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Administrative Prerequisites to Litigation Under Title VII of the Civil Rights Act of 1964—Recent Developments

James S. Bukes*

INTRODUCTION

Title VII of the Civil Rights Act of 1964 was enacted with the following purpose: "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title." "Sex" was added later as a basis of discrimination by an amendment proposed by Representative Smith of Virginia.1

The structure of the Equal Employment Opportunity Commission is modeled after the National Labor Relations Board. The investigatory powers of the Commission are similar to those of the National Labor Relations Board. For example, the subpoena powers found in Section 11 of the National Labor Relations Act are incorporated into Title VII. 3

However, unlike the Labor Board, the Commission has no authority to issue cease and desist orders. Cease and desist powers were considered, both prior to enactment of the 1964 act1 and prior to the

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2. See 110 CONG. REC. 2577 (1964) and EEOC, supra note 1, at 3213 (reprinting Congressional Debate by Subject Matter).

3. The Commission is composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission are appointed by the President, by and with the advice and consent of the Senate, for a term of five years. 42 U.S.C. § 2000e-4(a) (1976). See 29 U.S.C. § 161 (1976) for the text of § 11 of the National Labor Relations Act. These subpoena powers are incorporated into title VII by 42 U.S.C. § 2000e-9 (1976).

4. H.R. REP. No. 914, supra note 1, at 2426.
enactment of the 1972 amendments to the Act, but, after much debate, those powers were not given to the Commission. Under the present statutory scheme, the Commission investigates each charge and if it finds reasonable cause to believe that a charge is true, the Commission must then engage in conciliation discussions; if those discussions are unsuccessful, the Commission may litigate the charge. Powers of litigation were granted to the Commission by the 1972 amendments; prior to that time the Commission had no powers of litigation and the charging party was forced to file his own lawsuit in federal district court if conciliation discussions were unsuccessful. Since the 1972 amendments, the Commission has litigated only a small percentage of the charges upon which reasonable cause is found, and, therefore, the charging party is often forced to retain private counsel if he wishes to proceed after failure of conciliation.

Case law is still unsettled in many areas due to the relatively recent enactment date of the amendments. An area which has caused a great volume of litigation is with respect to prerequisites to litigation under the Act. The statutory requisites (post 1972 amendment) are as follows: "Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 706(e) of the Act requires that a charge be filed within 180 days after the alleged unlawful employment practice occurred, unless the aggrieved person has originally instituted proceedings with a state or local agency with the authority to grant or seek relief. In that case, the federal charge may be filed within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under state or local law, whichever is earlier. Additionally, no charge may be filed by the person aggrieved prior to the expiration of 60 days after proceedings have been commenced under the state or local Fair Employment Practice Law, unless such proceedings have been ear-

8. 42 U.S.C. §§ 2000e-5(b) and (e) (1976).
lier terminated. Furthermore, the Commission is required to serve notice of the charge upon the respondent employer within ten days after filing of the charge. Charging party shall be issued notice of right to sue within 180 days from filing of the charge if the Commission has not filed a civil action or obtained a conciliation agreement and charging party may file in the federal district court within 90 days after notice is given.

The requisites delineated in the preceding paragraph are the only statutory prerequisites to litigation set out in the Act and apply to all charges filed by aggrieved parties against covered respondent employers, labor organizations and employment agencies. The experience of the federal courts in interpreting the aforesaid sections of the Act differs considerably from that which a literal reading of the Act would lead one to expect.

CONTENTS OF CHARGE REQUIREMENTS

Bringing a charge before the EEOC is a jurisdictional prerequisite to the filing of a suit for Title VII violations. The Commission requires that a charge be made by or on behalf of an aggrieved person and that it be in writing, signed, and verified. Furthermore, the charge must be sufficiently precise to identify the parties and to describe generally the action or practices that are the basis of the complaint. A charge may be amended to cure defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Although the Commission desires additional specific information detailed in the charge, nothing additional is required by the Commission. Additional detailed information may be supplied by the aggrieved person during investigation of the charge.

14. 29 C.F.R. § 1601.12(b) (1978); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).
15. 29 C.F.R. § 1601.12(a) (1978).
16. Id. § 1601.15(b) (1978).
Although a literal reading of Section 706(a) of the Act would seem to require that a charge be verified at the time of filing with the Commission, the courts have not strictly applied this Section. A reading of the entire statute makes it clear that the Congressional intent in requiring an oath is to prevent the harassment of respondents by reckless charges. However, this purpose can be served by requiring verification before action is taken by the Commission, and this was done in the instant proceeding. Such a construction recognizes the remedial nature of the statute and does not prejudice an unwary victim of discrimination by insistence upon a formal requirement which can be supplied before the respondent is brought into the picture. Accordingly, courts have consistently held that a charge filed within ninety days of an alleged unfair practice need not be accompanied by the oath of the complaintant. Sworn verification may occur later.  

**TIMELINESS OF FILING CHARGES**

The EEOC has provided, by regulation, that the period of deferral to a state or local Fair Employment Practices agency (hereinafter FEP Agency) shall not affect the time limit for filing with the EEOC in that timeliness of a charge is to be measured by date of the Commission's receipt of the charge. However, interpretation of Section 706 of the Act concerning the time limitation for filing a charge has yet to be clearly resolved. The 180/300 day time limitation referred to therein has been construed in various ways. Most state FEP Agencies, including the Pennsylvania Human Relations Commission, have imposed time limits of 90 days for filing a charge. One view would thereby impose a time limit of 90 days on all charges filed with the EEOC, since the EEOC must defer to the FEP Agency pursuant to Section 706 of the Act. However, the

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19. Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972). By coincidence the time limits for filing with the EEOC and the New Mexico FEP agency, prior to the 1972 amendments, were the same, 90 days; therefore, the holding in this opinion can be otherwise interpreted.
majority view is that in no case will the time period for filing with the EEOC be less than 180 days.\textsuperscript{20}

Most courts have held that if the time limit for filing with the state agency is 180 days or less, filing with the state agency within its time limit is necessary in order to obtain the benefit of the 300 day limit for filing with the EEOC.\textsuperscript{21} A more interesting issue arises if the state or local FEP Agency has a time limitation for filing of more than 180 days. The Pittsburgh Commission on Human Relations, an EEOC designated FEP Agency, follows a time limitation of one year. If a charging party were to file with that agency against a respondent within the city limits more than 180, but less than 300, days after the discriminatory act, would he be permitted the 300 day period within which to file with the EEOC? In a similar situation, the Fourth Circuit has held that he would.\textsuperscript{22} EEOC Regulations concur with this viewpoint.\textsuperscript{23}

The United States Supreme Court has ruled that the filing of a union grievance pursuant to a collective bargaining agreement does not toll the running of the time to file a Title VII charge.\textsuperscript{24} Similarly, that Court has ruled that the filing of a charge with the EEOC does not toll the statute of limitations with respect to actions under the Civil Rights Act of 1866.\textsuperscript{25} However, there are other situations in which the courts have recognized an extension of the time period for filing a charge. The Fifth Circuit has held that the time period for filing a charge runs from the date that the charging party knew or reasonably should have known of the discriminatory act.\textsuperscript{26}

\begin{footnotesize}
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\item[21.] Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231 (8th Cir. 1975) \textit{(en banc)}.
\item[23.] 29 C.F.R. \textsection 1601.13(d)(2)(iii) (1978).
\item[26.] East v. Romine, Inc., 518 F.2d 322 (5th Cir. 1975); Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975). These decisions were followed in an order by the United States District Court for the Western District of Pennsylvania in Cropp v. Allegheny Ludlum Industries, No. 77-529 (W.D. Pa., order of April 17, 1978) (accepting recommendation of U.S.
\end{itemize}
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Of primary importance is the date accepted by the court as the date of "occurrence" of the discriminatory act. The Second Circuit held that the time limit for filing a charge was not triggered when an assistant professor was notified that her contract would not be renewed but, rather, when, she left the university or when a replacement was hired.\textsuperscript{27} Gates v. Georgia Pacific Co.\textsuperscript{28} involved a hiring situation in which the applicant could not tell whether she had been rejected until she was notified. The court held that the date of notice to her, and not the date of decision, was the date of "occurrence".

Another important point dealing with timeliness of a charge is in the area of "continuing violations." The United States Court of Appeals for the District of Columbia recently held that charging party may prove timeliness of her 1973 charge alleging that her former employer continued to discriminate against her by adverse references to her prospective employers, even though the example cited by her charge occurred in 1971, since she was attacking Respondent's persistent referencing policy, rather than its particular manifestations.

As a general rule, a Title VII claim may be premised only upon specific instances of misconduct of which the Commission is apprised within the statutorily-prescribed time. When, however, a continuing discriminatory employment practice is alleged, the administrative complaint may be timely filed notwithstanding that the conduct impugned is comprised in part of acts lying outside the charge-filing period. As Congress itself has said, for those "violations [that] are continuing in nature" it is appropriate to "measure the running of the required time
period from the last occurrence of the discrimination and not from the first occurrence.” Challenges to assertedly unlawful hiring and promotion policies are typical of those falling within the ambit of the continuing-violation principle. In these related contexts, it is the ongoing program of discrimination, rather than any of its particular manifestations, that is the subject of attack.29

Similarly, a repeated failure to promote has been held to be a continuing violation, and therefore, timely, even though the EEOC charge was not filed within the proscribed time limit after the discriminatory act.30 A course of conduct of denial of promotion can constitute a continuing violation and charging party is not precluded from seeking relief for denial of promotions more than 180 days prior to filing her charge.31 On the other hand, lay-offs are not generally considered to be continuing acts of discrimination.32

An important decision regarding timeliness in a case involving present effects of past discrimination is the 1977 Supreme Court Case, United Airlines v. Evans.33 Ms. Evans worked as a stewardess for United from 1966 to February 1968, when she was forced to resign because she married. Nine months later, the company eliminated the no-marriage policy for stewardesses. Evans was rehired in February 1972 as a new employee with no carry-over seniority. In February 1973, she filed a charge with the EEOC seeking credit for pre-1972 seniority. The Supreme Court found that charging party did not file a timely charge based on her termination and she did

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not attack the bona fide nature of the seniority system. Where a discriminatee does not make a timely charge complaining of the discriminatory act, a seniority system that merely perpetuates the effects of past discrimination is not unlawful.

The EEOC has interpreted *Evans* narrowly:

The Commission interprets *United Airlines v. Evans* to hold only that discharges are not continuing violations. If a claim for unlawful discharge is not filed within 180 days of termination, the charge is not timely.

The Commission does not consider that the case affects the continuing violation principle with respect to other employment practices. In particular, any allegation of discriminatory denial of transfer or promotion will be deemed continuing if the practice or policy accounting for the denial remains in effect within 180 days of the charge.  

Since *Evans* was decided, several courts have continued to adopt a liberal view regarding "continuing" or "policy" charges. In *White v. City of Suffolk*, plaintiff police officers filed an EEOC charge on July 29, 1974, claiming that defendant "continually" discriminated against them because of their race. Defendant argued that the 180 day time period for filing charges prevented plaintiffs from recovering for claims grounded in events prior to January 29, 1974 (180 days prior to filing of the charge). The court held that *Evans* did not apply because in this case, since plaintiffs alleged a "pattern" of discrimination, prolonged and continuing in many aspects of employment. Plaintiffs were not barred by the ruling in *Evans* from recovery for injuries suffered prior to January 29, 1974. According to this view, therefore, so long as any part of a discriminatory conduct is within the 180/300 days preceding filing of the charge, the entire course of conduct is properly before the court and plaintiffs may obtain relief for injuries that resulted therefrom, regardless of whether they occurred within the charge filing period.

The Third Circuit has issued two post *Evans* opinions regarding timeliness, without dealing with the difficult issues discussed above.

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34. EEOC Interpretive Memorandum, 46 U.S.L.W. 2028 (July 19, 1977).
35. In re Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (7th Cir. 1978); Farris v. Board of Educ., 576 F.2d 765 (8th Cir. 1978).
but indicating a strict adherence to the 180 day time limitation for filing a charge, although allowing rather loose notice pleading by plaintiff. 37

The question of timeliness of amended charges has recently been ruled upon by the Third Circuit in Hicks v. ABT Associates, Inc. 38 The court concurred with the regulations of the EEOC which provided that amendments to charges alleging additional acts directly related to or growing out of the original charge will relate back to the original filing date. 39 In Hicks, plaintiff alleged that he attempted to amend his charge to allege sex discrimination as well as race discrimination, but was not permitted to amend his charge by the EEOC Compliance Officer assigned to investigation. Nevertheless, the circuit court permitted plaintiff Hicks to proceed on a claim of sex discrimination if he could prove that his allegation regarding his attempt to amend was true, and the circuit court remanded the case to the district court.

Promptness of service of notice of charge upon respondent by the EEOC has been an issue of decreasing importance. Although the statute and commission regulations provide that notice should be served within ten days of filing of charge, 40 the courts have not penalized charging parties for failure of the Commission to strictly comply with this provision. 41 Clearly, this was also the intent of Congress. "The Commission is to serve a notice of the charge on the Respondent within ten days." It is not intended, however, that failure to give notice of the charge to the respondent within ten days would prejudice the rights of the aggrieved party. 42 Indeed, the courts have been loath to penalize the EEOC in its suits where it has failed to serve notice of charge within ten days. 43

38. 572 F.2d 960 (3d Cir. 1978).
42. BNA, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, Section by Section Analysis, at 129 (1973).
43. EEOC v. Airguide Corp., 539 F.2d 1038 (5th Cir. 1978); EEOC v. Kimberly Clark, 511 F.2d 1352, 1360 (6th Cir.), cert. denied, 423 U.S. 994 (1975); EEOC v. Children's Hospital,
EXHAUSTION OF REMEDIES AND DEFERRAL

An investigation by the EEOC and determination of reasonable cause to believe that the employer had violated Title VII is not a prerequisite to a Title VII suit filed by an individual.44 Neither does an EEOC finding of "no reasonable cause" bar suit by a charging party.45 Likewise, the failure of the EEOC to attempt or achieve conciliation does not bar the individual from bringing court action.46 Additionally, the charging party need not exhaust his union remedies before bringing a Title VII lawsuit.47

The courts have held that the state or local Fair Employment Practices agency must be given an opportunity to investigate the charge, but state or local remedies need not be exhausted before litigation ensues.48 The seminal case regarding deferral of EEOC charges to FEP agencies is Love v. Pullman Co.49 In that decision, the Supreme Court approved the procedure adopted by the EEOC of receiving charges, forwarding them to the recognized FEP Agency, then automatically assuming jurisdiction after the 60 day deferral period has expired; even oral deferrals were sanctioned by this decision. Belated deferrals by the EEOC have also received court sanction, extending to cases in which the deferral has taken place long after the FEP Agency's statute of limitations has passed.50 The courts have also allowed the EEOC to go through the motions of making a deferral, where there has been no previous deferral, years after the filing of a charge and after charging party

47. Smallwood v. National Can Co., 583 F.2d 419 (9th Cir. 1978); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1316 (7th Cir. 1974).
has filed suit in federal district court. The theory behind this position is that charging party should not be penalized for the errors of the EEOC. The Fifth Circuit has gone so far as to hold that failure to ever defer a charge will not bar subsequent suit under Title VII.

If charging party’s original charge has been properly deferred by the EEOC, subsequent amendments to that charge need not be deferred so long as the new allegations are reasonably related to, or grow out of, the original charge. Furthermore, the majority view is that amendments to the original charge containing additional allegations need not be filed with the EEOC, so long as the additional allegations included in the court complaint are similar or related to the EEOC charge.

EEOC regulations now provide that an FEP Agency designated as a deferral agency under Section 706 of the Act may agree to waive its right to exclusive processing of the charge during the sixty day period following filing of the charge. The EEOC and most designated FEP Agencies have entered into “Worksharing Agreements” whereby the FEP Agency agrees to waive its right to initial exclusive processing of charges (with rare exceptions) if the charges have been initially filed with the EEOC. The EEOC, likewise, agrees to forego processing charges initially filed with the FEP Agency prior to the agency’s having completed its investigation. Furthermore, under the worksharing agreements, each agency designates the other as its agent for the purpose of receiving charges. Waiver of jurisdiction by FEP Agencies has been endorsed by the United States District


Court for the Western District of Pennsylvania. The court in *Morgan* determined that the waiver of deferral by the plaintiff, in accordance with an agreement between EEOC and The Pennsylvania Human Relations Commission, constituted a valid early termination of proceedings pursuant to Section 706(c) of the Act.

In *Taylor v. Vocational Rehabilitation Center*, defendant moved to dismiss the complaint for lack of jurisdiction because the EEOC, pursuant to an agreement between it and the Pennsylvania Human Relations Commission, had deferred the charge directly to the Pittsburgh Commission on Human Relations, which, at the time, was not a designated 706 Agency. The court denied the motion to dismiss, thus recognizing the validity of such waivers. Similarly, deferral to the Pittsburgh Commission on Human Relations, in a case which the respondent employer was situated outside the city limits, was not fatal to charging party because the charge was later deferred to the proper authority, the Pennsylvania Human Relations Commission, two years after the charge was filed.

**SCOPE OF LAWSUIT**

An important issue not yet settled is concerned with the scope of the federal court complaint as related to the EEOC charge. The seminal case is *Sanchez v. Standard Brands*. The court held that the scope of the federal court complaint is defined by “the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.” The Ninth Circuit has held

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59. 431 F.2d 455 (5th Cir. 1970); accord, Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968).
60. *Id.* at 466. The complaint is therefore not limited to what the EEOC actually investi-
that the civil complaint may include "any discrimination like or related to the allegations of the EEOC charge, including new acts occurring during pendency of the charge before the EEOC." 

In Hicks v. ABT Associates, the Third Circuit recently delimited the proper scope of the federal court complaint to cover all areas which could have been investigated by the EEOC. Charging party, a white male, had filed a charge alleging race discrimination. The EEOC found no reasonable cause to believe that he had been discriminated against and issued a notice of right to sue; plaintiff thereafter filed suit based on sex and race discrimination. Plaintiff claimed that he was not contacted by the Commission investigator and did not know that the investigation was proceeding until the determination of no reasonable cause was sent to him. Since there was no charge of sex discrimination filed and the EEOC investigation did not include investigation of acts of sex discrimination, defendant argued that the EEOC investigation set the outer limit to the scope of the civil complaint. The circuit court disagreed, finding that the test is whether the claims of sex discrimination would have been investigated, given a reasonable investigation of the charge. Furthermore, the court stated that if the EEOC acted improperly by failing to accept an amendment to the plaintiff's charge, which would have included a sex discrimination claim, there is jurisdiction over that sex discrimination claim.

The United States District Court for the Western District of Pennsylvania has recently pointed out that "[A]ll Title VII judicial complaints are broader than the administrative charge." The court emphasized that this is due to the fact that the EEOC charge form does not allow for an extensive narrative with detailed explanations; furthermore, charges are usually written by lawmen untrained in the law. Although courts have agreed that the scope of an EEOC charge is to be liberally construed, they have not clarified the question of which issues not raised in the EEOC charge may be included.


in the civil action.\textsuperscript{65}

The EEOC has recently taken steps to reduce its much publicized backlog of charges by making extensive inquiries regarding alleged discriminatory acts during the taking of the charge by EEOC intake officers.\textsuperscript{66} The objective of this extensive probe is to eliminate charges obviously without merit or non-jurisdictional and also to pin down the charging party to specific allegations and detailed facts in order to assist compliance officers in investigation and attempted settlement. It has also been reported that EEOC intake officers nationwide are discouraging charging parties from filing class action charges and this has aroused the ire of civil rights groups who desire class-wide investigations.\textsuperscript{67} Another possible effect of the Commission's discouraging charging parties from filing class charges and requiring specific statements of acts of discrimination from charging parties is that in subsequent civil actions charging parties may be precluded from exceeding the scope of their tightly written charges.\textsuperscript{68}

\textbf{NOTICE OF RIGHT TO SUE}

A great number of problems have arisen in connection with issuance or nonissuance of Notice of Right to Sue by the EEOC. The Notice of Right to Sue, along with a timely filed charge, have been characterized as jurisdictional prerequisites to filing civil action under Title VII.\textsuperscript{69}

Issuance of the Notice has been described as: "a ministerial act required both by the statute and applicable regulations and not one involving the exercise of discretion by the Commission."\textsuperscript{70}

Section 706(f)(1) of the Act provides that if the Commission "has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, . . . shall so notify the person


\textsuperscript{66} EEOC, RAPID CHARGE PROCESSING MANUAL 302 (1st ed. October 12, 1977).


aggrieved and within 90 days of giving of such notice, a civil action may be brought against the Respondent named in the charge. . . .” Prior to April 4, 1975, it had been the practice of the EEOC to issue a “Failure of Conciliation” letter to charging party and thereafter to issue “Notice of Right to Sue” only at charging party’s request. The United States District Court for the Eastern District of Missouri, in a strict reading of the statute, held that the “Failure of Conciliation” letter constituted Notice of Right to Sue and triggered the 90 day filing period. The Eighth Circuit reversed the Missouri district court. Most other federal courts have found that only formal Notice of Right to Sue triggers the ninety day period for filing civil action. Since April 4, 1975, the EEOC has issued a combined “Notice of Right to Sue (Conciliation Failure)” and, therefore, this issue should not continue to trouble the courts unless an EEOC District office were to send a Failure of Conciliation letter to charging party by mistake.

It would appear clear that in order to proceed in federal district court under Title VII, plaintiff must first have filed a charge and obtained Notice of Right to Sue from the EEOC. However, this is not always necessary. It has long been settled that relief can be granted to non-charging parties in a class action. However, the Eighth and Fifth Circuits have held that non-charging parties may intervene in a non-class action and obtain relief. On the other hand, the Ninth Circuit has held that non-charging parties cannot rely upon a charge filed by another and simply file suit without first following the requisite administrative procedures.

The United States District Court for the Western District of Pennsylvania has allowed a named plaintiff to proceed in a Title VII class action, even though she had not filed a charge with the EEOC, where the union to which she belonged filed the EEOC charge. The

72. Lynn v. Western Gilette, Inc., 564 F.2d 1282 (9th Cir. 1977); Wilson v. Sharon Steel Corp., 549 F.2d 276 (3d Cir. 1977).
76. Inda v. United Airlines, Inc., 16 EMPLOYMENT LAWS. 251 (9th Cir. 1977).
United States District Court for the Eastern District of Wisconsin has permitted persons who have not filed EEOC charges to join as co-plaintiffs in a class action, but the court would only consider issues which charging parties before the EEOC had standing to raise.78

The naming of the proper respondent with the EEOC would seem to be a prerequisite to proceeding against that entity in federal district court under Title VII. The Third Circuit has reviewed the theories for allowing suit against unnamed respondents in Canavan v. Beneficial Finance Corp.79 The court pointed out that EEOC charges should be liberally construed because they are filed by laymen and generally without legal assistance. After citing various authorities allowing joinder of unnamed parties, some under Rule 19 of the Federal Rules of Civil Procedure and others under Rule 21, and also citing authorities to contrary, the court remanded the case to the district court for further discovery on the question of whether the party named in the EEOC charge adequately represented the interests of those defendants not named in the EEOC charge, in order for the plaintiff to have an opportunity to discover the existence of an agency relationship. Other decisions from federal district courts in Pennsylvania have dismissed Title VII actions as to defendant individuals employed by properly named respondent-defendants, but not named themselves in the EEOC charge and not having received notice of charge or engaged in conciliation discussions.80 It has been held that a civil action may be filed and recovery may be obtained against a successor corporation not named in a charge if a charge has been filed against the predecessor and the successor corporation had notice of the charge.81

The courts have been fairly liberal with respect to joinder of a

79. 533 F.2d 860 (3d Cir. 1977).
union not charged before the EEOC. In a case in which the local was charged but the international was not charged, the Third Circuit set forth the following factors to be examined by a court in determining whether an EEOC charge against the international was necessary:

(1) Whether its role "... could through reasonable effort by the complaint be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. Consideration of these factors should be initially in the hands of the district court."

Most courts have allowed an uncharged union to be joined under Fed. R. Civ. P.19, where the union is needed to participate in relief afforded plaintiffs, such as restructuring of the Collective Bargaining Agreement. This liberal allowance of joinder may be due to the fact that dismissal of the entire action for lack of indispensable party may be the only alternative.

Occasionally, charging parties have proceeded to federal district court without first obtaining notice of right to sue from the EEOC. The courts have held that issuance of the notice during pending litigation cures the jurisdictional defect. Similarly, where the EEOC has issued right to sue notice prematurely, before the running of the 180 day period for investigation, most courts have not


dismissed such actions where the EEOC case backlog precluded action on the charge within the 180 day period. 85

The EEOC Procedural Regulations now provide that if charging party requests a notice of right to sue prior to the expiration of 180 days, the EEOC may issue such notice if the District Director has determined that it is probable that the Commission will be unable to complete its processing within 180 days and has so certified. 86

A not uncommon occurrence is that charging parties will obtain notice of right to sue, but not file in the proper forum or within the 90 day period. 87 The 90 day period for filing runs from receipt of notice, not sending of notice. 88 Although the courts have adhered strictly to the time limitation in which to file suit after issuance of notice of right to sue, 89 a recent decision allows charging party an extra three days to file suit in light of Fed. R. Civ. P. 6(e), since the notice of right to sue is customarily served by mail. 90

Plaintiff’s Title VII complaint must clearly allege compliance with all jurisdictional prerequisites to suit, or it is subject to dismissal. 91 Furthermore, plaintiff cannot delay unduly before bringing suit because of laches. Although most courts hold that Title VII actions are not barred by applicable state statutes of limitations, 92

86. 29 C.F.R. § 1601.28(a)(2) (1978).
88. Archie v. Chicago Truck Drivers, Helpers and Warehouse Workers Union, 585 F.2d 210 (7th Cir. 1978).
plaintiff may be barred from back pay relief if defendant has suffered prejudice by the delay.\(^{93}\)

The Supreme Court has held that state statutes of limitation do not apply to suits by the EEOC. In *Occidental Life Insurance Co. v. EEOC*,\(^{94}\) the Court permitted the EEOC to bring an action more than three years after receipt of the charge. The only time limitation on the Commission is that it may not file suit during the initial 30 days from filing of the charge, unless it is seeking preliminary or temporary relief pursuant to Section 706(f)(2) of the Act.\(^{95}\)

An individual cannot bring a separate suit involving the same facts after one is brought by the EEOC; rather, the individual must seek to become a party to the EEOC suit\(^{98}\) and he may intervene as of right.\(^{97}\) Furthermore, an individual class member is precluded from later litigating issues dismissed at a class action.\(^{98}\)

DEFERRAL AS JURISDICTIONAL PREREQUISITE TO LITIGATION

The preceding analysis has served to outline the present state of the law with respect to prerequisites to litigation. In general, the courts which have allowed charging parties to proceed to civil litigation despite irregularities in pre-litigation procedures have done so because of a recognition of the remedial nature of Title VII of the Civil Rights Act of 1964 (therefore jurisdictional requirements should be liberally construed)\(^{99}\) and because of the feeling that charging parties should not be penalized for being misled by government agencies\(^{100}\) or for errors of government agencies.\(^{101}\) Despite this concern for the rights of charging parties, the courts have long

95. 42 U.S.C. § 2000e-5(f)(2) and 29 C.F.R. § 1601.27 (1978). Several courts have held that charging parties may proceed immediately to court under section 706(f)(2) without receipt of Notice of Right to Sue. See Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975), *vacated and remanded on other grounds*, 98 S. Ct. 623 (1977).
100. Richerson v. Jones, 572 F.2d 89 (3d Cir. 1978); Zambuto v. A.T.&T., 544 F.2d 1333 (5th Cir. 1977); De Matteis v. Eastman Kodak Co., 520 F.2d 409 (2d Cir. 1975).
pointed to the United States Supreme Court opinion of *Love v. Pullman*\(^ {102} \) as evidence that deferral of charges by the EEOC to Fair Employment Practices Agencies is required. Although *Love v. Pullman* did not *hold* that deferral is required, the Supreme Court decision in that case certainly suggests such a conclusion. "A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 1978 Stat. 253, may not maintain a suit for redress in Federal District Court until he has first unsuccessfully pursued certain avenues of potential relief."\(^ {103} \) The Third Circuit, in dicta, has interpreted *Love* to require resort to a state or local FEP agency. In *Holiday v. Ketchum, MacCleod and Grove, Inc.*,\(^ {104} \) an action under the Age Discrimination in Employment Act of 1967,\(^ {105} \) the circuit court stated as follows: "The Supreme Court has construed this provision in Title VII [section 706(c)] to require a prior resort to state remedies."\(^ {106} \) In *Holiday*, the Third Circuit emphasized the differences, with respect to resorting to state remedies, between actions under the Age Discrimination in Employment Act and Title VII. The court pointed out that Section 706(c) of Title VII has often been interpreted as requiring prior resort to state FEP Agencies, stating that legislative history is very clear on that point and most courts have followed this reasoning. In like manner, the United States District Court for the Eastern District of Pennsylvania has interpreted Section 706(c) as creating a jurisdictional bar to Title VII plaintiffs who have failed to resort to state agencies.\(^ {107} \)

Of more recent vintage than the Supreme Court's 1972 opinion in *Love v. Pullman*, the Supreme Court held in 1973,\(^ {108} \) and 1974\(^ {109} \) that there were only two "jurisdictional prerequisites" to a Title VII action: (1) A charge filed timely with the EEOC, and (2) Receipt and action upon the EEOC's statutory Notice of Right to Sue. These two decisions, *McDonnell Douglas v. Green* and *Alexander v.*

\(^{102}\) 404 U.S. 522 (1972).
\(^{103}\) 404 U.S. 522, 523 (1972).
\(^{105}\) 29 U.S.C. § 621.
\(^{106}\) 17 Fair Empl. Prac. Cases at 1175.
Gardner-Denver, may indicate that the Supreme Court is moving toward a more liberal attitude concerning prerequisites to litigation than those implied in Love v. Pullman.

Although the Third Circuit is not about to give up its position stated in Holliday, it has shown some inclination toward liberalization as evidenced in its decision in Richerson v. Jones. That decision involved an employee of the United States Navy whose only recourse to complain regarding discriminatory practices is under the provisions of Section 717 of Title VII. Plaintiff had filed an administrative complaint with the United States Naval Department's EEO Official, but withdrew his formal discrimination complaint after being assured by the EEO Officials that steps would be taken to end the racial discrimination alleged in the complaint. Although the procedures invoked by a Federal employee are quite different from those invoked by employees of private industry under Title VII, the Third Circuit indicated that there are exceptions to the exhaustion requirement of Title VII and allowed the plaintiff to proceed, even though he had not exhausted his administrative remedies. The court emphasized that the government, in effect, misled the plaintiff and that plaintiff should not be penalized for the fact that he had followed the procedures suggested by the EEO Officials. The reasoning in the Richerson case was followed by the United States District Court for the Eastern District of Pennsylvania in a case involving tolling, Webb v. Westinghouse Electric Corp. The Third Circuit has also shown its trend toward a more liberal attitude in Glus v. G.C. Murphy Co. and Hicks v. ABT Associates. "This right, to bring a civil action, should not be defeated by the EEOC's failure to comply with its statutory obligations."

A number of circuit court decisions have not analyzed Love v. Pullman in the same manner as the Third Circuit. In an action predating Love v. Pullman, the Supreme Court vacated the Ninth Circuit's decision in Crosslin v. Mountain States Telephone and Telegraph Co. In Crosslin, the Ninth Circuit held that the plaintiff's action had to be dismissed because it had not properly been

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110. 572 F.2d 89 (3d Cir. 1978).
112. 562 F.2d 880 (3d Cir. 1978).
113. 572 F.2d 960 (3d Cir. 1978).
114. Id. at 964.
115. 422 F.2d 1028 (9th Cir. 1970), vacated, 400 U.S. 1004 (1971).
referred to the appropriate state agency, even though her charge had not been so referred because of the EEOC's position that referral was not required to that agency. In the Supreme Court, the Solicitor General suggested the Ninth Circuit's decision should be reversed in so far as it required the dismissal of the plaintiff's action, and that it would be appropriate instead to require a remand to the district court, which could stay proceedings to allow an appropriate referral to the state agency. The Supreme Court vacated the Ninth Circuit's decision in light of this suggestion. Similarly, in *Mitchell v. Mid-Continent Spring Co. of Kentucky*\(^\text{116}\) the Sixth Circuit acted on a case in which plaintiff's charge had not been deferred by the EEOC to the Kentucky Human Rights Commission, and the court ordered that the charge be deferred, albeit belatedly, by the EEOC to the state agency in order for charging party to proceed in federal district court. In that case, the Sixth Circuit Court of Appeals simply followed the procedure adopted by the Supreme Court in *Crosslin*.

The Fifth Circuit has recently taken a step beyond *Crosslin* in *White v. Dallas Independent School District*.\(^\text{117}\) In that case the EEOC did not defer to the Dallas District or County Attorney, claiming that the District and County Attorneys' Offices were not designated as appropriate FEP deferral agencies under Section 706(c) of Title VII. The Fifth Circuit found that the EEOC should have, in fact, deferred the charge to the District or County Attorney, but that the mistake of the EEOC should not operate to penalize the charging party. Rather than having the EEOC go through the procedure of a sham deferral as was done in *Crosslin* and *Mitchell*, the court recognized that the time limitation for filing with the state had long since passed and remanded the case to the federal district court with instructions to proceed to the rights of the parties under Title VII. Although the court did not expressly decide that deferral is not jurisdictional, it nevertheless implicitly recognized that the only two jurisdictional prerequisites to suit are the timely filing of a charge with the EEOC and receipt and action upon notice of right to sue. Thus, we have seen the circuits take three different positions regarding the necessity of resort to FEP Agencies as evidenced by the Third Circuit in *Holliday*,\(^\text{118}\) the Ninth and Sixth Circuits in

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117. 581 F.2d 556 (5th Cir. 1978).
118. See text accompanying notes 104-107 supra.
Crosslin\textsuperscript{119} and Mitchell\textsuperscript{120} respectively, and the Fifth Circuit in White.\textsuperscript{121} It is anticipated that this conflict will be resolved by the Supreme Court in the not-too-distant future.

The Fifth Circuit analysis appears to be more in accordance with the intent and history of Title VII than the analysis of the other circuits regarding deferral as a jurisdictional prerequisite to litigation. As pointed out in White, the Equal Employment Opportunity Commission's own regulations require that the Commission defer all charges by transmitting copies thereof to the appropriate FEP agencies. "Title VII created federal rights in a plaintiff which are not necessarily barred by the running of a state statute of limitations."\textsuperscript{122} A charging party who has reasonably relied upon the EEOC to defer a charge should not lose all rights under Title VII simply because of a procedural mistake by the Commission. The provision of Title VII requiring initial recourse to state or local FEP agencies\textsuperscript{123} was enacted with the intent of avoiding duplication of efforts by the EEOC and the FEP agency, thereby preserving the effectiveness of FEP agencies,\textsuperscript{124} and not with the intent of enacting a barrier to access to federal courts for violation of a charging party's rights under Title VII. The Supreme Court has emphasized the broad remedial purposes of Title VII in the 1975 decision of Albermarble Paper Co. v. Moody,\textsuperscript{125} and it would be surprising, as well as taking a backward step in light of Albermarble Paper Co., McDonnell Douglas, and Gardner-Denver, were the Court to adopt the Third Circuit view regarding this issue. To accept the views of the Ninth and Sixth Circuits would be to require needless delay in action by federal district courts while charges are being deferred to FEP agencies long after state statutes of limitations have passed, and therefore, such deferrals would have absolutely no utilitarian value.

\textsuperscript{119} See text accompanying note 115 supra.
\textsuperscript{120} See text accompanying note 116 supra.
\textsuperscript{121} See text accompanying note 117 supra.
\textsuperscript{122} White v. Dallas Independent School District, 581 F.2d 556, 562 (5th Cir. 1978).
\textsuperscript{123} 42 U.S.C. § 2000e-5(c).
\textsuperscript{125} 422 U.S. 407 (1975).
CONCLUSION

The federal district courts have indicated a strong pre-disposition toward a liberal interpretation of Title VII since its enactment in 1964, and this position has been evidenced in the interpretation of several different sections of the Act. Although Section 706(b) of the Act would seem to require that a charge be filed under oath or affirmation at the time of filing with the Commission, the courts have permitted verification to take place at any time prior to investigation of the charge.\textsuperscript{126} Secondly, the courts have also ignored the apparent requirement of Section 706(f)(1) that the Commission issue Notice of Right to Sue 180 days after filing of the charge, if the Commission has not entered into a conciliation agreement or filed a civil action.\textsuperscript{127} Thirdly, the courts have accorded an extremely liberal interpretation to the language of Section 706(f)(1) relating to failure of conciliation as constituting notice of right to sue, finding that only the formal Right to Sue letter starts the 90 day period for filing suit.\textsuperscript{128}

The aforementioned examples are indications that the courts have found that Congress could not have intended procedural technicalities, due to no fault of the charging party, to bar access to federal court. The intent of Congress requiring that an opportunity be given FEP Agencies to process Title VII charges was three-fold: (1) to encourage more states to adopt fair employment practice laws, (2) to stimulate increased activity under state laws already in existence,\textsuperscript{129} and (3) to avoid duplication of effort by Federal and local Fair Employment Practice Agencies.\textsuperscript{130}

An additional public policy ground for insuring that charging party’s Title VII rights are preserved is based on the fact that the Supreme Court has decided that charges filed under Title VII do not


\textsuperscript{127} Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1969); EEOC v. E. I. DuPont De Nemours and Co., 516 F.2d 1297 (3d Cir. 1975).


\textsuperscript{130} 110 CONG. REC. 12,721-25 (1964), reprinted in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3003 (1970).}
toll rights under 42 U.S.C. section 1981. The import of this decision is that a charging party, whose charge has been delayed in EEOC processing for several years, may lose his right under 42 U.S.C. section 1981.

In general, the courts have indicated an increased liberalization in construction of section 1981 since the landmark decision of the U.S. Supreme Court in Jones v. Alfred H. Mayer Co., which held that section 1982, a companion section to section 1981, prohibited private acts of racial discrimination. This trend toward liberal construction of Civil Rights laws has caused a fundamental shift in the position of courts in construing section 1981. It seems obvious that the trend is to construe Title VII in a similarly liberal fashion. In addition to the circuit and district court cases aforementioned, the Supreme Court's decision in Albermarble Paper Co. v. Moody emphasized the fact that the purpose of Title VII is to make persons whole for injuries suffered on account of employment discrimination and that Congress took care to arm the courts with full equitable powers.

Relatively recent Worksharing Agreements entered into between the EEOC and State FEP Agencies have been recognized as offering the FEP Agency the requisite opportunity to act as required by Section 706(c). The validity of Worksharing Agreements has not been reviewed by a single circuit court to date, and, in any case, the problem of deferral is not the only one facing the courts in dealing with the question of prerequisites to Title VII litigation. Equitable extension of time as applied to tardy filing of charges is another area in which the law is quickly evolving. The courts appear to be

133. 3 SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 72.04 (4th ed. 1976); cf. Davis v. United States Steel Supply Corp., 581 F.2d 335 (3d Cir. 1978) (court followed Pennsylvania's six year statute of limitations applying to breach of contract actions rather than state's two year statute of limitations for tort actions). See also Novotny v. Great American Savings & Loan Association, 584 F.2d 1235 (3d Cir. 1978), cert. granted.
avoiding literalism in favor of a trend toward deriving the intent of Congress in interpretation of Civil Rights laws in general, and hopefully this trend will continue, in order to prevent the loss of charging parties' rights under Title VII of the Civil Rights Act of 1964.