# THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: COMMENTS ON THE AGENCY AND ITS ROLE IN EMPLOYMENT DISCRIMINATION LAW

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## I. INTRODUCTION AND OBSERVATIONS ON THE EXTRATERRITORIAL APPLICATION OF AMERICAN EMPLOYMENT DISCRIMINATION LAW

The Equal Employment Opportunity Commission (EEOC) is the federal agency primarily responsible for administering and enforcing the major federal statutes prohibiting various forms of discrimination in employment. These statutes are Title VII of the Civil Rights Act of 1964 (Title VII),[1] the Age Discrimination in Employment Act of 1967 (ADEA),[2] the Equal Pay Act of 1963 (EPA),[3] and section 501 of the Rehabilitation Act of 1973.[4]

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[1] Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e, *et seq.* (1988)). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex (including sexual harassment and, since 1978, pregnancy), or national origin. Title VII also prohibits retaliation by employers or unions against employees, applicants, members (in the case of unions), and, in some cases, ex-employees for opposing any discrimination or participating in the Title VII processes. Moreover, Title VII applies to foreign employers doing business in the United States, subject to treaties providing otherwise. Some courts have ruled that the act also covers United States citizen employees of United States companies operating abroad.

[2] Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-34 (1988)). The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination in employment against persons aged 40 and over. Generally, absent a treaty with contrary provisions, the ADEA applies to employees of foreign firms operating in the United States as well as to United States citizens working for United States firms or United States controlled firms located outside the United States.

[3] Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. §§ 26(d) (1988)). The Equal Pay Act of 1963, enacted as an amendment to the Fair Labor Standards Act of 1938, prohibits discrimination in pay on the basis of gender. It covers only those employees working within the United States.

[4] Pub. L. No. 93-112, § 501, 87 Stat. 355, 390 (codified at 29 U.S.C. § 79 (1988)). The Rehabilitation Act prohibits discrimination against the disabled by federal employers. The EEOC has some interpretive and review authority for section 501 of the Rehabilitation Act. Other functions are administered by the Department of Labor.

The EEOC and the anti-discrimination legislation administered by the agency have significantly altered the nature of employment in the United States.[5] The legislation enforced by the EEOC affords broad rights and remedies to employees which they would not have otherwise. For many employees, the modern discrimination statutes are the sole protection against a system of employment at will and work places in which discrimination is practiced.

Further, in the interest of affording United States citizens the same protections abroad as they have in the United States, a number of the anti-discrimination laws have been given extraterritorial application. This situation has led to conflicts of jurisdiction and potential problems for American companies operating overseas. In a 1984 amendment to the ADEA, Congress extended the protections of the ADEA to United States citizens working for American companies abroad. However, Section 4(f)(1) of the Act contains a "foreign laws" defense which provides that actions otherwise prohibited under the Act shall not be unlawful if compliance with the ADEA's provisions "would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located."[6]

Moreover, there is a current of opinion that would also afford the protections of Title VII to United States citizens working for American companies abroad. However, Title VII does not specifically address the issue. Most courts which have considered the question have ruled in favor of or have simply assumed such jurisdiction.[7] However, a recent *en banc* majority decision of the Fifth Circuit Court of Appeals in *Boureslan v. Aramco*[8] held that Title VII did not have extraterritorial effect. The EEOC had intervened in the *Boureslan* case and

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[5] It should also be noted that Congress recently passed the Americans with Disabilities Act of 1989. Under this Act the EEOC is the enforcing body and will follow the procedures and remedies of Title VII. The Act prohibits discrimination in private employment, public accommodations, state and local government services, transportation, and telecommunications against individuals with disabilities. The legislation will become effective two years after signature by the President. It is estimated that the legislation will cover 3.9 million business establishments and 666,000 employers. N.Y. Times, Sept. 17, 1989, at E5, col. 1.

[6] 29 U.S.C. § 623(f)(1) (1988).

[7] *See* Bryant v. Int'l Schools Serv., Inc., 502 F. Supp. 472 (D. N.J. 1980), *rev'd on other grounds* 675 F.2d 562, 577 n.23 (3rd Cir. 1982); Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); Love v. Pullman Co., 13 FEP 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978).

[8] 892 F.2d 1271, 1273 (5th Cir. 1990).

argued in favor of finding jurisdiction. The Court emphasized the right of nations to regulate conduct within their own borders which it said is a "fundamental concept of sovereignty that is not lightly tossed aside."[9] According to the Court, this concept had given rise to a presumption against extraterritorial application of a statute. The Court concluded that nothing in the language of Title VII indicates that Congress intended to override this presumption. Also, a legal advisor to the State Department has recently advocated a more cautious approach to the extraterritorial application of Title VII than that advocated by the EEOC.[10] United States companies with overseas operations are also concerned about extraterritorial jurisdiction and the specter of dual liability under Title VII and the law of the other countries in which they conduct business.

Similar concerns about conflicts of jurisdiction and dual liability present themselves when non-United States companies operating in this country are subject to the anti-discrimination statutes. A recent General Counsel of the EEOC expressed the view that foreign governments and employers have claimed too much protection under their treaties of Friendship, Commerce, and Navigation.[11] The Supreme Court recently refused to intervene in a job bias lawsuit filed against Korean Air Lines.[12] The Court's action let stand a Third Circuit Court of Appeals ruling that the 1957 Treaty of Friendship, Commerce, and Navigation did not grant the Korean air line blanket immunity from American labor laws.[13] The Third Circuit concluded that the treaty gives companies the right to engage executives "of their choice" and permits intentional discrimination based on citizenship, but not upon race, age, or national origin.[14]

Because of the central role and broad scope of the anti-discrimination statutes, employees, United States and foreign employers, and foreign governments have reason to familiarize themselves with these laws. Affirmative duties, including reporting requirements, are im-

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[9] *Id.* at 1272.

[10] *See* Comments of Ted A. Borek of the State Department's Office of Economic, Business, and Commercial Affairs, in *Attorneys Debate Wisdom of Extraterritorial Application of U.S. Fair Employment Statutes*, Daily Lab. Rep. (BNA) No. 206, at A-3 (Oct. 26, 1989) [hereinafter *Attorneys*].

[11] *See* Comments of Charles A. Shanor, General Counsel, EEOC, in *Attorneys, supra* note 10.

[12] Korean Air Lines v. MacNamara, 110 S. Ct. 349 (1989).

[13] MacNamara v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 110 S.Ct. 349 (1989).

[14] *Id.* at 1147.

posed upon employers subject to these acts. In addition, violation of the statutes can be costly. While the design of most of the legislation and the role of the EEOC in enforcing the laws is to effect voluntary compliance, the EEOC has found litigation to be an important tool in achieving its congressionally mandated goal of eliminating discrimination in employment and remedying the unlawful effects of discrimination which is uncovered. Over the years, the EEOC, through its conciliation and litigation actions, has secured millions of dollars in monetary benefits and other affirmative relief for victims of discrimination in employment.

Critics of the EEOC fall into two camps. Some critics maintain that the Agency's investigative powers are too broad and that these powers and the discrimination laws have spawned too much litigation. Others argue that the Agency and the laws that it enforces are not powerful enough, that the Agency's procedures are too complex, and that the Agency's time limitations are too restrictive. Major changes have been proposed and will be discussed below. In an attempt to present an overview of the EEOC and its functions, this paper will serve as a commentary on the Agency, its administrative procedures, and its role in eliminating employment discrimination.

## II. THE EEOC

The EEOC was created by Title VII of the Civil Rights Act of 1964 and became functional in July of 1965.[15] Enactment of the Civil Rights Act followed many years of effort. State laws prohibiting discrimination had already emerged but provided only a piecemeal array of rights and remedies for employees, depending on where they happened to work. Moreover, the Civil Rights Act of 1866 (part of the Reconstruction Era statutes), including Section 1981, was assumed to apply only to government action. Not until 1968 was this statute held to apply to private conduct. Since that time, Section 1981 has been used extensively to fight discrimination in employment. However, Section 1981 in general applies only to race and alienage and requires the initiation of court action. Section 1981 is currently codified in 42 U.S.C. § 1981.

With the increasing violence that surrounded the early days of the civil rights movement in the United States, particularly in Birmingham

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[15] The EEOC has approximately 48 field offices (23 full service district offices, 16 area offices, and 9 local offices) located throughout the United States. The Agency's fiscal year 1990 appropriation has been set at $184.9 million.

in May of 1963, support for federal civil rights legislation grew. The Kennedy administration submitted a draft of a civil rights bill in June of 1963. After President Kennedy's assassination, President Lyndon B. Johnson gave the civil rights legislation great priority. The Senate approved its version of the bill on June 17, 1964. The House adopted this version on July 2, 1964, which President Johnson signed into law the same day.

However, efforts were made to sabotage the bill. For example, it is generally acknowledged that sex was added as a basis of discrimination by members of Congress opposed to Title VII. This addition was intended to sabotage the chances of passage of the Title VII legislation.[16] This tactic failed, and over the years sex discrimination, despite the intentions of those original "backers," has become one of the main areas of employment discrimination litigation.[17] Since their inception, Title VII and the EEOC have been caught between those seeking a strong law and agency and those who want far less federal regulation of business affairs.

The enforcement mechanism for Title VII has sparked a great deal of debate and controversy. As noted above, much of the dispute arose between those who favored an agency with strong enforcement power and those who desired a weaker agency emphasizing investigation, reporting, and voluntary compliance. One proposal which favored a more active agency provided for complaints before an independent Equal Employment Opportunity Board. The Board would have had the power to issue cease and desist orders enforceable in the federal courts of appeals. The compromise reached by Congress resulted in the EEOC which is a bipartisan commission composed of five members who are appointed by the President, with the advice and consent of the Senate, for five year terms. One member is designated as chair. As created, the EEOC had no enforcement powers and was only empowered to investigate and seek a voluntary conciliation agreement. If conciliation failed, the individual complainant could bring a lawsuit in federal district court. The Department of Justice, at the court's discretion, could seek to intervene in the private suit. The Attorney General also had authority to bring pattern and

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[16] *See* 110 Cong. Rec. pp. 2577-88, 2718-21, 13647, 13663-64 (1964).

[17] In 1978, Title VII was amended by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. 2000 (as amended) (1988)) which added Section 701(k) to the Act. Subsection (k) defines "sex" as including pregnancy, childbirth, and related medical conditions.

practice lawsuits.[18] The emphasis was clearly on effecting voluntary compliance with the statute. In 1972, along with other changes, the EEOC was given the additional authority to litigate Title VII cases, and the Office of General Counsel was created to carry out this function.[19] The General Counsel is appointed by the President, with the advice and consent of the Senate, for a four year term. In most cases the General Counsel makes a recommendation to the Commissioners on whether the Agency should file a lawsuit. If the Commissioners vote to approve such action, the General Counsel is responsible for the litigation. However, suits against state or local government entities are referred to the United States Department of Justice. While the emphasis is still on conciliation of cases, litigation has proven an effective means of accomplishing compliance with the laws.

Beginning in July of 1979, the EEOC assumed responsibility for enforcing the ADEA and the Equal Pay Act (EPA). This authority had previously rested with the Department of Labor but was transferred to the EEOC pursuant to Reorganization Plan No. 1 of 1978.[20] Briefly summarized below are the administrative and enforcement procedures which must be followed in processing Title VII, ADEA, and EPA cases.

### *A. Administrative and Enforcement Procedures under Title VII*

Title VII cases may be litigated either by the EEOC or by the private party alleging discrimination. Before any private party can file a lawsuit charging employment discrimination under Title VII, he or she must first file a timely charge of discrimination and receive

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[18] Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 92 Stat. 259-62 (codified at 42 U.S.C. § 2000 e(5) and 42 U.S.C. § 2000 e(6).

[19] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3(f)(1), § 8(e)(1), 86 Stat. 103, 105-06, 110 (codified at 42 U.S.C. § 2000 e(5)(f)(1) and 42 U.S.C. § 2000 e(4)(b) (1988)). The Commission's authority to bring lawsuits was proposed by the White House and adopted by Congress after bills giving the EEOC more extensive powers, similar to the cease and desist powers exercised by the National Labor Relations Board, were favorably reported by the House Labor Committee. While the Senate Labor Committee also favorably reported the cease and desist scheme, the prospect of a long debate caused that Committee to follow the proposal for EEOC enforcement through lawsuits. The amendments to Title VII also provided, at the urging of employer representatives, that the period for recovering back pay be limited to two years prior to the filing of the charge of discrimination.

[20] 43 Fed. Reg. 19, 807, *reprinted in* 5 U.S.C. App. at 1155 (1982), 92 Stat. 3781.

a Right to Sue letter from the EEOC. Then the suit must be filed in federal district court within 90 days of the notice of Right to Sue.

The processing of most Title VII cases begins with a charge of discrimination filed by an aggrieved person or by someone on his or her behalf against an employer, labor organization, joint labor-management apprenticeship program, or employment agency which employs 15 or more persons. In a state which does not have a state and local fair employment practices agency (FEPA) with enforcement powers,[21] the charge must be filed with the EEOC within 180 days of the alleged discriminatory act. In a state which does have a FEPA with enforcement powers, known as a deferral agency, the charge must be filed first with the state agency. The state agency has up to 60 days during which time it has exclusive jurisdiction. In these states, if the state agency does not resolve the charge, the charge must be filed with the EEOC within 300 days of the alleged discriminatory act. Members of the EEOC may also initiate charges against entities covered by Title VII. In Title VII cases alleging discrimination by a state or local government agency, the case is forwarded to the United States Department of Justice which determines whether to initiate litigation.

Once the EEOC receives a charge, the Agency notifies the entity charged with discrimination and then undertakes an investigation of the charge. The EEOC has the power to subpoena both documents and witnesses during the course of its investigation. Its subpoenas can be enforced through the federal district courts. If immediate action is required to preserve evidence or to protect a charging party from retaliation, the EEOC in appropriate cases may seek a temporary restraining order or preliminary injunction pending final resolution of the charge. The investigators may consult with the EEOC attorneys throughout the processing of the charge. A charging party may request

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[21] The EEOC works in conjunction with state and local fair employment practices agencies (FEPAs). Nationwide, 109 state agencies have been designated as FEPAs. These agencies administer state and local laws prohibiting employment discrimination and the enforcement mechanisms for these laws. The EEOC is responsible for overseeing the work of the FEPAs including making sure that FEPA investigations meet EEOC standards. Figures from the EEOC between 1983 and 1987 indicate that on an annual basis the Agency directly processes and is responsible for monitoring approximately 115,500 charges of discrimination. In fiscal year 1989 alone, the Agency received 59,411 charges. The EEOC forwarded 3,459 of the charges to the FEPAs. The Agency received 3,572 charges from the FEPAs. *See generally* EQUAL TIMES, U.S. EEOC, OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, Jan. 1990.

the issuance of the Notice of Right to Sue at any time after the Agency has had a charge for 180 days. The EEOC normally terminates its investigation of the charge when this occurs but may intervene in a private lawsuit filed by the complainant upon the complainant's receipt of the Right to Sue Notice. The charging party of course may wait to act until the EEOC fully investigates the case and makes its determination.

Once the EEOC investigation is complete, the investigator to whom the charge has been assigned makes a recommendation to the local District Director as to whether reasonable cause exists to believe that the charge is true. If no cause is found, then the charging party may appeal this decision to the EEOC's Determination Review Program (DRP) in the Agency's headquarters office within 14 days. The determination becomes final when no timely appeal is filed or when the DRP issues a decision upholding the determination. This final determination is considered the required Notice of Right to Sue.

If a finding of cause is made, the EEOC District Office issues a Letter of Determination (LOD). After issuance of the LOD, the respondent is invited to engage in conciliation efforts with the agency. The EEOC is required to attempt a good faith conciliation of charges in which cause is found.

Unless a satisfactory conciliation agreement is reached on a "cause" finding, EEOC attorneys review the case and make a recommendation to the EEOC as to whether the agency should file suit. The Commissioners then vote on whether to authorize litigation. If litigation is approved, then the case is sent back to the District Office Legal Unit. At that point, the individual is notified and may intervene in the Agency's suit.

No statutory or other time limit exists within which the government must finish its investigation or bring suit. While the doctrine of laches can be applied to the government's action, the only statutory prerequisite to the government's lawsuit, once the government has received a charge, is that it must attempt conciliation and it may not file a lawsuit until it has had the charge for at least 30 days. The government has the first option of suit which it may lose once it has had the charge for more than 180 days. In any event, the process of bringing a charge to court can be a lengthy one. This delay is one of the main criticisms lodged against the system.

In any Title VII case, if the EEOC or Department of Justice declines to bring suit on the charge, a Notice of Right to Sue is issued to the charging party who must then file suit in federal district court within 90 days. The courts have been strict in requiring that plaintiffs

file within the 90 day period. If they do not do so, their rights under Title VII are lost.

In all Title VII litigation, the charging party is entitled to a trial de novo in the federal district court. The trial is before a judge without a jury because, when Title VII was enacted, most juries were considered hostile to the rights enforced by the statute. Finally, employees cannot receive compensatory or punitive damages; only back pay, benefits, and injunctive relief are available.

### *B. Administrative and Enforcement Procedures under the Age Discrimination in Employment Act*

The EEOC investigation of an ADEA violation is essentially the same as its investigation of a Title VII case. Again the emphasis is on conciliation, but there are three major differences between the two types of actions. First, ADEA time limits are different. Second, under ADEA, plaintiffs are entitled to jury trials if the case is litigated. Finally, ADEA plaintiffs may be awarded liquidated damages upon a showing of willful discrimination.

The ADEA specifies that a private party may not file suit alleging violation of the Act until 60 days after he or she has filed a discrimination charge with the EEOC. In a state with no age discrimination law, the charge must be filed within 180 days of the alleged discriminatory act; in a state with an age discrimination law, the charge must be filed within 300 days of the alleged unlawful practice or within 30 days after notice that the state proceedings have been terminated, whichever is earlier. Suit must be initiated in federal district court within two years from the discriminatory act or within three years in the case of willful violations. These time periods may be tolled for up to one year while the EEOC is engaged in conciliation efforts.[22]

The EEOC may bring an ADEA lawsuit even in cases in which the aggrieved party does not initiate proceedings by filing a charge. The only prerequisite to a suit by the government is that the agency engage in conciliation efforts and that the agency meet the two or three year statute of limitations. Because of the two year statute of limitations, age cases must be closely monitored to ensure compliance with the limits.

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[22] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 605 (codified at 29 U.S.C. § 626(e)(2) (1988)).

### *C. Administrative and Enforcement Procedures under the Equal Pay Act*

One of the major differences between the EPA and other anti-discrimination laws is that the EPA provides for private and government initiated lawsuits *without* requiring administrative charges or conciliation. The statute of limitations is two years from the alleged discrimination and three years in cases of willful violation. Generally, each pay day on which disparate wages are paid because of gender is considered a violation.

An individual may sue his or her employer directly in federal district court pursuant to Section 16(B) of the Act; also, he or she may request that the EEOC seek redress for violation of the Act, or the EEOC may initiate an EPA action on behalf of an aggrieved party. Individuals often allege EPA violations in conjunction with Title VII charges. A government suit precludes private litigation. The EEOC investigation of EPA cases is essentially similar to its investigation of Title VII and ADEA cases.

### *D. Comments*

As noted above, employees must exhaust their administrative remedies with the EEOC prior to instituting a lawsuit under Title VII or ADEA. Some have criticized the time limits and procedures as posing unnecessary obstacles to employment discrimination victims. However, employers generally favor strict adherence to the time limits; they argue that without such limits they would be subject to suit on old charges where evidence would be unavailable. In addition, an important feature of the administrative scheme is that employers are required to post a notice informing employees of their rights. It also is argued that the required procedures are not that complex. Further, an aggrieved person may bring a charge without the necessity of a lawyer. Thus, the individual is spared a great investment of time and money as the EEOC pursues its investigation and attempts to conciliate. Even if at some point the individual decides to sue on his or her own, he or she has the benefit of the evidence obtained by the EEOC.[23] In fact, in cases involving race discrimination, plaintiffs often join a Title VII claim with a Section 1981 claim and use the

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[23] This commentary does not include a discussion of the procedures applicable to cases brought by federal employees, including procedures provided for under section 501 of the Rehabilitation Act.

evidence gathered in the EEOC proceeding. Under Section 1981, plaintiffs may seek punitive damages, and they are not limited by either short time limits or a requirement of exhausting administrative remedies. In many instances the employee is made whole at the administrative stage and can avoid the time and expense of litigation altogether.

## III. IMPACT AND EFFECTIVENESS OF THE EEOC

In 1964, when the Civil Rights Act was enacted, Title VII was certainly not viewed as the most controversial section of the legislation. Most would agree that the Public Accommodations Section held this distinction. Over the years, however, Title VII has eclipsed the other titles of the Act and has generated by far the most litigation. With the enactment of the ADEA in 1967, the EPA in 1963, and various amendments to Title VII, employment discrimination litigation has exploded in volume. The impact of this legislation on working conditions has been dramatic and to a certain extent incalculable.

Yet, in terms of statistics, the following numbers represent some tangible proof of the Agency's impact. Since 1982, the EEOC has secured approximately $907 million for victims of discrimination,[24] not to mention the broad injunctive relief obtained or the educational and preventive measures effectuated. During fiscal year 1989, the EEOC filed 599 direct lawsuits and interventions and resolved 558 lawsuits. By the third quarter of 1989 alone, the EEOC recovered $26.1 million on behalf of victims of discrimination through court litigation.[25] Monetary benefits obtained through conciliation by mid-fiscal year 1989 totalled $52.7 million.[26]

These statistics are even more significant when one considers that a large number of the individuals helped by the EEOC have no other forum or have a less effective forum available to them. For example, only about 16.4% of the United States wage and salaried workforce is unionized and covered by collective bargaining agreements (CBAs) which may contain provisions on discrimination and provide for binding arbitration.[27] Also, many of the issues covered by the anti-

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[24] EQUAL TIMES, U.S. EEOC, OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, Apr. 1989.

[25] EQUAL TIMES, U.S. EEOC, OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, Jan. 1990.

[26] EQUAL TIMES, U.S. EEOC, OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, Sept. 1989.

[27] Daily Lab. Rep. (BNA), at B8 (Feb. 8, 1990).

discrimination laws are ones that arise before a CBA comes into play, such as discriminatory recruitment and hiring practices.

Moreover, even those employees who are unionized and are covered by a CBA and those managers and executives who have individual employment contracts with arbitration provisions may be better served by the EEOC processes. This observation is based on both the procedural advantages of the EEOC processes and the public policy and purpose underlying the anti-discrimination statutes.

The United States Supreme Court, while discussing the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight Sys., Inc.*,[28] observed that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining" and further stated that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[29] It is widely argued that because of the common factors behind the purpose and policies of the anti-discrimination legislation the Court's observations in *Barrentine* have direct application to the anti-discrimination statutes and to all employees whether covered by a CBA, an individual employment contract, or neither. In fact, the courts generally have refused to defer discrimination cases because of agreements to arbitrate such claims or because of the facts giving rise to the dispute.[30]

## IV. ADVANTAGES OF THE EQUAL EMPLOYMENT OPPORTUNITY PROCESS OVER ARBITRATION IN DISCRIMINATION CASES

Congress designed the anti-discrimination legislation to be overseen and enforced by a public agency with final enforcement responsibility, namely, the EEOC. The responsibility of the EEOC to eliminate discrimination is far broader than the responsibility of an arbitrator to construe a particular contract and resolve only the issue presented.

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[28] 450 U.S. 728 (1981). The Court held that § 216(b) of the Fair Labor Standards Act gave employees a right to bring their claims to court and that such claims are not waiveable by an agreement to arbitrate. *Id.* at 745.

[29] *Id.* at 737.

[30] In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the United States Supreme Court was very critical of the ability of the arbitration process to handle statutory issues and ruled that arbitration agreements and decisions do not foreclose access to the EEOC or courts to resolve a Title VII claim. In Nicholson v. CPC International Inc., 887 F.2d 221 (3d Cir. 1989), the Third Circuit reached a similar ruling in an ADEA case.

The EEOC has authority not only to resolve the individual charge before it, but also in many cases it may use the charge to investigate and to eliminate other discriminatory actions and practices by the employer. Alternative procedures such as an individual's reliance on the more limited arbitration process can undermine the statutory scheme of the anti-discrimination legislation designed to eliminate not simply individual complaints but discrimination in the entire workplace. Moreover, arbitration often proves to be an unsatisfactory forum in which to resolve issues of discrimination because of the inherent policy and procedural differences it has with EEOC enforcement. An employee who files a charge with the EEOC, as noted above, need not expend any of his or her own money or time. He or she is provided with an investigator who has subpoena power and access to a legal staff which can investigate the charge. In the arbitration forum, on the other hand, the employee may be dependant on the efforts of a union which does not have interests identical to those of the individual. The union must serve the interests of the union as a whole, which may be at odds with those of the individual. In addition, most arbitration procedures do not provide for the broad discovery/investigative powers possessed by the EEOC; nor is court-enforced subpoena power available to back up information requests in many arbitration forums.

Partly because one of the primary functions of arbitration is to insure industrial peace and to avoid strikes, arbitrators often compromise the case before them and tend to avoid findings of intentional wrongdoing. This tendency of arbitration rulings to represent a compromise often precludes giving full relief to individuals asserting discrimination claims. For example, a disparate treatment claim by an individual under Title VII or the ADEA requires a finding of discriminatory intent, and a sexual harassment claim under Title VII often mandates the discipline or discharge of a valued employee who is found to have harassed co-workers or subordinates. Such findings and remedies may be difficult for an arbitrator to order.

Also, discrimination claims often involve difficult issues, the resolution of which will impact cases and employment practices other than the one at hand. Not only are most arbitrators prevented by the contract from expanding the scope of the case, they do not have to apply external law. They are able to make compromises virtually free from scrutiny. Judicial review of arbitration decisions is extremely narrow and does not involve the merits of the dispute. The decision will not be overturned because of a mistake of law or fact as long

as it draws its "essence" from the contract.[31] The significance of there being, as a practical matter, no appeal from an arbitration decision is further underscored in that some of the most important discrimination law has been developed on appeal.[32] Another significant point is that even though the EEOC process is independent and court review of the case is de novo, arbitration decisions are generally admissible as evidence before the EEOC and in court.[33] This may cause individuals and/or unions to withdraw intentionally a discrimination issue from an arbitrator for fear that it will not be dealt with adequately and will then impact negatively on a future EEOC or court decision.

Finally, the remedies available through the EEOC/court process are far greater than those afforded by the arbitration process. Employees who pursue their rights through the EEOC are afforded the collection of damages to make them whole and injunctive relief provided by anti-discrimination legislation, as well as often helpful procedural tools, such as the class action, which are not available under most arbitration procedures. In ADEA cases, employees may even obtain liquidated damages if the discrimination is proven to be willful.

## V. FUTURE PROSPECTS FOR THE EEOC AND EMPLOYMENT DISCRIMINATION LAW

The EEOC has carried a heavy burden on an ever-shrinking budget. It has done so remarkably well. The system does have problems meeting the ever-increasing demand for its services, and the federal court system has seen a 2,166% increase in employment discrimination cases filed over the past 20 years.

To relieve the burden on the courts, the Federal Courts Study Committee (FCSC) issued a draft report which is part of a Congressionally mandated report on the reform of the federal court system. This draft report recommends that the EEOC assume a quasi-judicial role in resolving wrongful discharge claims. This proposal is

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[31] United Steelworkers of America v. America Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

[32] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (sexual harassment decision setting forth both quid pro quo and hostile environment theories).

[33] As to evidence admitted in court, the judge accords to the evidence the weight he or she deems appropriate.

fairly similar to those included in the original bill submitted to Congress in 1963 and in the amendments suggested in 1972. Under the proposal, Title VII would be amended and for a five year experimental period the EEOC could adjudicate such claims. Charging parties would be able to choose between going to the agency or to federal district court. In either case, a right of appeal would exist to the federal court of appeals. The NLRB procedures would serve as a guide for such proceedings. Employers are generally opposed to this proposal.[34] An alternative to added EEOC participation in resolving employment discrimination cases would be some type of dispute resolution system under the aegis of the district court.[35] The draft report will be the subject of public hearings, and a final report will be presented to Congress, the Chief Justice, and the President.

The EEOC has expressed doubt as to whether it has the ability under its present structure to assume a quasi-judicial role as proposed by the Draft Report. The Agency has also pointed out that it likely will be assuming significant new responsibilities under the Americans with Disabilities Act. The EEOC has suggested that the FCSC consider the proposal for alternative dispute resolution under federal court supervision for wrongful discharge claims.[36]

Also pending are proposals to amend Title VII to provide for compensatory and punitive damages in cases of intentional discrimination, and to allow jury trials. This latter proposal is said to be prompted by perceived pro-employer bias of the federal judiciary. Juries are now seen to be more sympathetic to Title VII claimants than are the judges. These proposals are part of the pending Civil Rights Act of 1990[37] which was drawn up primarily in response to several 1989 Supreme Court decisions widely perceived to cut back on the rights of plaintiffs in discrimination cases.[38] These legislative efforts to amend and expand Title VII have met with stiff opposition.[39]

Regardless of the outcome of the Federal Court Study Committee reports and the proposed amendments to Title VII, the importance of the anti-discrimination statutes and the often difficult questions

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[34] Daily Lab. Rep. (BNA), at A5-A6 (Feb. 16, 1990).

[35] *Id.*

[36] *Id.*

[37] S. 2104, 101st Cong., 2nd Sess. (1990). H.R. 4000, 101st Cong., 2nd Sess. (1990).

[38] *Id.*; Lab. L. Rep. (CCH), at 1 (Feb. 19, 1990).

[39] Daily Lab. Rep. (BNA), at A10-A11 (Feb. 28, 1990).

which arise under them mandate that these statutes be given priority in our federal judicial system.