S.C. § 633(b)] provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act [29 U.S.C. § 626] before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if the individual chooses to apply first to the State agency for relief he must give

declared: "The provision does not require that the individual go to the state first in every instance."[44] Concededly, caution must be exercised in using current congressional declarations as a basis for interpreting past congressional action.[45] Nevertheless, the court in *Holliday* accepted the 1978 legislative interpretation of the ADEA as indicative of original congressional intent.

The legislative history of the ADEA prior to the 1978 Senate Report has been considered too ambiguous to lend strength to either side of the argument.[46] It was partially due to this ambiguous legislative history that the controversy over section 633(b) has flourished in the courts for as long as it had.[47] The court in *Holliday* viewed the 1978 declaration of Congress' intent behind section 633(b) as an opportunity to remove that ambiguity. The Senate committee's statements comported with the position which consistently had been advocated by the Secretary of Labor in his amicus briefs.[48] A stronger reason for the court's acceptance of the committee

---

> the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance . . . .*
>
> It is the committee's view that an individual who had been discriminated against because of age is free to proceed either under state law or under federal law. *The choice is up to the individual.* However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

S. REP. NO. 493, 95th Cong., 1st Sess. 6-7 (emphasis added), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 796, 981-82, adopted in "Joint Explanatory Statement of the Committee of Conference," H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 7, 12, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1000, 1006.

44. *Id.*

45. Haynes v. United States, 390 U.S. 85, 87 n.4 (1968) ("[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress"); United States v. Price, 361 U.S. 304 (1960) (the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one); *see* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

46. In Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974), the court characterized the legislative history of the ADEA as "devoid of any intention of Congress to deviate from the basic philosophy of the 1964 Act, Title VII, of initially giving the state agencies sixty days to resolve the problem." *Id.* at 16. But the Secretary of Labor in an amicus brief in the same case stressed that the ADEA legislative history was "devoid of any indication that Congress intended to restrict an individual's rights to file suit under the Act to cases in which proceedings have first commenced under state law." Brief for the Secretary of Labor as Amicus Curiae at 12, Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974).

47. *See* Annot., *supra* note 17, at 834; *see also* Comment, *Procedural Prerequisites to Private Suit under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457 (1977).

48. The Secretary of Labor, whose agency is charged with the administration and enforcement of the ADEA, filed amicus briefs in a majority of the cases

report was the court's desire to rid the clogged judicial system of this frequently litigated problem. Since *Goger*, the Third Circuit's 1974 interpretation of section 633(b), at least forty federal district courts and four circuit courts had attempted to resolve the issue.[49] The Third Circuit apparently hoped to provide an interpretation of section 633(b) which had such commanding support for its position that the issue would be decisively resolved.

Armed with textual interpretations as suggested by the Supreme Court in *Lorillard* and by the Senate Report, the *Holliday* court reexamined the original intent of the ADEA. The ADEA was remedial legislation enacted to prevent age discrimination, such discrimination not being specifically prohibited by the Civil Rights Act of 1964.[50] The remedial nature of the ADEA had been frustrated by the creation of the procedural pitfall in section 633(b) which often served to bar individuals with meritorious claims from federal court.[51] This pitfall—requiring initial recourse to state remedies— in many cases thwarted the purpose of the Act.[52] The court realized that a change was needed in the statutory analysis of section 633(b), and was able to solve the problem by reversing its earlier precedent and allowing the plaintiff to proceed with his federal action.

---

concerning judicial construction of § 14(b) of the ADEA (29 U.S.C. § 633(b) (1976)).

49. *See* cases cited notes 19, 30, 31 & 32 *supra; see also* Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975) (dicta) (acknowledging the similarity between Title VII of the Civil Rights Act of 1964 and the ADEA); Marshall v. Chamberlain Mfg. Corp., 443 F. Supp. 159 (M.D. Pa. 1977) (holding that § 633(b) requires the Secretary of Labor to seek state relief before commencing federal action); McCracken v. Shenango Inc., 440 F. Supp. 1163 (W.D. Pa. 1977) (relying on *Goger* decision and holding that Pennsylvania is a deferral state under § 633(b)); Cowlinshaw v. Armstrong Rubber Co., 425 F. Supp. 802 (E.D.N.Y. 1977) (Secretary of Labor is not required by § 633(b) to seek relief for employees through any state agency); Fitzgerald v. New England Tel. & Tel. Co., 416 F. Supp. 635 (D. Mass.), *vacated*, 437 F. Supp. 635 (D. Mass. 1977) (state filing required); Dunlop v. Crown Cork & Seal Co., 405 F. Supp. 774 (D. Md. 1976) (Secretary of Labor is excepted from the ADEA's requirement of exhaustion of state remedies).

50. Congress recognized that the 1964 Civil Rights Act left the major problem of age discrimination untouched and consequently directed the Secretary of Labor to make a study of the problem. Act of July 2, 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265. The Secretary's report, *The Older American Worker: Age Discrimination in Employment,* H.R. DOC. NO. 3708, 89th Cong., 1st Sess. (1965), and his legislative recommendations formed the basis of the ADEA.

51. Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975), *rev'd on other grounds*, 579 F.2d 107 (1st Cir. 1978); *accord*, Comment, *supra* note 47, at 478-79.

52. 29 U.S.C. § 621(b) (1970) sets forth the congressional statement of purpose: "It is therefore the purpose of the chapter to promote employment of older persons based on their ability rather than age; . . . to help employees and workers find ways of meeting problems arising from the impact of age on employment."

In the wake of the *Holliday* decision, the question arises whether the four-year controversy surrounding the interpretation of section 633(b) is now indeed settled. While such a result seems probable, the full implications of *Holliday* remain unclear. It is not certain that courts formerly requiring initial resort to state remedies will acquiesce in the Senate committee's interpretation of section 633(b).[53] The Congress made no changes in the ambiguous language of section 633(b) while amending several other sections of the Act.[54] Since Congress is presumed to be aware of the judicial interpretations of a statute,[55] it could have easily amended section 633(b) so as to prevent a court from requiring prior resort to state remedies. Amending section 633(b) would have conclusively removed the current ambiguity of the section and put the issue to rest. Regardless of the lack of amendment, however, the three cases most recently decided since the 1978 amendments to the ADEA have all adopted the Senate committee's interpretation of section 633(b) and allowed the plaintiff a choice of forums.[56]

The *Holliday* court's interpretation of section 633(b)—allowing an aggrieved individual a choice of forums—also creates a problem concerning the scope of section 626(d)(2) of the ADEA.[57] Normally section 626(d)(2) allows a complainant 180 days in which to file his charge; however, this time period is extended by section 626(d)(2) to 300 days *if* section 633(b) applies. At least two requirements must be met before sec-

---

53. *See* note 43 *supra*.

54. The 1978 amendments to the Age Discrimination in Employment Act with explanatory notes may be found in 46 U.S.L.W. 51 (1978).

55. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8, (1975) (presumption that Congress is aware of judicial interpretations of various legislative actions); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951); National Lead Co. v. United States, 252 U.S. 140, 147 (1920); *cf.* Morton v. C.R. Mancari, 417 U.S. 535 (1974) (little can be inferred from congressional silence); Zuber v. Allan, 396 U.S. 168, 185-86 (1969) (congressional inaction frequently betokens unawareness, preoccupation or paralysis).

56. Evans v. Oscar Mayer & Co., 17 Fair Empl. Prac. Cas. 1119 (8th Cir. 1978) (individual is not required to file a complaint with the state agency before coming into federal court); Smith v. Jos. Schlitz Brewing Co., 584 F.2d 1231 (3d Cir. 1978) (no requirement to file with state at all); Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978).

57. 29 U.S.C. § 626(d)(2) (1970) provides:

> (d) No civil action may be commenced by any individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

tion 633(b) applies: there must be a state law against age discrimination, and there must be a state agency or authority charged with granting or seeking relief against such discrimination.[58] If only these requirements exist for the applicability of section 633(b), residents of states having such laws[59] and agencies could be accorded a significant procedural advantage. Residents of those states might be able to sleep on their federal rights beyond the period prescribed by Congress. A more reasonable interpretation would be that before the federal limitation period is extended to 300 days, the state agency must in fact have been timely prevailed upon.[60] If this interpretation were adopted, no procedural advantage would be gained regarding the time within which an individual must file an initial complaint except by residents of states with periods for filing of charges longer than 180 days.[61] Such residents would only benefit if, having failed to file with the Secretary of Labor within 180 days, they timely *and* within 300 days filed with both the state agency and the Secretary of Labor. So doing, their rights to a federal action would be revived.

The court's decision had the additional implication of removing a state's ability to affect the length of time in which a plaintiff might seek a remedy in federal court. Prior to *Holliday*, because a plaintiff was required to seek state relief before commencing federal action, the time period in which he might seek federal action could in reality be dictated by a shorter state statute of limitations.[62] After *Holliday* if an aggrieved individual elects to pursue his complaint utilizing state remedies he must still file within a timely period; but should he decide on federal action, a state statute of limitations cannot conditionally alter the federal time period for filing a charge with the ADEA. To do so improperly turns the state filing period into the federal filing period.[63] To bar a plaintiff from federal court by state time limitations more restrictive than those authorized under the ADEA would frustrate the purpose and provisions of the ADEA and would distort the notions of federal-state comity.[64] In allowing

58. Eklund v. Lubrizol Corp., 529 F.2d 247 (6th Cir. 1976) (outlining the two requirements of 29 U.S.C. § 633(b) (1970)).

59. In the Eighth Circuit only Missouri and Arkansas are without such laws.

60. *See* Gabriele v. Chrysler Corp., 573 F.2d 949 (6th Cir. 1978).

61. Only five states allow more than 180 days for an aggrieved individual to file his complaint alleging age discrimination in employment: Alaska—300 days; California—365 days; Idaho—365 days; New York—365 days; and Wisconsin—300 days. The filing periods for the states may be found in 8A Lab. Rel. Rep. (BNA) at the beginning of the section on each state.

62. As seen by the district court's action, Holliday's federal suit was dismissed because of his untimely filing with the appropriate state agency. Several courts have considered this problem. *See* Gabriele v. Chrysler Corp., 573 F.2d 949, 955 (6th Cir. 1978); Bonham v. Dresser Indus., Inc., 569 F.2d 187, 194 (3d Cir. 1977); *cf.* Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977) (Title VII action).

63. Bonham v. Dresser Indus., Inc., 569 F.2d 187, 194 (3d Cir. 1977).

64. Brief for Appellant at 7, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978).

