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TITLE VII—THE DOCTRINE OF LACHES AS A DEFENSE TO PRIVATE PLAINTIFF TITLE VII EMPLOYMENT DISCRIMINATION CLAIMS

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INTRODUCTION

Congress enacted Title VII of the Civil Rights Act of 1964 to eliminate employment discrimination based on race, color, religion, sex, and national origin. To accomplish these goals, Congress created the United States Equal Employment Opportunity Commission (EEOC) to investigate charges of unlawful employment practices and


(1) 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, because of such individual's race, color, religion, sex, or national origin; or

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


2. 42 U.S.C. § 2000e-4(a) (1982). The EEOC is designed to eliminate discriminatory employment practices by certain employers, unions and employment agencies. Under Title VII, the EEOC is charged with preventing employers from engaging in any unlawful employment practice set forth in specific provisions of Title VII. Id. § 2000e-5(a). Generally, the EEOC's powers are twofold. First, the EEOC is empowered to receive and investigate charges of discrimination in employment; and second, if it determines that reasonable cause exists to believe that a charge is true, the EEOC is empowered to attempt through conciliation and persuasion to resolve disputes involving such charges. Id. § 2000e-5(b).

In addition, the EEOC has the power to issue, amend or rescind suitable procedural regulations to carry out the provisions of Title VII. Id. § 2000e-12(a). These EEOC procedural regulations may be found at 29 C.F.R. §§ 1601.1-80 (1988 & Supp. 1989). Specifically, the EEOC has promulgated interpretive regulations on discrimination because of sex,
to bring about voluntary settlement of employment discrimination claims. In addition to creating the Equal Employment Opportunity Commission, Congress created a private right of action in the party who alleges employment discrimination.

In 1972, Congress amended Title VII by passing the Equal Employment Opportunity Act. Among other changes, the amendment

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3. 42 U.S.C. § 2000e-5(a), (b) (1982). There are two methods for instituting an administrative proceeding before the EEOC. First, a person claiming to be aggrieved may file a charge in writing and under oath. Id. § 2000e-5(b). Second, a member of the EEOC who has reasonable cause to believe that a violation has occurred may file a written charge made under oath. Id.

4. 42 U.S.C. § 2000e-5(f)(1) (1982). Any person whom the charge alleges was aggrieved by the alleged unlawful employment practice may bring a private action against the person or employer alleged to have violated Title VII. Id. 42 U.S.C. § 2000e-5(f)(1) provides:

If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action ... , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge ... by the person claiming to be aggrieved. . . .

Id.


6. Title VII, as originally enacted in 1964, afforded a remedy for employment discrimination only to employees in the private sector. The 1972 amendment expanded coverage to employees of state and local governments, as well as to employees of the federal government. 42 U.S.C. § 2000e-a (1982). In addition, the 1972 amendment increased Title VII coverage to businesses with fifteen or more employees, whereas only businesses with twenty-five or more employees were covered prior to the amendment. Id. § 2000e-b (1982 & Supp. 1987).

With respect to federal employees, the 1972 amendment added section 717. This section requires that "[a]ll [federal] personnel actions affecting employees or applicants for employment ... be made free from any discrimination based on race, color, religion, sex, or
empowered the EEOC to bring an action against the employer in a federal district court. The employee's private right to sue, originally created by the Civil Rights Act of 1964, was retained in the 1972 Act and, even today, continues to be one of the "most important enforcement mechanism[s] in Title VII." 

Under the Act, as amended, private claimants are entitled to prompt processing of their charge by the EEOC. In fact, the legislative history of Title VII establishes that it is appropriate for the individual to pursue a private action when delay is occasioned by the inefficiencies of the administrative agency. Section 706(f)(1) of Title VII, however, permits the claimant to await the termination of EEOC proceedings before filing suit and does not impose any maximum time period within which the EEOC must conclude its administrative proceedings and conciliation efforts.

In the absence of such a statutory limitation on a Title VII claimant's right to await the conclusion of EEOC action, courts have considered whether equitable principles may be applied to protect Title VII defendants who have been prejudiced because of an unreasonable national origin." 

7. 42 U.S.C. § 2000e-5(f)(1) (1982). The 1972 amendment provided that "[i]f within thirty days after a charge is filed with the Commission ... the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent ... named in the charge." 

8. Under the Act, a private party may bring an action if the EEOC dismisses the employment discrimination charge, enters into an unacceptable conciliation agreement, or does not act upon the charge within one hundred and eighty days. If the EEOC fails to act within the 180-day period, it must notify the complainant, who then has the option of filing a private suit within ninety days after receiving such notice, or awaiting completion of the EEOC's administration of the charge. See supra note 4 for the text of 42 U.S.C. § 2000e-5(f)(1) which provides for a private right of action in a party who alleges employment discrimination.


11. Id. Under Title VII, Congress provides an aggrieved person the opportunity to bring an independent action against the respondent if the EEOC has not issued a notice of right to sue within one hundred and eighty days. 42 U.S.C. § 2000e-5(f)(1) (1982). "The committee believes that aggrieved persons are entitled to have their cases processed promptly ... [t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. REP. No. 238, 92d Cong., 1st Sess. 13, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2148.

or inexcusable delay by the claimant in filing an action.\textsuperscript{13} These courts have ruled, under certain circumstances, that the equitable doctrine of laches\textsuperscript{14} may be applied as a time limitation on a Title VII claimant's right to bring suit.\textsuperscript{15} Specifically, where courts find inexcusable and unreasonable delay in seeking a remedy, and prejudice to the defendant by the passage of time,\textsuperscript{16} the defense of laches has been successfully applied to bar a Title VII claim.\textsuperscript{17}

This comment addresses the specific question of whether the equitable doctrine of laches might bar a private plaintiff's Title VII employment discrimination action, when the claimant has timely filed charges as required under section 706,\textsuperscript{18} but, before filing suit, has cho-

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  \item \textsuperscript{13} A court of equity may refuse relief to one who has been dilatory or waiting in diligen ce in prosecuting a cause of action. \textit{See} Urquhart v. McDonald, 252 Ala. 505, 509, 42 So. 2d 9, 13 (1949).
  \item \textsuperscript{14} The maxim that equity aids the vigilant, not those who sleep on their rights, expresses the concept which is fundamental to the doctrine of laches. \textit{See} New York City v. Pine, 185 U.S. 93, 98 (1902); Farm Bureau Mut. Auto Ins. Co. v. Houle, 118 Vt. 154, 159, 102 A.2d 326, 329 (1954). The basis of the doctrine of laches is said to be public policy, which requires, for the peace of society, the discouragement of stale demands. \textit{See}, e.g., Mackall v. Casilear, 137 U.S. 556, 566 (1890); Davidson v. Grady, 105 F.2d 405, 408 (5th Cir. 1939); Denison v. McCann, 303 Ky. 195, 198, 197 S.W.2d 248, 249 (1946); Wilhelm v. Pinning, 191 Okla. 321, 323, 129 P.2d 580, 582 (1942). The doctrine is based on the injustice of allowing recovery where no explanation is given for unreasonable and injurious delay, and is based, in part, on the injustice that might result from the enforcement of a neglected right or claim. \textit{See} City of Paducah v. Gillispie, 273 Ky. 101, 104, 115 S.W.2d 574, 575 (1938); O'Grady v. Deery, 94 N.H. 5, 7-8, 45 A.2d 295, 297 (1946).
  \item \textsuperscript{16} In equity a party is not permitted to sleep on a right of action to the prejudice of the party against whom a claim is made, and who by the delay may be deprived of the evidence and means of making an effective defense. \textit{See supra} notes 13-14. A demand must be made within a reasonable time, otherwise the claim is considered stale, and courts of equity have refused to aid stale demands where the party has acquiesced for a great length of time. \textit{See}, e.g., Urquhart v. McDonald, 252 Ala. 505, 509, 42 So. 2d 9, 13 (1949); Sampson v. Cottongim, 249 Ky. 670, 671, 61 S.W.2d 309, 310 (1933); Burns v. Dillon, 226 Ky. 82, 88, 9 S.W.2d 1095, 1098 (1928). \textit{See also} Lorenz v. Rowley, 122 Vt. 480, 485, 177 A.2d 364, 368 (1962).
  \item \textsuperscript{17} \textit{See}, e.g., Garrett v. General Motors Corp., 844 F.2d 559 (8th Cir.), \textit{cert. denied}, 109 S. Ct. 259 (1988); Jeffries v. Chicago Transit Auth., 770 F.2d 676, 680-82 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1050 (1986).
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sen to await the conclusion of extended EEOC proceedings. Consideration of this issue must address two competing concerns which provide the major background for this comment. First, the concern for the Title VII claimant's statutory right to await the termination of EEOC proceedings before initiating a suit in federal court and the legislative policy reflected in Title VII which favors the administrative resolution of claims by the EEOC must be examined. Second, the interest in limiting prejudice and inconvenience to the employer in defending a Title VII action, due to the EEOC's inability to act promptly, must be scrutinized. In light of these concerns, courts have had to decide whether it is unreasonable or inexcusable, pursuant to a laches defense, for a private plaintiff to delay filing suit until the EEOC has made its determination and issued a right-to-sue letter.

Part I of this comment traces the origin of Title VII of the Civil Rights Act of 1964, the legislative intent behind the creation of the Equal Employment Opportunity Commission, and the EEOC's authority to administer Title VII discrimination claims. Part II examines the development of the doctrine of laches as an equitable time limitation on a Title VII claimant's right to bring suit.

Part III of this comment focuses on the question of whether laches may be applied in particular instances where a Title VII claimant awaits the conclusion of extended EEOC proceedings, receives a right-to-sue letter and files suit within ninety days of receipt of the right-to-sue letter. Part III surveys various federal courts of appeals' decisions which consider the applicability of the defense of laches to Title VII private plaintiffs under these circumstances. Specifically, this section separates the cases into two categories. The courts of appeals which support the classic laches approach will be examined, followed by a discussion of the courts of appeals which adhere to the contrasting presumption approach.


20. The courts which follow the presumption approach generally have held that the private plaintiff is entitled to await the completion of EEOC proceedings before filing suit. See, e.g., Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985); Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984); Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), aff'd, 452 U.S. 89 (1981). These courts have shown repeated reluctance to dismiss a private plaintiff's claim on the basis of laches and, therefore, have limited the application of laches to rare cases. See, e.g., Cleveland Newspaper Guild, Local 1 v. Plain
While there does not appear to be a viable solution to the questions of whether laches should apply in the particular circumstances involved or at what point the elements of laches have been established, there is an alternative answer available to the question of how laches could apply when it is raised as a defense to a Title VII claim. In Part IV, this comment suggests a method by which the district courts may locate "a just result" without limiting the right of a Title VII private plaintiff to await the EEOC's administrative resolution of claims and without providing for the indefinite tolling of a claim to the prejudice of the defendant-employer.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Legislative History and the Literal Requirements of Title VII

In 1964, in response to a compelling national need and concern, Congress enacted Title VII of the Civil Rights Act. The purpose of Title VII was to eliminate discrimination in employment based on race, color, religion, sex, or national origin through the utilization of Dealer Publishing Co., 839 F.2d 1147 (6th Cir.), cert. denied, 109 S. Ct. 245 (1988); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979).

21. The Supreme Court has previously noted that district courts have discretion to locate "a just result" in light of the circumstances peculiar to a case. Langnes v. Green, 282 U.S. 531, 541 (1931).

22. In enacting Title VII, Congress was concerned mainly with eliminating racial discrimination. See H.R. REP. No. 914, 88th Cong., 1st Sess. 18, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2393-94. The House Report noted that national legislation became necessary because progress in eliminating discrimination through state and local legislation had proceeded too slowly. Id. In addition, the committee reported that the legislative bill dealing with discrimination "is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination. It is a reasonable and responsible bill whose provisions are designed effectively to meet an urgent and most serious national problem." Id. at 18, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS at 2394.


formal and informal remedial procedures. By its action, Congress acknowledged the prevalence of employment discrimination in the United States and the need for federal legislation to remedy the inequities associated with employment discrimination.

The Civil Rights Act authorized the establishment of an Equal Employment Opportunity Commission (EEOC) and delegated to it the primary responsibility for preventing and eliminating unlawful employment practices in the United States. As enacted in 1964, Title VII of the Civil Rights Act created the EEOC to administer provisions of Title VII and to encourage the achievement of equal opportunity employment.

Title VII, however, limited the EEOC's functions to the investigation of employment discrimination charges and informal methods of

unlawful employment practices include discriminating against any employee for making charges, testifying, assisting, or participating in enforcement proceedings. In addition, it is an unlawful employment practice for an employer to print or publish any notice or advertisement indicating a prohibited preference, limitation, specification or discrimination, based on race, color, religion, sex, or national origin.

25. The legislative history of Title VII indicates a congressional desire for out-of-court settlement of Title VII violations. See H.R. REP. No. 238, 92d Cong., 1st Sess. 12-13, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2147-48. When the EEOC determines after an investigation that there is reasonable cause to believe that a charge is true, Title VII mandates that it endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. 42 U.S.C. § 2000e-5(b) (1982). The EEOC understands its objective under this provision as being to achieve voluntary compliance with Title VII by means of a written agreement resulting from conciliation. 29 C.F.R. § 1601.24 (1988); EEOC Compl. Man. (BNA) § 60.1 (Mar. 1979). This agreement should embody a just resolution of the issues and assure that the respondent will eliminate unlawful employment practices and take appropriate affirmative action.

26. The United States Supreme Court has said that the objective of Congress in the enactment of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). What is required, said the Court, "is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id. at 431.


28. Title VII of the Act was enacted with the primary objective of improving the status of minorities and women in the United States. H.R. REP. No. 238, 92d Cong., 1st Sess. 3, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2139.

conciliation and persuasion. In effect, the failure of EEOC conciliation efforts terminated its involvement in the claim. Enforcement could be achieved, if at all, only if the Title VII claimant initiated a private suit within thirty days after the receipt of EEOC notification that conciliation efforts had not been successful.

When it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the Act. The refusal

(Mar. 1979); EEOC Compl. Man. (BNA) § 26 (May 1979). If informal methods are unavailing, however, the EEOC has subpoena power which it may use in appropriate cases to compel the production of needed evidence. 29 C.F.R. § 1601.16 (1988); EEOC Compl. Man. (BNA) § 24 (Aug. 1984).

Title VII provides that in connection with any investigation of a charge, the EEOC shall have access to and the right to copy "any evidence of any person being investigated or proceeded against that relates to" the unlawful employment practices prohibited by Title VII and that "is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a) (1982). The information which the EEOC uncovers in its investigation is kept confidential from the public, but the parties actually engaged in the investigation, and their attorneys, are entitled to examine the EEOC's files under most circumstances. 29 C.F.R. § 1601.22 (1988); EEOC Compl. Man. (BNA) § 83.5 (Mar. 1979).

31. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a)-(e), 78 Stat. 241, 259-60 (codified as amended at 42 U.S.C. § 2000e-5(b) (1982)). If the EEOC determines, after an investigation, that there is reasonable cause to believe that a charge is true, Title VII mandates that it endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Id. The EEOC attempts to "achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief." 29 C.F.R. § 1601.24 (1988). If accepted by the employer, the remedy is embodied in a conciliation agreement that is signed by the charging party and the employer. Id. If the employer fails or refuses to conciliate or to make a good faith effort to resolve the dispute, the EEOC may terminate its conciliation efforts and so notify the employer. Id. § 1601.25.


During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.

Id.
of many employers to comply, however, compelled Congress to strengthen the EEOC's investigatory and enforcement powers. Subsequently, Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972. The 1972 amendment, while enlarging the powers of the EEOC to include enforcement, retained the previous emphasis on the administrative resolution and conciliation of charges. Congress did not abandon its belief that violations of the statute could be remedied without resort to the courts. This is evidenced by the fact that before the EEOC may bring a civil suit it must follow a series of prescribed administrative steps.

The administrative procedures begin with the filing of a charge with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within one hundred and eighty days after the occurrence of the allegedly discriminatory act, and the EEOC is required to serve notice of the charge on the

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34. Id. "Facts, statistical evidence and experience demonstrate that employers, labor organizations, employment agencies and joint labor-management committees continue to engage in conduct which contravenes the provisions of Title VII. The existence of such practices demonstrates the immediate need to effectuate the purposes of the Civil Rights Act of 1964." Id. at 9, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 2144.


36. 42 U.S.C. § 2000e-5(f) (1982). Under the 1972 amendment, the EEOC, if it is unable to secure an acceptable conciliation agreement within thirty days after filing of the charge, may bring an action against any respondent not a government, governmental agency or political subdivision named in the charge. Id. at § 2000e-5(f)(1). The EEOC may sue on the basis either of a private charge of employment discrimination or on a charge filed by a commissioner of the EEOC. In cases against a state or local government, the attorney general, rather than the EEOC, is authorized to bring the action. Id. Under the 1972 amendment, the individual retains the right to bring a court action if dissatisfied with the EEOC's handling of the case. Id. See supra note 7 for the text of 42 U.S.C. § 2000e-5(f)(1).

37. Id. Title VII retains the general scheme of the original act which enables the EEOC to process a charge of employment discrimination through the investigation and conciliation stages. 118 CONG. REC. 7563, 7564 (1972). In addition, Title VII "now authorizes the EEOC . . . to file a civil action against the respondent in an appropriate Federal District Court, if it has been unable to eliminate an alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Id.


39. 29 C.F.R. § 1601.7(a) (1988) provides:

A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization.

Id.
employer within ten days of filing. 40

After serving notice of the charge on the employer, the EEOC must commence an investigation to determine whether there is reasonable cause to believe that the charge is true. 41 This investigation culminates in a "no cause" or "reasonable cause" determination. 42 The EEOC's determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." 43 If the EEOC determines that there is

40. 42 U.S.C. § 2000e-5(e) (1982) provides that a charge must be filed within one hundred and eighty days after the alleged discriminatory act occurred and notice of the charge must be served upon the person against whom such charge is made within ten days thereafter. The notice of the charge must include the date, place and circumstances of the alleged unlawful employment practice. Id. A copy of the charge shall be served by mail or in person. 29 C.F.R. § 1601.14(a) (1988).

The purpose of this notice is to alert the Title VII defendant promptly of the possibility of an enforcement suit so that steps may be taken to protect the defendant's interests. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 372 (1977). The courts have differed as to whether this period is directory or jurisdictional, the majority concluding that it is simply a direction to the EEOC and will not bar a suit if the EEOC fails to give timely notice. Thornton v. East Texas Motor Freight, 497 F.2d 416, 424 (6th Cir. 1974) (service of notice on a respondent within 10 days is not a jurisdictional requirement). See Note, Time Limitations For Title VII Suits, 14 GA. L. REV. 540, 545 n.28 (1980). The courts are hesitant to preclude the enforcement of the plaintiffs' rights on matters which are beyond their control. See Sangster v. United Air Lines, Inc., 438 F. Supp. 1221, 1228 (N.D. Cal. 1977), aff'd, 633 F.2d 864 (9th Cir. 1980), cert. denied, 451 U.S. 971 (1981); Askins v. Imperial Reading Corp., 420 F. Supp. 413, 416 (W.D. Va. 1976). As a result of this interpretation, it is evident that the ten day requirement for notice is not mandatory.

41. 42 U.S.C. § 2000e-5(b) (1982). Normal EEOC practice, after an EEOC investigation begins, is to conduct an on-site investigation or plant tour. EEOC Compl. Man. (BNA) § 25.2 (June 1983). During the inspection, the investigator will pay particular attention to the charging party's worksite to acquire a general understanding of the work environment and specific information relating to the allegations. Id. § 25.5(d)(1). After the plant tour, the investigator will customarily request particular records from the employer. Id. § 26.1 (May 1979). The types of records which an employer will be expected to provide include payroll records, seniority lists, job descriptions, collective bargaining agreements, personnel records and the company's written affirmative action program, if there is one. Id. § 26.2(c).

42. 29 C.F.R. §§ 1601.19, .21 (1988). The result of the EEOC's deliberations is called a "determination." Thus, there are two possible determinations for any given charge. A "no cause" determination is meant to indicate to the charging party that the EEOC has fully considered the allegations and has concluded that there is not reasonable cause to believe that employment discrimination has occurred. Id. § 1601.19. If a "no cause" result is reached, the EEOC will dismiss the charge and promptly notify the person claiming to be aggrieved, and the respondent, of its action. 42 U.S.C. § 2000e-5(b) (1982). A "reasonable cause" decision, on the other hand, signifies a belief by the EEOC that a violation of Title VII has in fact occurred. 29 C.F.R. § 1601.21 (1988). Title VII requires the EEOC, upon reaching a "reasonable cause" decision, to endeavor to eliminate the alleged unlawful employment practice. Id. § 1601.24; 42 U.S.C. § 2000e-5(b) (1982).

43. 42 U.S.C. § 2000e-5(b) (1982). See also 29 C.F.R. § 1601.21(b) (1988) ("the Commission shall provide prompt notification of its determination ... to the person claiming to be aggrieved ... and the respondent.").
not reasonable cause to believe that the charge is true, the EEOC must dismiss the charge and notify the employee and the employer.\textsuperscript{44} If, however, the EEOC determines "after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."\textsuperscript{45} In conciliation efforts, the EEOC's regulations require it to "attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief."\textsuperscript{46} Successful conciliation avoids litigation through the execution of a formal conciliation agreement.\textsuperscript{47} Only after the EEOC determines that it has been unsuccessful in securing a satisfactory conciliation agreement from an employer may it bring a civil action.\textsuperscript{48} If the EEOC does not bring an action within one hundred and eighty days after the claim is filed, it must then notify the aggrieved party of the failure of conciliation.\textsuperscript{49} The private civil action must be commenced within ninety days of receipt from the EEOC of a notice of right to sue.\textsuperscript{50}

\textsuperscript{44} If the EEOC makes a "no cause" determination, 29 C.F.R. \S 1601.19(a) (1988) provides:

The person claiming to be aggrieved or the person on whose behalf a charge was filed may request a review of the issuing director's determination within 14 days of the date of the issuing director's determination by the Director . . . . The issuing director's letter of determination shall inform the person claiming to be aggrieved or the person on whose behalf a charge was filed of the right to sue in federal district court within 90 days of the date that the issuing director's letter of determination becomes the Commission's final determination.

29 C.F.R. \S 1601.19(a) (1988). If the aggrieved does not request a review of the "no cause" determination, the determination becomes final on the 15th day from the date of issuance.\textsuperscript{id}

\textsuperscript{45} 42 U.S.C. \S 2000e-5(b) (1982).

\textsuperscript{46} 29 C.F.R. \S 1601.24(a) (1988).

\textsuperscript{47} A settlement agreement may be negotiated at several different stages during the processing of a discrimination charge. The charge may be resolved in a pre-determination settlement negotiated after the charge is filed, but before the EEOC makes a reasonable cause determination. See 29 C.F.R. \S 1601.20 (1988); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 944 (2d ed. 1983). The settlement of a claim brought under Title VII in a federal district court may be incorporated later in a consent decree, subject to the court's approval and enforceable under the court's contempt powers. See EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1043-44 (7th Cir. 1982).


\textsuperscript{49} Id. In Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977), the Supreme Court held that no section of the Act required the conciliation effort to be concluded in any definite period of time. The 180-day provision merely limits the right to bring a private action. Whereupon, if the plaintiff is not satisfied with the efforts of the EEOC, the plaintiff's right to bring an action does not arise until one hundred and eighty days after the charge has been filed with the EEOC. Id.

\textsuperscript{50} 42 U.S.C. \S 2000e-5(f)(1) (1982). The plaintiff must file a complaint in federal
Congress, in granting the EEOC the power to bring suit directly in federal court, preserved the employee's private right of action created under Title VII.\textsuperscript{51} Under the provisions of section 706(f)(1), as amended, a potential litigant who has met the required charge filing deadlines\textsuperscript{52} may file a civil action with the appropriate federal district court within ninety days of receiving a right-to-sue letter from the EEOC.\textsuperscript{53} Under this subsection, the EEOC must notify the employee of his right to sue if the EEOC does not find reasonable cause, takes no action regarding the charge, or has not secured a conciliation agreement that is acceptable to the agency within one hundred and eighty days after the charge is filed.\textsuperscript{54} The 180-day limitation provides that a complainant whose charge is not dismissed, promptly settled, or litigated by the EEOC may bring a lawsuit, but must wait one hundred and eighty days before doing so.\textsuperscript{55} After the one hundred and eighty days have passed, the aggrieved party may either file a private suit within ninety days after EEOC notification of right to sue or continue to leave the resolution of the charge to the efforts of the EEOC.\textsuperscript{56}

B. \textit{National Policies and Priorities Reflected By Title VII}

Section 706(f)(1) is the heart of the Equal Employment Oppor-

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52. \textit{Id.} § 2000e-5(e). \textit{See supra} note 40 and accompanying text.


54. \textit{Id.}

55. \textit{Id.}

56. \textit{Id.} A charging party has an unqualified right to obtain a right-to-sue letter from the EEOC after one hundred and eighty days from effective filing of a charge with the EEOC, regardless of whether the EEOC has completed its administrative process. 29 C.F.R. § 1601.28(a) (1988). Upon receipt of the right-to-sue letter, the charging party has ninety days to file a court suit, in default of which the party is barred from bringing a Title VII action on the basis of the original charge. \textit{See} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (charging party's "receiving and acting upon the Commission's statutory notice of the right to sue" is a "jurisdictional prerequisite" to Title VII suit). If, however, the charging party permits the EEOC procedures to continue after the 180-day period, the 90-day period for commencing suit does not automatically start to run. Rather, the 90-day period is triggered only by the receipt of the right-to-sue letter. It is generally true that there is no definite period within which the charging party is required to file suit in court up until the EEOC issues a right-to-sue letter and starts the 90-day period running. \textit{See generally} Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975), \textit{cert. denied}, 423 U.S. 1052 (1976).
\end{footnotesize}
nity Act of 1972. The legislative history of section 706(f)(1) provides firm evidence that the purpose of this provision is to afford an aggrieved person the option of withdrawing a case from the EEOC if dissatisfied with the rate at which the charge is being processed. Both the House and Senate Reports expressly provide that the purpose of section 706(f)(1) is to give the charging party an option to circumvent extended EEOC delays resulting from the EEOC’s burgeoning workload and insufficient resources.

Specifically, in the House Report discussing the provisions of the bill, Congress recognized that the EEOC’s workload was enormous, frequently causing administrative delays and frustrating the remedial character of the EEOC’s actions. Congress believed that granting the employee the private right to sue would best alleviate the “administrative quagmire” that often developed.

The Senate Report also explained that this provision became necessary because the EEOC’s heavy caseload could result in delays unacceptable to aggrieved persons:

As it indicated in testimony, [the EEOC’s] caseload has increased at

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60. H.R. REP. No. 238, 92d Cong., 1st Sess. 12, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2147. Specifically, the House Report stated:

In recent years regulatory agencies have been submerged with increasing workloads which strain their resources to the breaking point. The Commission has stated, in testimony before this committee, that its caseload has increased even more rapidly than its projections had anticipated. The result of this increasing use of many of the Federal regulatory agencies has frequently affected those agencies' abilities to remain current on all of the matters for which they are responsible. This has led to lengthy delays in the administrative process and has frequently frustrated the remedial role of the agency.

Id. Congress believed that granting the private plaintiff the right to sue is appropriate where the delay is occasioned by administrative inefficiencies. Id. at 13, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 2148.

The House Report stated:

In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted. This situation leads the committee to believe that the private right of action, both under the present Act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.

Id. at 12, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 2147-48.
a rate which surpasses its own projections. The result has been increasing backlogs in making determinations, and the possibility of occasional hasty decisions, made under the press of time, which have unfairly prejudiced complaints. Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission. 62

Despite its support for the private right to sue, the Senate Report expressed the preference "that recourse to this remedy will be the exception and not the rule." 63

Ultimately, both Houses concluded that the retention of the private right of action was designed to provide the aggrieved person with an option to pursue a prompt remedy through the EEOC's administrative proceedings or through a private action. 64 In addition, the Conference Report for both Houses declared that the EEOC's administrative resolution of claims is the legislatively preferred method of handling employment discrimination claims and that the priority of Title VII is to protect the aggrieved person's option to seek a quick and effective remedy in the best manner available. 65

The legislative history of section 706(f)(1) demonstrates that an aggrieved person, unwilling to await the termination of lengthy EEOC administrative proceedings, may request a right-to-sue letter one hundred and eighty days after a charge has been filed with the EEOC and

63. Id.
64. A section-by-section analysis presented to both Houses in the Conference Report provides the final and conclusive meaning of section 706(f)(1):
   The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
65. Id.

It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

Id.
may institute a private lawsuit within ninety days of receipt of the right-to-sue letter. If the party prefers, however, section 706(f)(1) provides that an aggrieved party may await the termination of EEOC proceedings before initiating a private action. Neither section 706(f)(1) nor any other section of Title VII of the Civil Rights Act explicitly requires the EEOC to conclude its conciliation efforts within any maximum period of time.

II. THE COURT'S DISCRETIONARY POWER TO LOCATE A JUST RESULT IN THE CONTEXT OF TITLE VII

There are no statutory limitations facing Title VII claimants awaiting EEOC action under section 706(f)(1). The courts, however, have had to decide whether equitable considerations affect a Title VII claimant's decision to indefinitely delay bringing suit until completion of lengthy EEOC proceedings. Cases indicate that equitable considerations have influenced the Supreme Court when it considered claims under Title VII.

In Occidental Life Ins. Co. v. EEOC, the Supreme Court upheld the timeliness of an EEOC Title VII enforcement suit charging discrimination in employment on the basis of sex and held that the 180-day limitation provision of 42 U.S.C. § 2000e-5(f)(1) is not a statutory limitation on the right of the EEOC to bring an action after the expiration of one hundred and eighty days from the filing of a charge. In

67. Id.
68. Id.
69. 42 U.S.C. § 2000e-5(e), (f)(1) (1982). The sole limitation period on Title VII claims is embodied in Title VII's own time limits on filing charges and giving notice to the employer. See supra note 40 and accompanying text. A Title VII claimant must file a claim with the EEOC within one hundred and eighty days after the allegedly discriminatory act occurred. Id. § 2000e-5(e). Once EEOC proceedings have terminated and the agency issues its right-to-sue letter, the claimant has ninety days to file suit in federal court. Id. § 2000e-5(f)(1). If, however, the EEOC proceedings are still in progress, a claimant may request a right-to-sue letter one hundred and eighty days after the filing of the charge. Id. This 180-day provision is not a statute of limitations. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977). Rather, "it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so." Id.
70. 432 U.S. 355 (1977). In Occidental, an employee of Occidental Life Insurance Company filed a Title VII sex discrimination claim with the EEOC on March 9, 1971. After investigation, the EEOC served proposed findings of fact on Occidental. Conciliation attempts between the EEOC and Occidental began in the summer of 1972 and continued sporadically into 1973. On September 13, 1973, the EEOC determined that the conciliation efforts had failed and notified both Occidental and the employee. The employee requested the case be referred to the EEOC to bring an enforcement action. On February 22, 1974,
addition, the Court acknowledged the procedural safeguards in the EEOC regulations, but found it "possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action . . . ." In the event of an unexcused delay by the EEOC, the Court suggested that federal courts exercise their discretionary power "to locate 'a just result' in light of more than three years after the claim was filed with the EEOC and five months after EEOC conciliation efforts had failed, the EEOC filed suit. Id. at 357-58.

The district court granted Occidental's motion for summary judgment on the ground that the enforcement action was time barred by § 706(f)(1) of the Act, since the action had not been brought within one hundred and eighty days of the formal filing of the charge with the EEOC. The Court of Appeals for the Ninth Circuit reversed on the ground that § 706(f)(1) imposes no limitation upon the EEOC's power to file suit in federal court. Id. at 358.

In Occidental, the Supreme Court acknowledged Congress' expressed "concern for the need of time limitations in the fair operation of the Act," but noted that Congress' "concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." Id. at 371. The Court affirmed the court of appeals' decision holding that the provisions of § 706(f)(1) and the legislative history showed that it was intended to enable an aggrieved person unwilling to await the conclusion of extended EEOC proceedings to institute a private lawsuit one hundred and eighty days after a charge has been filed. The Court further determined that nothing in the subsection indicated that the EEOC's enforcement powers ceased if the aggrieved person decided to leave the case in the hands of the EEOC rather than pursuing a private action. Id. at 361-73. "[N]either § 706(f) nor any other section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." Id. at 360.

71. Id. at 358-73. The EEOC regulations require that a charge be filed with the EEOC within one hundred and eighty days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e) (1982). In addition, the alleged violator must be notified of the charge within ten days thereafter. Id. See also 42 U.S.C. § 2000e-5(b). Moreover, regulations promulgated by the EEOC require that the charged party be notified when a determination of reasonable cause has been made, 29 C.F.R. § 1601.21(a), (b) (1988), and when the EEOC has terminated its efforts to conciliate a dispute. Id. § 1601.25. In effect, "during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action." Occidental, 432 U.S. at 372.

72. Id. at 373. In Occidental, the Court realized that the absence of time limitations on the bringing of lawsuits might ultimately result in prejudice to the employer in making a defense. Id. In such a case, the Court asserted that "the federal courts do not lack the power to provide relief." Id. Specifically, the Court suggested that when prejudice to the employer occurs, "the trial court may restrict or even deny backpay relief." Id. (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-25 (1975)).

73. Langnes v. Green, 282 U.S. 531, 541 (1931). In Langnes, the Court stated that: The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Id. (citation omitted).
the circumstances peculiar to the case.”

One equitable consideration available to courts acting in their discretion is the doctrine of laches. Laches is an equitable doctrine which is frequently termed the “doctrine of stale demand.” The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief. Specifically, laches has been defined as “neglect or omission to assert a right, taken in conjunction with lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate as a bar in a court of equity.”

A: The Doctrine of Laches As A Means Of Providing Equitable Relief From The Prosecution Of Stale Claims

Although Occidental does not specifically mention the equitable doctrine of laches by name, the allusion seems unmistakable since the case holds that there is no statute of limitations on EEOC enforcement suits. In Occidental, the Supreme Court refused to impose a time limitation on the power of the EEOC to file suit in a federal court. The Court acknowledged, however, that the absence of such a time limitation may result in prejudice to a Title VII defendant due to an inordinate EEOC delay. Therefore, the Court held that the trial courts possess the discretionary power to provide relief in particular cases where the defendant is in fact prejudiced by the unexcused delay.

The equitable doctrine of laches is premised upon the same principle that underlies statutes of limitations. This principle includes the desire to avoid unfairness that can result from the prosecution of stale

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74. Occidental, 432 U.S. at 373 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-25 (1975)).

75. Another such equitable consideration available to courts acting in their discretion is the granting and denial of back pay. See infra notes 181-98 and accompanying text for a discussion of the back pay remedy.


77. Annotation, Laches As Precluding Cancellation of or Other Relief Against Release for Personal Injuries, 34 A.L.R.2d 1314 (1954).


79. Occidental, 432 U.S. at 361. See supra notes 69-74 and accompanying text for a discussion of the Occidental decision.

80. Id. at 373.
The application of laches, however, departs from the operation of statutes of limitations in that laches is more flexible and depends upon equitable circumstances rather than on delay alone. Where there has been no inexcusable or unreasonable delay in seeking a remedy and/or the defendant has not been prejudiced by the mere passage of time, there is no reason to deny relief. Thus, the application of laches is left to the court's discretion. Accordingly, the Supreme Court has repeatedly emphasized "[t]hat no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case."

As a result of the application of the doctrine of laches, a case may ultimately be dismissed before the merits of the plaintiff's claim are reached. Courts agree, however, that the judicial system was designed "not only to right wrongs, but to do so fairly and equitably."

B. The Defense Of Laches As An Equitable Time Limitation On A Title VII Claimant's Right To Bring Suit

To sustain the defense of laches two elements must be shown: first, an unreasonable or inexcusable delay on the part of the plaintiff

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81. Costello v. United States, 365 U.S. 265, 282-83 (1961). See also Randolph's Ex'r. v. Quidnick Co., 135 U.S. 457 (1890). In equity, a demand must be made within a reasonable time or the claim is considered stale, and courts of equity refuse their aid to stale demands where the party has slept on his/her rights. See Urquhart v. McDonald, 252 Ala. 505, 509, 42 So. 2d 9, 13 (1949); Sampson v. Cottongim, 249 Ky. 670, 671, 61 S.W.2d 309, 310 (1933); Burns v. Dillon, 226 Ky. 82, 88, 9 S.W.2d 1095, 1098 (1928).

82. Unlike a statutory period of limitation, laches is not a mere matter of elapsed time, but is principally a question of the inequity of permitting the claim to be enforced. Delay, although an important consideration in determining whether relief will be barred in equity because of laches, is not decisive. See Archambault v. Sprouse, 215 S.C. 336, 55 S.E.2d 70 (1949). Lapse of time is only one of the elements to be considered in determining the existence and application of laches as a defense in a suit of equity. See Finucane v. Hayden, 86 Idaho 199, 206, 384 P.2d 236, 240 (1963) (Lapse of time is an element but not the controlling factor of laches.).

83. The determination of whether the doctrine of laches should be applied proceeds in light of the circumstances of the particular case before the court and according to right and justice. What might be inexcusable delay in one case might not be inconsistent with diligence in another. See Alsop v. Riker, 155 U.S. 448, 461 (1894) (length of time which must pass in order to show laches varies with the peculiar circumstances of each case); Hammond v. Hopkins, 143 U.S. 224 (1892); Jackson v. Stevenson, 156 Mass. 496, 501, 31 N.E. 691, 693 (1892) ("Whether the right to equitable relief is affected by acquiescence depends upon the circumstances of each case."); Bowen v. Hamilton, 393 P.2d 858 (Okla. 1964).

84. The Key City, 81 U.S. 653, 660 (1871).

in bringing suit; and second, undue prejudice to the defendant. These elements are conjunctive, and, since laches is considered an affirmative defense, the burden of establishing both is on the defendant.

Since the *Occidental* decision, a majority of courts have held that Title VII suits are subject to the doctrine of laches. Additionally, the doctrine of laches has been applied to Title VII lawsuits both when the EEOC is suing on behalf of the charging party and when the charging party is suing as plaintiff.

86. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980). In general, a suit is held to be barred by the doctrine of laches where the following factors are present: 1) delay in asserting the complainant’s rights, the complainant having had knowledge or notice of the defendant’s conduct and having been afforded an opportunity to institute a suit; and 2) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred. See also Johnson v. Delony, 241 Ala. 16, 1 So. 2d 11 (1941); Aronovitch v. Levy, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953) (“The doctrine of laches is an equitable doctrine intended to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.”).

87. FED. R. CIV. P. 8(c) provides that “[i]n pleading to a preceding pleading, a party shall set forth affirmatively ... laches, ... and any other matter constituting an avoidance or affirmative defense.”


90. The applicability of the laches doctrine to Title VII actions when the EEOC is suing was established by EEOC v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980). In *Massey-Ferguson*, the court found that the EEOC’s enforcement suit was unreasonably delayed, and it remanded for a determination of the employer’s prejudice. *Id.* at 273. The court stated that although Title VII imposes no express limitation on the time within which the EEOC may bring a suit, the EEOC may be barred by laches from filing a suit. *Id.* at 275. Recourse to the doctrine of laches is appropriate, the court said, if the EEOC has “unduly, inexcusably, unreasonably, or inordinately delayed in asserting a claim,” and if that delay has “substantially, materially, or seriously prejudiced” the defendant’s ability to conduct the defense. *Id.*

See also EEOC v. Dresser Indus., Inc., 668 F.2d 1199, 1200 (11th Cir. 1982) (stating that the “tortoise-like” speed with which the EEOC had handled the suit had “cost it the race”); EEOC v. Alioto Fish Co., 623 F.2d 86 (9th Cir. 1980); EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979) (acknowledging the applicability of the doctrine of laches to Title VII claims, but rejecting the laches defense under the particular circumstances of the case); EEOC v. Nicholson File Co., 408 F. Supp. 229 (D. Conn. 1976).

91. The applicability of the laches doctrine to Title VII actions when the charging party is suing as plaintiff has been similarly established in Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), aff'd, 452 U.S. 89 (1981). In *Bernard*, the court acknowledged
The principle that Title VII suits are subject to the equitable doctrine of laches does not mean that delay in the processing of a claim necessarily leads to the doctrine being applied. As stated above, to apply laches to a Title VII case, the defendant must satisfy the court on both prongs of the two-prong laches test. Specifically, the defendant must prove that the plaintiff's delay was both unreasonable and prejudicial to the defendant.


In particular instances where the defense of laches has succeeded in barring a Title VII claim, courts have found that the plaintiff's delay was both unreasonable and prejudicial to the defendant. EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1978). In Liberty Loan, the Eighth Circuit Court of Appeals held an EEOC administrative delay of four years and four months to be unreasonable and upheld the district court's grant of summary judgment for the defendant based on its finding of sufficient prejudice. Id. at 857-58. The court found that under the circumstances presented, the delay was not only inordinately long, but was caused in part by the agency's unexplained failure to properly conduct its investigation. Id. at 857.

Concerning the prejudice resulting from the delay, the court found that prejudice to the employer existed, even assuming that relevant records could be located. This prejudice was due to the hardship in locating former employees and procuring their testimony. Id. at 858. In its finding, the court noted that of the one hundred and forty-five persons employed with the company during the relevant period, only five were still so employed. In addition, the supervisors familiar with the employee were no longer employed by the company nor were any persons responsible for the company's personnel policies and practices during that relevant time period. Finally, noting that the company had also undergone a reorganization, the court found that the employer was now an essentially different company from that which allegedly discriminated against the employee. Id. at 855. It would be grossly unfair, the court concluded, to require the employer to spend large amounts of time and money to locate former employees and records in order to defend an essentially moot lawsuit which was unreasonably delayed by the EEOC. Id. at 858. See also Fridy v. Moultrie, 595 F. Supp. 34 (D.D.C. 1984).

Conversely, where the doctrine of laches has failed to bar a Title VII claim, courts have found, under the particular facts and circumstances of a case, that the equitable defense of laches was not established or supportable. Specifically, courts have found that plaintiff's delay in bringing suit was not unreasonable or inexcusable, and/or that the defendant was not prejudiced as a result of the delay. In Askins v. Imperial Reading Corp., 420 F. Supp. 413 (W.D. Va. 1976), the United States District Court for the Western District of Virginia held that laches did not apply to a Title VII action brought by private plaintiffs more than four years after the filing of an employment discrimination claim with the EEOC because it was not shown that prejudice had resulted to the defendant. In Askins, each of the named plaintiffs filed a race and sex discrimination charge with the EEOC in May, 1971. The EEOC commenced an investigation at that time and subsequently issued letters of determination in February, 1974. Thereafter, the EEOC and Imperial entered into conciliation discussions. Conciliation efforts continued unsuccessfully through August, 1974, whereupon the EEOC invited plaintiffs to request a right-to-sue letter. Plaintiffs promptly filed their requests; however, the EEOC delayed issuing the right-to-sue letters until November, 1975. Plaintiffs commenced their Title VII class action lawsuit in February, 1975. While noting that the EEOC's delay in this case meant that the court sitting in 1976 would be adjudicating claims reaching back to 1969 with evidence adduced
ant must establish that the delay was inexcusable or unreasonable and resulted in undue prejudice to the defendant's ability to defend the case on the merits. One court stated that, in its determination, a court should examine "the length of the delay, the reasons therefor, reaching even further into the past, the court determined that "in the absence of specific prejudice to the Defendant," the court could not penalize Title VII plaintiffs for any delay. Id. at 416. The court acknowledged, however, that as the action progressed the defense of laches may, if appropriate, be applied in any relief granted. Id. "This is not to say that as this action progresses, the doctrine of laches may not, if appropriate, be applied in any relief granted." Id. See also Rowe v. General Motors Corp., 550 F. Supp. 204 (N.D. Ga. 1982).

93. Where laches is argued as a defense to a Title VII claim, the determination of whether the delay of a plaintiff is inexcusable or unreasonable is closely related to whether the defendant suffered prejudice from the delay. Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982). In Weinberger, the court stated that where the delay is a short period of time, the magnitude of prejudice required is great; if the delay is lengthy, prejudice is more likely to have occurred and less proof of the prejudice will be necessary. Id. (quoting Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980)).

In Title VII cases where the private plaintiff delays in bringing suit, some courts consider the nature of the EEOC's administrative activity and conciliation efforts on behalf of the plaintiff in their determination of "unreasonableness." For example, the courts in the following cases held that lengthy delays by private plaintiffs in bringing Title VII actions were reasonable where the plaintiffs awaited the outcome of the EEOC administrative process and EEOC efforts on behalf of the plaintiffs were active and continuing: Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985); Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984); Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314 (W.D.N.C. 1978). Alternatively, where the EEOC has been characterized as dormant in processing the private plaintiff's Title VII claim, the following courts considered the plaintiff's delay in bringing court action unreasonable: Jeffries v. Chicago Transit Auth., 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979); Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977).

The courts recognize, however, that the nature of the EEOC's activity is but one factor to be considered in assessing the reasonableness of the plaintiff's own delay, and the determination must be made in consideration of all the circumstances surrounding the plaintiff's actions. See Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co., 839 F.2d 1147, 1153-54 (6th Cir.), cert. denied, 109 S. Ct. 245 (1988).

94. Where laches is argued as a defense to a Title VII claim, the prejudice suffered by the defendant will usually consist of the unavailability of witnesses, changes in work force and personnel structure, and loss of records occasioned by the plaintiff's delay in bringing suit. See Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979). In Jones, the court, in analyzing possible prejudice to the defendant occasioned by a Title VII plaintiff's more than nine year delay in bringing suit, emphasized that defendant's personnel directors had changed and employees familiar with the facts had long since departed. In addition, the court noted that the individuals still employed had only vague memories of events which transpired more than nine years prior to the filing of the lawsuit, and files of possibly great importance were no longer available. Jones, 614 F.2d at 1390, n.1.

In Boone, in which a Title VII plaintiff delayed seven years before bringing suit, the court found the defendant's showing that missing witnesses were unavailable to testify and that state unemployment compensation appeal files relating to plaintiff's discharge from
how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim."95

Each court to consider the specific issue of the applicability of the laches doctrine to bar a Title VII action agrees, at least in theory, that laches may be applied as an equitable time limitation on a Title VII claimant's right to bring suit.96 Questions arise, however, as to the application of the defense of laches in particular circumstances. Specifically, when a private plaintiff timely files a Title VII action in federal court, after waiting for the conclusion of the EEOC administrative process and within ninety days after receiving a right-to-sue letter, the question then arises when and under what circumstances does the delay of the private plaintiff in filing suit give rise to the equitable defense of laches. More particularly, when and under what circumstances does the delay become "unreasonable" or "inexcusable" so as to satisfy the first prong of the two-prong laches test. The next section of this comment examines the disagreement among the federal courts of appeals' decisions which have considered the applicability of the doctrine of laches under these circumstances.

III. THE ADMINISTRATIVE RESOLUTION OF TITLE VII CLAIMS VERSUS THE INDEFINITE TOLLING OF CLAIMS

Against the backdrop of cases which have applied the doctrine of laches in the context of Title VII97 and in light of the provisions in

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96. See generally Jeffries v. Chicago Transit Auth., 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986); Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979); Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), aff'd, 452 U.S. 89 (1981).

section 706(f)(1)\textsuperscript{98} that permit a private plaintiff to await the termination of EEOC proceedings before filing suit, the federal courts of appeals have disagreed on the specific application of equitable principles to Title VII cases. Particularly, courts disagree on whether the application of equitable principles permits a dismissal based on laches when a private plaintiff chooses to await the completion of lengthy EEOC proceedings before filing suit in federal court and the defendant employer proves undue prejudice as a result of plaintiff's delay. Under these circumstances, courts have had to decide whether it is "unreasonable" or "inexcusable," pursuant to a laches defense, for a private plaintiff to delay filing suit until the EEOC has made its determination and issued the plaintiff a right-to-sue letter. These questions raise two competing concerns: first, concern for the EEOC's administrative resolution of Title VII claims under section 706(f)(1), as the legislatively preferred method for achieving the goal of equality of employment opportunities; and second, the resulting indefinite tolling of a Title VII claim to the prejudice of the defendant.

A. Ad Hoc Determinations

The arguments on each side of the laches issue are compelling. A Title VII plaintiff asserts both a statutory right to await the completion of the EEOC administrative process before filing suit\textsuperscript{99} and the congressional policy of favoring reliance on the administrative proceedings.\textsuperscript{100} A Title VII defendant looks to the equitable doctrine of laches to protect himself/herself from prejudice by the prosecution of stale claims.\textsuperscript{101} Both the plaintiff and defendant assert viable and supportable reasons for their respective positions. Neither party, however, is so clearly entitled to a decision that it could be said that as a matter of law the decision should be made in his/her favor.

The United States Courts of Appeals for the Seventh\textsuperscript{102} and


\textsuperscript{100} See supra notes 57-68 and accompanying text for a discussion of the congressional policies reflected in § 706(f)(1).

\textsuperscript{101} See supra notes 75-96 and accompanying text for a discussion of the development of the doctrine of laches as a defense to Title VII claims.

\textsuperscript{102} See Jeffries v. Chicago Transit Auth., 770 F.2d 676, 680 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986) (relying on the administrative process of the EEOC cannot excuse a delay of over ten years in asserting a Title VII claim).
Eighth \footnote{103} Circuits have addressed the precise issue and have taken a classic laches approach. These courts have held that a private plaintiff does not have an absolute right to await termination of EEOC proceedings where an unreasonable or inexcusable delay has prejudiced the defendant employer. These courts accept the defense of laches, based on the facts of each case, as an equitable time limitation on the private plaintiff's right to file suit in federal court.

In sharp contrast, the Fourth, \footnote{104} Fifth, \footnote{105} Sixth, \footnote{106} Ninth, \footnote{107} Eleventh, \footnote{108} and District of Columbia \footnote{109} Circuits have generally held that a plaintiff's failure to file a Title VII lawsuit until completion of the EEOC process is not inexcusable or unreasonable delay and, therefore, cannot support the application of laches. To the contrary, these courts generally grant the private plaintiff the presumption that the plaintiff is entitled to await the completion of EEOC proceedings before filing suit in federal court. \footnote{110} Despite recognizing that the doc-
trine of laches may apply, these courts have shown a reluctance to dismiss Title VII suits on the ground of laches and have limited the defense to rare cases.\textsuperscript{111}

In each case, the threshold inquiry in deciding the laches issue, whether for the plaintiff or the defendant, is whether the plaintiff delayed unreasonably or inexcusably in filing suit in the district court. The circumstances militating for or against the application of the doctrine of laches vary among the courts. Generally, in determining the reasonableness of the plaintiff's delay, courts will consider not only the plaintiff's conduct, but also the EEOC's delay in proceeding, insofar as it bears on the reasonableness of the plaintiff's conduct.\textsuperscript{112}

Thus, whether the circumstances of a particular case warrant the delay depends on the particular facts of each case; and since no specific length of time has been established by the courts as per se unreasonable, the determination of reasonableness must be decided on an ad hoc basis.\textsuperscript{113} Accordingly, the respective decisions of the courts which have applied the laches doctrine illustrate the fact-dependent nature of
dence of unreasonable delay on the part of the private plaintiff and resulting prejudice to
the defendant in making a defense. The presumption courts, however, hold that the application of the doctrine of laches barring Title VII claims is an exception and not the general rule. See infra notes 165-78 and accompanying text for a discussion of such a rare case.

\begin{itemize}
\item \textsuperscript{111} See Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir.), cert. denied, 109 S. Ct. 245 (1988); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979).
\item \textsuperscript{112} See, e.g., Jeffries v. Chicago Transit Auth., 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986); Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), aff'd, 452 U.S. 89 (1981).
\item \textsuperscript{113} See Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3d Cir. 1986). In Waddell, a religious discrimination charge had been timely filed with the state deferral agency and the EEOC. Due to a misunderstanding, the EEOC did not pick up the case after the deferral agency dismissed the underlying charges. Even though the plaintiff wrote the EEOC twice requesting some action, the EEOC believed that the deferral agency still had jurisdiction and continued to defer. The plaintiff, in the meantime, received no response to his letters. Four and one-half years after the plaintiff's last letter to the EEOC, the misunderstanding was resolved, and the EEOC proceeded to issue a right-to-sue letter. The plaintiff then timely filed a lawsuit some six years after he first filed an administrative charge of discrimination. At the conclusion of a full trial, the district court found for the plaintiff. Small Tube appealed, contending that the district court's decision was clearly erroneous and that the court erred in failing to find Waddell's claim barred by the doctrine of laches as a matter of law. \textit{Id.} at 71-74.
\end{itemize}

After reviewing the circumstances of the case, the court of appeals concluded that, "although plaintiffs have some obligation to monitor the progress of their charge and do not have the absolute right to await termination of EEOC proceedings where it would appear to a reasonable person that no administrative resolution will be forthcoming, whether the circumstances warranted the delay in a particular case requires an ad hoc determination." \textit{Id.} at 77. The circumstances in \textit{Waddell} included his testimony that he did not know a charging party could secure a right-to-sue letter one hundred and eighty
the inquiry and the necessity for a reasoned exercise of discretion in their determinations.

B. *Laches As An Avenue For Relieving Unfair Prejudice To The Title VII Defendant: The Classic Laches Approach*

The courts which have held that lengthy delays by private plaintiffs in bringing Title VII actions are "inexcusable" or "unreasonable" recognize the tremendous work load and overburdened staff of the EEOC, but reason that there must be a limit to the prejudice and inconvenience that can be placed on a Title VII defendant because of the EEOC's inability to act promptly in processing a plaintiff's claim. These courts hold that a Title VII private plaintiff is not permitted to unduly prejudice and inconvenience the defendant by relying on the EEOC's slow process and the administrative resolution of employee claims.\(^{114}\)

Contrary to the presumption that Title VII provides a private plaintiff with an unqualified right to await the conclusion of EEOC proceedings before filing suit,\(^{115}\) the Seventh and Eighth Circuits have held that Title VII does not countenance the type of delay which results in undue prejudice to the defendant's ability to defend the case on days after a charge was filed. Furthermore, he had a limited education and was not then represented by counsel. *Id.*

Although the court found the arguments on both sides of the laches question to have merit, under the circumstances, it concluded that the question was too close to be determined as a matter of fact, law, and discretion on appeal. The court remanded for "pivotal findings on whether Waddell's conduct was excusable and whether Small Tube suffered sufficient prejudice to warrant application of laches." *Id.* at 79.

In addition to the issue of laches as a bar to commencement of the lawsuit, the court of appeals applied the doctrine of laches to the accrual of back pay. The trial court had ruled that a lack of diligence prejudiced the employer because back pay continued to mount even as the ability to defend decreased. The district court, therefore, tolled the back pay award for a four and one-half year period. *Id.* at 78.

The appellate court found that "[j]ust as a decision on laches as a defense requires a finding whether Waddell's delay was excusable or not, so also does a decision that laches can be used to bar part of Waddell's back pay claim." *Id.* Although the court of appeals remanded the case for a finding of inexcusable delay, it stated its approval of an approach to laches which allowed the district courts to use a less draconian penalty than dismissal. *Id.* at 79.


115. See infra notes 146-78 and accompanying text for a discussion of the courts of appeals which grant the Title VII private plaintiff the presumption that they are entitled to await the termination of EEOC proceedings before filing suit in federal court.
In support of their determination to allow the defense of laches to bar a Title VII claim in these instances, these courts point to the length of the delay, the extent of the loss of evidence in support of defendant's position, the unavailability of witnesses, and the notion that allowing the private plaintiff to unreasonably delay the filing of a Title VII claim may result in the prosecution of stale claims.

Garrett v. General Motors Corp., decided in 1988 by the United States Court of Appeals for the Eighth Circuit, and Jeffries v. Chicago Transit Auth., decided in 1985 by the United States Court of Appeals for the Seventh Circuit, represent the latest statements of these circuits on the question of the application of the defense of laches to bar a Title VII claim when a private plaintiff chooses to await the completion of lengthy EEOC proceedings before filing suit, and the defendant employer proves undue prejudice as a result of the delay. The following section discusses the classic laches approach and the rationales relied upon in Garrett and Jeffries by the Courts of Appeals for the Eighth and Seventh Circuits, respectively, in their decisions to apply the defense of laches to the Title VII claims in those instances.

1. Garrett v. General Motors Corp.

In Garrett, the Eighth Circuit Court of Appeals held that a private plaintiff's fourteen and one-half year delay in filing a Title VII claim was unreasonable and inexcusable and that defendant's defense had been prejudiced as a result. The plaintiff in Garrett filed a race discrimination charge with the EEOC in 1971. On July 22, 1985, the EEOC issued the plaintiff a right-to-sue letter and plaintiff filed suit in September, 1985.

At trial, plaintiff claimed to have contacted the EEOC office on numerous occasions by phone and in person between 1972 and 1980. In addition, testimony indicated that in 1983 plaintiff was informed by the EEOC that the discrimination file had been destroyed. Although evidence was offered at trial to attempt to reconstruct the EEOC's processing of plaintiff's claims, the district court concluded that it was

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117. Jeffries, 770 F.2d at 679-82; Whitfield, 820 F.2d at 245-46.
120. Id. at 561-62.
121. Id. at 560-61.
difficult to determine how the claim was actually processed. Based on its findings of fact, the district court found that plaintiff’s “contact with the EEOC was minimal” and that plaintiff “did not actively pursue his rights.” The district court concluded that plaintiff’s claim was barred by the doctrine of laches as a matter of law.

On appeal, plaintiff argued that a Title VII plaintiff’s failure to file a civil suit until completion of the EEOC administrative process was not inexcusable and could not support the application of the laches defense. The court of appeals, however, emphatically disagreed. The court stated simply “that the doctrine of laches is a proper defense in a Title VII action, and may be used to bar a lawsuit where the plaintiff is guilty of (1) unreasonable and unexcused delay, (2) resulting in prejudice to the defendant.”

In its determination, the court of appeals noted that the plaintiff’s file was improperly processed by the EEOC and that the plaintiff was misinformed about the status of the case. The court, however, also considered the fact that plaintiff’s minimal contact with the EEOC and plaintiff’s own delay caused prejudice to the defendant. Based on these findings, the court of appeals held that it was within the district court’s discretion to apply the defense of laches under these circumstances.

In Whitfield, the Court of Appeals for the Eighth Circuit affirmed the district court’s dismissal of a plaintiff’s Title VII claim on the ground of laches, where the plaintiff filed suit ten years after the claim was originally filed with the EEOC, but within the statutory time following issuance of the right-to-sue letter. The court agreed with the district court’s finding that the plaintiff unreasonably and inexcusably delayed filing suit and that the employer was prejudiced by the delay.

In Whitfield, the plaintiff filed a charge of race discrimination with the EEOC on January 17, 1973. Thereafter, the EEOC commenced an investigation of the charge and held a hearing in October, 1974. Following the hearing the claim remained dormant with the EEOC until the EEOC issued the plaintiff a right-to-sue letter in July, 1983. Within ninety days of receiving the right-to-sue letter, the plaintiff filed suit in district court. Based on the depositions of two key defense witnesses who testified they could no longer recall the events which led to the decision to terminate the plaintiff, the defendant filed a motion for summary judgment based on laches. The district court granted the motion, ruling that the Title VII claim was barred by the doctrine of laches, and the plaintiff appealed.

In considering whether the case was a proper setting for the application of laches, the court of appeals applied both prongs of the two-prong laches defense. To determine the reasonableness of the delay, the Eighth Circuit Court of Appeals considered “both the

122. Id.
124. Garrett, 844 F.2d at 561.
125. Id.
126. Id.
127. Id. at 562.
128. Id.
129. Id. See also Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987).
2. Jeffries v. Chicago Transit Auth.\textsuperscript{130}

In \textit{Jeffries}, the Seventh Circuit Court of Appeals held that a plaintiff's Title VII claim, which was timely filed with the EEOC in 1974, was barred by the doctrine of laches. The court found that both elements of the laches defense were present. The court stated that the delay of over ten years in filing suit was inexcusable and the defendant was prejudiced by such delay through its destruction of relevant records.\textsuperscript{131}

In \textit{Jeffries}, the plaintiff filed a race discrimination charge with the EEOC on November 11, 1974. The defendant received notification of the charge and responded on December 17, 1974, denying the allegation. Thereafter, the EEOC took no further action until June 9, 1982, when it informed the defendant of its reasonable cause determination. On July 28, 1982, the defendant requested reconsideration, which the EEOC denied on September 24, 1982. The EEOC issued a right-to-sue letter to the employee on January 12, 1984, and on March 8, 1984, the plaintiff filed suit.\textsuperscript{132}

The defendant moved for summary judgment based on the doctrine of laches. In support of this motion, defendant submitted affidavits indicating that several employees relevant to the defense had either retired or were no longer in defendant's employ and that relevant employment and medical records had been destroyed as part of the defendant's regular retention-destruction schedule. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed.\textsuperscript{133}

On appeal, the plaintiff argued that it would be contrary to the policies reflected in Title VII to allow a claim to be barred by the defense of laches prior to the completion of the EEOC's administrative

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\textsuperscript{130} 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986).
\textsuperscript{131} \textit{Id.} at 679-82.
\textsuperscript{132} \textit{Id.} at 678.
\textsuperscript{133} \textit{Id.} at 678-79.
\end{flushright}
process.\textsuperscript{134} The court of appeals acknowledged the legislative and judicial desire to resolve most complaints through the EEOC's administrative process rather than litigation,\textsuperscript{135} but concluded that a plaintiff does not have an absolute right to await the termination of EEOC proceedings.\textsuperscript{136} The court held that laches will bar a claim if the plaintiff inexcusably delays in asserting it and the defendant has been materially prejudiced as a result.\textsuperscript{137}

The court of appeals found that the defendant satisfied both elements of the laches defense. The court found that plaintiff's delay in filing suit was inexcusable and that the delay resulted in undue prejudice to the defendant.\textsuperscript{138} In determining that the plaintiff's delay in this case was both unreasonable and inexcusable, the court relied on several factors including the apparent lack of activity on the plaintiff's part and the fact that plaintiff had counsel for one year.\textsuperscript{139} On the basis of these factors, the court concluded that the ten year delay was "manifestly" unreasonable and plaintiff's reliance on the EEOC's administrative process was not excusable.\textsuperscript{140}

The court further determined that the element of prejudice was clearly supported by the affidavits submitted by the defendant.\textsuperscript{141} On this point, plaintiff argued that the defendant could not be prejudiced by lack of records it destroyed or lost because it had a duty to retain

\textsuperscript{134} Id. at 681. The plaintiff argued "that it would be antithetical to Congress' 'preferred' method of resolving Title VII claims if victims of discrimination could be guilty of laches for allowing the EEOC's administrative process to run its course before filing suit in federal court." \textit{Id.} (citation omitted).

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 679-81.

\textsuperscript{138} Id. at 679-82.

\textsuperscript{139} Id. at 679-80. In finding that the plaintiff's delay was inexcusable, the court relied on these factors:

\begin{enumerate}
  \item plaintiff . . . showed alacrity in filing the EEOC complaint . . . ;
  \item he had counsel for one year;
  \item he could not rule out that counsel had helped him with his EEOC claim;
  \item it should have been apparent that no administrative resolution was imminent long before 1982;
  \item he could have requested a right-to-sue letter; and
  \item he did nothing in the ten years between filing the charge and this suit.
\end{enumerate}

\textit{Id.} In addition, the court took note of an affidavit submitted by the plaintiff indicating that he took no action because in 1975 certain EEOC agents advised him to do nothing about the case until he heard from the EEOC. \textit{Id.} at 679. Regardless of plaintiff's affidavit, the court found that plaintiff's reliance on the EEOC could not excuse a delay of this length. \textit{Id.} at 680.

\textsuperscript{140} Id. at 680 ("[r]elying on the administrative process cannot excuse a delay of this length").

\textsuperscript{141} Id.
them under EEOC regulations. The court, however, ruled that the regulations could not be read as requiring the defendant to maintain the records indefinitely, where the defendant had no notice of a continuing obligation to retain them. Specifically the court noted that the charge was filed in 1974, the defendant denied the charge, and then heard nothing for eight years.

Based on the court's finding of inexcusable and unreasonable delay by the plaintiff and prejudice to the defendant, the court concluded that the defendant had satisfied the requirements of the doctrine of laches. The court determined that the defendant had established inexcusable delay on the part of the employee and resulting prejudice as a matter of law. The court, therefore, affirmed the dismissal of the plaintiff's Title VII claim based on laches.

The Garrett and Jeffries opinions best exemplify the decisions of the classic laches courts which seek to limit the prejudice and inconvenience that can be placed upon a Title VII defendant because of the private plaintiff's statutory right to rely on the EEOC's administrative resolution of a Title VII claim. These courts characterize the doctrine of laches as a readily available avenue for relieving unfair prejudice to the defendant under these circumstances.

C. The Private Plaintiff's Right To Rely On The EEOC's Administrative Resolution Of Title VII Claims: The Presumption Courts

The courts that grant the private plaintiff the presumption that

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142. Id. at 681. The EEOC requires employers, employment agencies, and labor organizations to make and preserve certain employment records and to make certain reports concerning their employment activities and practices. The EEOC is empowered to impose such requirements by 42 U.S.C. § 2000e-8(c) (1982). In addition, 29 C.F.R. § 1602.14(a) (1988) requires an employer to keep employment records which are relevant to a Title VII discrimination charge until the date of expiration of the statutory period within which an action may be filed or, if an action is filed, on its termination date. The EEOC also requires an employer to keep for at least six months all personnel records that are made. Id. The records that must be kept are those made in connection with job applicants, hiring, promotion, demotion, transfer, layoffs, rates of pay, and other forms of compensation. Id. If an employee is discharged, the employer must keep his or her personnel record for six months from the date of discharge. Id. For the provisions of 29 C.F.R. § 1602.14, see infra note 200.

143. Jeffries, 770 F.2d at 681. See also Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979). The Boone court held that "in the absence of any type of continuing administrative proceedings ..., we do not believe that Mechanical was under an affirmative obligation to prepare for a lawsuit which would be filed seven years after the incident giving rise to it occurred." Id. at 960 (footnote omitted).

144. Jeffries, 770 F.2d at 681.

145. Id. at 682.
they are entitled to indefinitely await the termination of the EEOC’s administrative process generally find that it is reasonable for an aggrieved employee to allow the EEOC to retain jurisdiction over a Title VII action. The conviction to which these authorities give voice—that a Title VII plaintiff should not be penalized for pursuing administrative avenues of relief—is premised on the strong federal policy which favors the avoidance of private suits by encouraging claimants to rely on the EEOC administrative procedures. In addition, these courts find that the Title VII remedial scheme would be frustrated were the defense of laches to be allowed.146 These courts characterize the private remedy allowed by Title VII147 as an alternative method for private plaintiffs to obtain relief from discrimination. In support of this contention, the courts point to the legislative analysis of the 1972 amendment of Title VII as evidence of the strong federal policy favoring reliance on the EEOC’s resolution of disputes.148

*Bernard v. Gulf Oil Co.*,149 decided in 1979 by the United States Court of Appeals for the Fifth Circuit, and *Howard v. Roadway Express, Inc.*,150 decided in 1984 by the United States Court of Appeals for the Eleventh Circuit, best illustrate the position of the courts which, as a general rule, grant the Title VII private plaintiff the pre-


[Plaintiff’s] reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

... EEOC’s conciliation efforts, “regardless of the time taken,” are designed to aid in effectuation of remedy. The court will not find that its procedure has in this instance prevented it.


In *Howard*, the court of appeals observed that Congress’ preference for the administrative resolution of claims was reflected in the legislative history of the 1972 amendment to Title VII:

It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC ... However, as the individual’s right[] to redress are [sic] paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

*Id.* at 1532 (quoting 118 CONG. REC. 7563, 7565 (Conference Report on H.R. 1746, Equal Employment Opportunity Act of 1972)).

149. 596 F.2d 1249 (5th Cir. 1979).

150. 726 F.2d 1529 (11th Cir. 1984).
sumptive right to await the conclusion of EEOC proceedings before filing suit, with an exception only in rare cases. The following section discusses the rationales relied upon in *Bernard* and *Howard* by the Courts of Appeals for the Fifth and Eleventh Circuits, respectively, in establishing the general rule.


   In *Bernard*, the Fifth Circuit Court of Appeals noted that in order for the doctrine of laches to bar a Title VII action, it must be found both that the plaintiff delayed inexcusably in bringing suit and that the delay unduly prejudiced the defendant. The court, however, cautioned that a Title VII private plaintiff cannot be penalized for choosing to forego the alternative of privately bringing suit and "electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC."  

   In *Bernard*, the plaintiffs failed to file their Title VII claims in federal court until completion of the EEOC process, some nine years after their original EEOC complaint. The only justification offered by the plaintiffs for this delay was their asserted right to await termination of the EEOC process. The court considered whether the plaintiffs failure to file the Title VII claims until after the completion of the EEOC's administrative process and conciliation efforts was unreasonable and inexcusable.

   The Fifth Circuit Court of Appeals held that the doctrine of laches did not bar the Title VII claim commenced by the private plaintiffs nine years after the filing of discrimination charges with the EEOC. In its determination, the court noted that the EEOC actively pursued the administrative process and conciliation efforts with the defendant company for almost all of the nine years. The court also considered the fact that the EEOC's efforts ultimately resulted in a conciliation agreement between the EEOC and the defendant.

   The court observed that although the plaintiffs had received no-

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151. See Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir.), cert. denied, 109 S. Ct. 245 (1988); Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979). See *infra* notes 165-78 and accompanying text for a discussion of such a rare case.

152. 596 F.2d at 1257.

153. *Id.* at 1253.

154. *Id.* at 1256.

155. *Id.*

156. *Id.* at 1253-57.
practice from the EEOC that they could request a right-to-sue letter fourteen months before the plaintiffs actually did request their right-to-sue letter, the EEOC had continued conciliation efforts up until one month prior to the plaintiffs' request. The court concluded, therefore, that the plaintiffs' failure to file their Title VII claims until the completion of the EEOC's active, continuing administrative process was not inexcusable delay and subsequently failed to satisfy the requirements of the defense of laches.

157. *Id.* at 1253.

158. *Id.* at 1257. See also *Brown v. Continental Can Co.*, 765 F.2d 810 (9th Cir. 1985). In *Brown*, the Ninth Circuit Court of Appeals held that lengthy delays by the EEOC are not to be charged against private plaintiffs and that complainants are not required to terminate the administrative process by requesting a notice of right-to-sue.* Id.* at 815. The court acknowledged that this circuit had previously applied the doctrine of laches as a defense against a private plaintiff in a Title VII action, but held that the prior court's holding "stated the exception and not the general rule," *Id.* at 814. See *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979).

The plaintiff in *Brown* filed two charges of employment discrimination with the EEOC. The first charge alleged racial discrimination in a training program and was filed in July, 1977. The second charge alleged discrimination in plaintiff's termination and was filed in November, 1978. *Id.* at 812. The EEOC commenced an investigation on the second charge prior to the first charge, alleging discrimination in training. The EEOC, however, dismissed the termination charge in December, 1983, due to plaintiff's failure to respond to EEOC correspondence. A right-to-sue letter was thereafter issued to the plaintiff on January 26, 1983, regarding the discrimination in termination charge. The plaintiff did not file a civil action within the required ninety days of receipt of the right-to-sue letter. *Id.*

Subsequently, the EEOC commenced an investigation on the discrimination in training charge. The EEOC determined that there was reasonable cause to believe the allegations were true and, thereafter, made conciliation attempts with Continental. When conciliation efforts failed, the EEOC issued a right-to-sue letter to plaintiff on November 17, 1983. *Id.* Thereupon the plaintiff filed suit within the 90-day limitation period prescribed by statute. In the complaint, the plaintiff alleged discrimination in termination. Continental moved to dismiss the action, and the district court granted the motion, dismissing the plaintiff's complaint with prejudice because of the failure to file within ninety days of receipt of the January 26, 1983 right-to-sue letter issued on the termination charge. The plaintiff appealed the dismissal of the complaint to the court of appeals. *Id.*

First the court of appeals determined that since the plaintiff filed the action within ninety days of a valid right-to-sue letter issued upon a prior, reasonably related incident of discrimination by the same employer, the plaintiff should be allowed to amend the complaint to allege discrimination in training as well as discrimination in termination. The court further determined that the complaint, as amended, would be timely filed and therefore should not have been dismissed as untimely. *Id.* at 813-14.

Continental contended that the district court's order should be affirmed on the alternative ground that the plaintiff's Title VII claim was barred by the doctrine of laches. In support of this claim, Continental presented affidavits alleging prejudice through loss of witnesses and the loss of plaintiff's personnel file. *Id.* at 814-15. The court, however, found that the plaintiff did not deliberately delay seeking a right-to-sue letter and further noted that Continental was on notice from the filing of the initial charge up to the issuance of the November 17, 1983 right-to-sue letter that it would be required to preserve whatever
In *Howard*, like *Bernard*, the court of appeals was confronted with the issue "whether plaintiff[s]' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable." Like the plaintiffs in *Bernard*, the private plaintiff in *Howard* asserted the right to await completion of the EEOC's administrative resolution of the Title VII claims. *Howard* filed a Title VII race discrimination charge with the EEOC in December, 1976. The defendant, Roadway, acknowledged receipt of the charge in January, 1977. In 1978, Howard's attorney requested a right-to-sue letter from the EEOC and then later withdrew the request. In December, 1981, five years after the initial charge was filed, the EEOC made a "no cause" determination and issued Howard a right-to-sue letter. Howard filed a claim in federal court in March of 1982, within the required 90-day period after receiving the right-to-sue letter. The Eleventh Circuit Court of Appeals acknowledged that laches could be applied to Title VII actions brought by private plaintiffs, but saw no reason to make that exception under these circumstances and, therefore, held that Howard's failure to file his Title VII claim until the termination of the EEOC process was not inexcusable based on these facts, the court declined to affirm the district court's decision. *Id.* at 815.

The court, therefore, held that its prior decision in *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979), was not dispositive in this case. See *infra* note 178 for a discussion of the *Boone* decision. In fact, the court emphasized that *Boone* represented the exception to the general rule that the Title VII private plaintiff may rely on the EEOC's administration of Title VII claims. 765 F.2d at 814-15. See also *Gifford v. Atchison, T. & S.F. Ry. Co.*, 685 F.2d 1149, 1152 (9th Cir. 1982) ("Ordinarily, if the EEOC retains control over a charge, a private plaintiff will not be charged with its mistakes."); *Watson v. Gulf & Western Indus.*, 650 F.2d 990, 992 (9th Cir. 1981) ("A Title VII complainant is not charged with the commission's failure to perform its statutory duties.") (quoting *Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976)); *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 667 n.8 (9th Cir. 1980).

159. *Howard*, 726 F.2d 1529, 1532 (11th Cir. 1984) (quoting *Bernard*, 596 F.2d 1249, 1256 (5th Cir. 1979)).

160. 726 F.2d at 1532.

161. *Id.* at 1531.

162. *Id.* The court refused to distinguish this case from *Bernard* on the ground that in this instance the EEOC made a "no-cause" determination. *Id.* at 1533, n.2. In such a case, the court stated that "[a] plaintiff may not be faulted for relying on the administrative process prior to the issuance of a no-reasonable-cause determination, for there remains the potential that the EEOC investigation will result in conciliation or prosecution on the EEOC's part." *Id.*

This holding is consistent with Congress' expressed preference for the administrative resolution of claims as reflected in the legislative history of the Civil Rights Act. *Id.* at 1532. It is also consistent with the *Bernard* conclusion that relying on the EEOC's administrative processes is the judicially favored method. *Id.* at 1533.
delay and could not support the defense of laches.\textsuperscript{163}

The \textit{Bernard} and \textit{Howard} decisions support the general rule that private plaintiffs are not required to terminate the administrative process by requesting a right-to-sue letter and may await the termination of EEOC proceedings before filing suit.\textsuperscript{164} These opinions are representative of the presumption which courts, in the absence of an exception, generally allow the private plaintiff to await termination of EEOC proceedings before filing suit.

2. An Exception To The General Rule: Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co.\textsuperscript{165}

In the wake of the disagreement among the courts of appeals as to whether the application of equitable principles to Title VII cases permits a dismissal based on laches when a claimant chooses to await the termination of EEOC proceedings, the Sixth Circuit Court of Appeals ruled on the issue in \textit{Cleveland Newspaper}. A sharply divided court of appeals held that a union that delayed filing in federal court for ten years while employment discrimination charges were pending at the EEOC is precluded by the defense of laches from pursuing its claim in court.\textsuperscript{166}

\textsuperscript{163} \textit{Id.} at 1533. Note that in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. \textit{Bernard}, therefore, is binding on the \textit{Howard} court.

\textsuperscript{164} See also Holsey v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984), \textit{cert. denied}, 470 U.S. 1028 (1985) ("decision to rely on the commission’s administrative process before initiating a private suit is not inexcusable delay"); Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983).


\textsuperscript{166} \textit{Id.} at 1155. In \textit{Cleveland Newspaper}, the Cleveland Newspaper Guild (Guild) filed a sex discrimination charge with the EEOC on behalf of the Guild’s female members on April 12, 1972. One month later the employer was notified of the charge by means of a form notice which did not name the persons who brought the charge, but stated that an EEOC regulation requires the employer to preserve all relevant personnel records until the charge is resolved. \textit{Id.} at 1149.

In 1974, the EEOC sent the Guild a form notice entitled "Charging Party Follow-up," which informed the Guild that the EEOC had not been able to process the charge and could not predict when it would begin to do so. The Guild was given the choice of keeping the charge open and having it processed when the EEOC could attend to it, suing the employer in federal court, or closing the charge without further action. The Guild elected to have the EEOC process the charge. \textit{Id.}

The EEOC’s investigation began in May, 1976. At that time, the EEOC gave the employer a copy of the original charge which had been filed by the Guild on April 12, 1972. Upon receipt of the charge, the Plain Dealer requested that the EEOC dismiss the claim, asserting that the delay had substantially impaired its ability to respond. The EEOC refused to dismiss the charge and, in June of 1976, requested that the Plain Dealer supply it
The issue considered by the en banc panel of the Sixth Circuit Court of Appeals was whether the application of equitable principles to Title VII cases permits a dismissal based on laches when a claimant chooses to await the termination of EEOC proceedings before filing suit. Specifically, the court considered whether a claimant who awaits the outcome of the EEOC's administrative proceedings for a period of ten years before filing suit has caused inexcusable or unreasonable delay and prejudice to the employer sufficient to justify the application of the doctrine of laches.

In an 11-5 ruling, the court of appeals held that the ten year lapse between the union's filing of a sex discrimination charge with the EEOC and the filing of its Title VII suit constituted an unreasonable delay which prejudiced the employer's ability to defend itself against the Title VII charge. The court ruled that the Title VII suit was, therefore, barred by the equitable doctrine of laches.

The court of appeals began by analyzing other federal courts of appeals' decisions which had decided the laches issue in similar circumstances. Based on an examination of each court to have considered the question, the Cleveland Newspaper court concluded that the doctrine of laches should apply to Title VII proceedings "in practice

with documents and information regarding employees for the previous six years. The Plain Dealer refused to submit the requested information and the EEOC thereafter issued the employer a subpoena. The Plain Dealer immediately filed a petition seeking revocation and/or modification of the EEOC subpoena. One year later, the EEOC denied revocation and the employer then informed the EEOC it would not appear. Nothing further occurred until 1979 when the Guild wrote the EEOC concerning the status of the charge. Then in 1980, the EEOC informed the Plain Dealer that it would not seek to enforce the 1976 subpoena. Id. at 1149-50.

On July 3, 1980, the employer responded to the Guild's charge and contended that because of the lapse of time, personnel and documents relevant to the charge were no longer available. On October 10, 1980, the EEOC issued a finding of reasonable cause and thereafter attempted to commence conciliation efforts. The attempts proved fruitless, and on May 21, 1982, ten years after the Guild filed its charge with the EEOC, the EEOC issued the Guild a right-to-sue letter. The Guild then filed suit. Id. at 1150.

The Plain Dealer filed a motion for summary judgment based on the affirmative defense of laches. The trial court found plaintiff's delay in filing suit inexcusable and that the delay resulted in prejudice to the defendant in the form of unavailable witnesses, destruction of documentary evidence, and erosion of available witnesses' memories. The court, therefore, granted the defendant's motion for summary judgment, and the Guild appealed. On appeal, a panel of the Sixth Circuit Court of Appeals reversed. 813 F.2d 101 (6th Cir. 1987). On rehearing en banc, the court of appeals affirmed the district court's decision. 839 F.2d 1147, 1154-55 (6th Cir. 1988).

167. Id. at 1154-55. Judge Guy wrote the majority opinion joined by three members of the court. Judges Lively, Merritt and Nelson each wrote separate concurring opinions. Judge Milburn dissented in an opinion joined by Judges Edwards, Keith and Jones.

168. Id.

169. Id. at 1151-53.
as well as theory."170 The court acknowledged that the EEOC's administrative resolution of Title VII claims is the preferred method, but concluded that "in rare cases, the only avenue for relieving unfair prejudice to the defendant is dismissal of the plaintiff's claim,"171 on the basis of the doctrine of laches.172

In concluding that laches applied in this particular circumstance,

170. Id. at 1153.

171. Id.

172. In a powerful dissent, Judge Milburn contended that section 706(f)(1) of Title VII of the Civil Rights Act and the policies it reflects precluded the invocation of the equitable doctrine of laches where the Title VII claimant elects to await completion of the EEOC's processing of the charge and the issuance of a right-to-sue letter. Id. at 1157. Judge Milburn proclaimed that "[c]ourts may not invoke the doctrine of laches where to do so would be inconsistent with national policies and priorities established by Congress." Id. at 1158 (citation omitted). The dissent premised its argument on a literal reading of section 706(f)(1) and on the recognition of the federal policy favoring the administrative resolution of employment discrimination claims before suit is brought in federal court. Specifically, the dissent argued that the mandatory language of section 706(f)(1) does not require a charging party to request a right-to-sue letter within a certain time, or at all. The literal language of section 706(f)(1) leads to the conclusion that after one hundred and eighty days have elapsed "the [charging party] may either file a private action within 90 days after EEOC notification or continue to leave the ultimate resolution of his charge to the efforts of the EEOC." Id. at 1159 (Milburn, J., dissenting) (quoting Occidental Life Ins. v. EEOC, 432 U.S. 355, 361 (1977)). The dissent argued further that "Congress expressly intended that recourse to a civil action would 'be the exception and not the rule, and that the vast majority of complaints [would] be handled through the offices of the [EEOC].'" Id. at 1158 (Milburn, J., dissenting) (quoting 118 CONG. REC. 7563, 7565 (1972) (Conference Report on H.R. 1746, the Equal Employment Opportunity Act of 1972)). Judge Milburn further argued that the legislative history "evinces that Congress did not intend the charging party's statutory right to await termination of EEOC proceedings to be emasculated by lengthy EEOC delays." Id. at 1159.

See also Cleveland Newspaper, 839 F.2d at 1162 (Keith, J., dissenting). Judge Keith concurred in Judge Milburn's dissenting opinion, and in a separate opinion stressed the irony of granting a Title VII defendant equitable relief:

[I]t strikes me as ironic that plaintiff is being penalized for fully exhausting its administrative remedies—pursuant to a complex and comprehensive statutory scheme—rather than resorting to the courts for relief, while this Court, as well as the courts of most other jurisdictions, have been consistently unsympathetic to plaintiffs who seek judicial relief prior to exhaustion even as a reaction to demonstrably lengthy and time-consuming administrative procedures. Indeed, the requirement that one exhaust all administrative remedies has been intoned with such frequency, despite the hardship for plaintiffs which can result, as to have become liturgically axiomatic.

Id. See also Cleveland Newspaper, 839 F.2d at 1163 (Jones, J., dissenting) ("[T]he aggrieved filed their complaints with the EEOC in a timely manner. By engrafting a laches defense onto the statute this court majority is doing the opposite of what Congress intended."). See also Cleveland Newspaper, 839 F.2d at 1163 (Edwards, J., dissenting) ("In my view of this case the majority opinion simply amends the statute to provide a time limitation not adopted by Congress and not justified in equity.").
the court pointed to the following factors as sufficient support for the district court's finding of inexcusable delay by the plaintiff:

1) plaintiff's knowledge of its ability to obtain a right-to-sue letter and institute a civil action;
2) plaintiff's specific knowledge and responsibility in EEOC matters;
3) plaintiff's lack of activity over the eight year period;
4) plaintiff's lack of contact with the EEOC during that period;
5) the EEOC's lack of activity during this time which could explain plaintiff's failure to act;
6) the EEOC's failure to take enforcement action on the subpoena issued to the defendant; and
7) the lack of a conciliation agreement between the plaintiff and defendant. 173

Relying on these factors, the Cleveland Newspaper court affirmed the district court's finding that the plaintiff's lack of diligence in filing suit was inexcusable. 174

In concluding that plaintiff's inexcusable delay caused prejudice to the defendant, the court relied on the employer's affidavits which detailed the loss of key defense witnesses and relevant documentary evidence. The plaintiff did not dispute the finding of prejudice, but contended that the prejudice the defendant suffered resulted from its own error. Specifically, plaintiff argued that the defendant had received notice that a sex discrimination charge had been filed with the EEOC and that the defendant was ordered to retain all relevant records. 175 In rejecting this argument, the court of appeals agreed with the district court that the EEOC notice to the defendant was too ambiguous to serve as a valid command. The court reasoned that the defendant did not know which personnel files were relevant because it did not receive a copy of the charge until four years after it was filed with the EEOC. 176 The court noted further that even if the defendant had retained all of the relevant records, that still would not have reduced the amount of prejudice to defendant, due to witnesses who were no longer available or whose memories had faded. 177

173. *Id.* at 1154.
174. *Id.* The court further noted that the EEOC's actions are only one factor considered by the court in assessing the reasonableness of the plaintiff's actions. The court must still make its determination based on whether the plaintiff's own delay or lack of diligence is inexcusable. *Id.* at 1153-54.
175. *Id.* at 1154.
176. *Id.*
177. *Id.*
On the basis of all the facts presented, the *Cleveland Newspaper* court found no abuse of discretion in the district court's dismissal of the plaintiff's Title VII claim. More importantly, however, the court recognized the "understandable" reluctance courts have shown to dismiss Title VII claims and limited the defense of laches to "rare cases."  

The *Bernard* and *Howard* opinions, discussed above, represent

178. *Id.* at 1153. *See also* *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979). In *Boone*, the Court of Appeals for the Ninth Circuit held that laches may be used as a defense to a Title VII action. The court found that a plaintiff who delayed filing in federal court for almost seven years while charges were pending at the EEOC, was precluded by the defense of laches from pursuing the claim in court. Specifically, the court determined that the plaintiff's delay was unreasonable and defendant employer was severely prejudiced as a result. *Id.* at 959-60. In its conclusion, however, the court emphasized that the finding in this case "state[d] the exception and not the general rule." *Id.* at 960.

In this case, the plaintiff filed a racial discrimination charge with the EEOC in October, 1969, alleging wrongful termination. The charge remained pending with the EEOC for nearly seven years, until plaintiff requested and received a right-to-sue letter on August 3, 1976. Plaintiff filed suit in a federal district court in December, 1976. *Id.* at 957.

The district court entered an order dismissing the plaintiff's action on the merits. Specifically, the district court found that "[b]ecause [plaintiff's] substantial delay in bringing this action was inexcusable and has resulted in severe prejudice to [the defendant employer], [defendant] is entitled to a dismissal of this action under the doctrine of laches." *Id.* at 958 (quoting from the district court's finding below).

On appeal, the plaintiff argued that the defendant should have been on notice of the Title VII claim because the charge had remained on the books over all those years. In addition, plaintiff contended that the defendant could have preserved the testimony of the lost witnesses and avoided the prejudice which resulted with the passage of time. *Id.* at 959.

The issue considered by the court of appeals was whether laches or an unreasonable delay may bar a Title VII claim. In concluding that laches applied in this particular circumstance, the court pointed to the following factors as sufficient support for the district court's finding of inexcusable delay by the plaintiff:

1. plaintiff's knowledge of its right to request and receive a right-to-sue letter and bring an action in federal court at an earlier time;
2. plaintiff's failure to request such right-to-sue letter;
3. plaintiff's rejection of the EEOC's earlier offers of right-to-sue letters; and
4. the lack of evidence from which the court could infer an excuse for the delay. *Id.* at 957-59. Based on these factors, the court of appeals concluded that the district court was correct in finding that the plaintiff's delay was unreasonable. The court further stated that "Title VII clearly cannot countenance the type of delay which occurred in the present case." *Id.* at 959.

In concluding that the plaintiff's unreasonable delay resulted in prejudice to the defendant, the court relied on the evidence offered by the defendant detailing the loss of defense witnesses and relevant personnel files. In addition, the court stated that "[i]n the absence of any type of continuing administrative proceedings (as opposed to a sleeping claim)," the defendant was not under an affirmative duty to avoid the prejudice. *Id.* at 960.
prime examples of the court decisions which grant Title VII plaintiffs the presumption that they are entitled to await the completion of the EEOC's administration of a claim before filing suit, as opposed to favoring the application of the doctrine of laches to the Title VII claims. These courts encourage the informal conciliation of Title VII claims through the office of the EEOC and allow the defense of laches only in rare circumstances where no other avenue for relief exists. *Cleveland Newspaper* is one such "rare case" in which the Sixth Circuit Court of Appeals stated the exception and not the general rule.

Conversely, the *Garrett* and *Jeffries* opinions, discussed in the preceding section, are representative of the courts which take the classic laches approach and readily apply the doctrine of laches to bar Title VII claimants from indefinitely awaiting the conclusion of EEOC proceedings. These classic laches cases, when compared and contrasted with the presumption cases, exemplify the basic dispute which exists among the federal courts of appeals on the question of the applicability of the doctrine of laches when a plaintiff awaits the completion of EEOC proceedings before filing suit. In light of the preceding discussion, this comment will propose an appropriate resolution of the laches issue.

IV. AN EQUITABLE ALTERNATIVE TO THE LACHES DISMISSAL

The various decisions of the courts of appeals, discussed above, illustrate that the status of a Title VII claimant's right to indefinitely delay bringing suit until the completion of EEOC proceedings varies among the courts considering this issue. Viable arguments for and against the application of the equitable doctrine of laches in such circumstances are not hard to make. On one hand, one can reasonably argue that a Title VII claimant's patience in awaiting completion of conciliation efforts is not to be considered unreasonable or inexcusable in light of the "federal policy requiring employment discrimination claims to be . . . , whenever possible, administratively resolved before suit is brought in a federal court." Conversely, it is just as reasonable to make the argument, in pursuance of equity, that the Title VII claimant's statutory rights under section 706 of the Civil Rights Act are outweighed by the defendant's right to defend against a Title VII

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Thus, the court held that the district court did not err in the finding of prejudice to the defendant. *Id.*

On the basis of all the facts presented, the *Boone* court found no clear error in the district court's finding of unreasonable delay on the part of the plaintiff and prejudice to the defendant. Therefore, the judgment of the district court was affirmed. *Id.* at 959-60.

The conflict between the courts is plain. It is also apparent that these courts disagree as to what point in time the length of the delay between the plaintiff’s initial filing of a charge with the EEOC and subsequent bringing of a suit in federal district court becomes unreasonable or inexcusable. The practical result of this lack of established guidelines has been for the federal courts of appeals to make ad hoc determinations based on the particular circumstances of each case.

While there appears to be no bright-line rule to apply to this question, there exists an equitable alternative to circumvent the result. When the doctrine of laches is applied to a Title VII claim, the defense acts as a bar, and the ultimate consequence is dismissal. This result is contrary to the central statutory purposes of Title VII to eradicate discrimination and make persons whole for injuries suffered through past discrimination. Conversely, when the application of the doctrine of laches to a Title VII claim is denied, the consequence is that the employer is unduly prejudiced in making a defense. This result is contrary to the fundamental concept of fairness and equity.

In light of the resulting conflicts, there appears to be an alternative which balances the various equities between the parties and reaches a result which is both consistent with the purposes of Title VII and the concept of fairness. Specifically, an alternative method, more appropriate and perhaps more effective than the laches dismissal, would be to use the laches defense to decrease exposure to back pay liability.

As the Court of Appeals for the Third Circuit suggested in EEOC

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181. The principal relief to a Title VII plaintiff is the back pay award, “which serves to compensate the victim for the renumeration ... lost as a result of the unlawful act and to deter future violations of the act.” C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION part V at 1 (2d ed. 1988). The back pay period commences on the date the alleged unlawful employment discrimination occurred. Id. § 14.4.3, at 19. However, an employer is not liable for back pay for any period prior to two years before the charge was filed with the EEOC. 42 U.S.C. § 2000e-5(g) (1982). Furthermore, the back pay period normally ends on the date the court enters judgment for the plaintiff and orders reinstatement, employment, or promotion. C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 14.4.3 at 21 (2d ed. 1988). But see Kameros v. GTE Automatic Elec., Inc., 603 F.2d 598 (7th Cir. 1979), cert. denied, 454 U.S. 1060 (1981); Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977). See infra notes 191-96 and accompanying text for a discussion of the Lynn and Kameros cases. Specifically, 42 U.S.C. § 2000e-5(g) provides: “Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.” Id.
v. Great Atlantic & Pacific Tea Co.,\textsuperscript{182} even if a district court finds that the elements of laches have been proven, the district court in the exercise of its discretion, "must take into account whether or not a less drastic form of equitable relief than a complete dismissal of the action would have been more appropriate."\textsuperscript{183} In Great Atlantic, the court further suggested that prior references by the Supreme Court "to the district court's power to afford protection from prejudice arising from delays in prosecution may well speak only to the discretion which 42 U.S.C. § 2000e-5(g) ... affords respecting the imposition of back pay liability rather than other forms of prospective equitable relief."\textsuperscript{184}

The statutory authority for making awards of back pay in Title VII cases is cast in language that emphasizes flexibility and discretion in fashioning an appropriate remedy:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.\textsuperscript{185}

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\textsuperscript{182} 735 F.2d 69 (3d Cir. 1984). In Great Atlantic, the EEOC appealed from a summary judgment in favor of the Great Atlantic & Pacific Tea Company. The district court held that the EEOC's complaint, which sought injunctive relief and back pay, must be dismissed on the ground of laches. The Third Circuit Court of Appeals reversed, holding that the defense of laches was not available in view of the fact that there was no inexcusable delay in the administrative process. \textit{Id.} at 84-85.

\textsuperscript{183} \textit{Id.} at 81. In addition, "[t]he court's discretion must also be exercised commensurately with Congress' purpose that the [EEOC's] capacity to investigate charges of discrimination not be undermined." \textit{Id.}

\textsuperscript{184} \textit{Id.} at 80 (citing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977), and Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-25 (1975)). See \textit{Occidental}, 432 U.S. at 373 (back pay may be denied or restricted when delay by EEOC in bringing action handicaps defendant significantly); \textit{Albemarle}, 422 U.S. at 424-25 (back pay may be restricted or denied when private plaintiff's unexcused conduct prejudices defendant).

\textsuperscript{185} 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). The fact that Congress provided the courts with this equitable power indicates the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. The "make whole" purpose of Title VII is made evident by the legislative history. 118 CONG. REC. 7166, 7168 (Equal Employment Opportunity Act of 1972 — Conference Report); 118 CONG. REC. 7563, 7565 (Conference Report on H.R. 1746, Equal Employment Opportunity Act of 1972). In fact, a section-by-section analysis accompanying the Conference Committee Report on the Equal Employment Opportunity Act of 1972 clearly stated the "make whole" purpose of Title VII:

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of
The general principles governing the award of back pay under the Title VII back pay provision were enunciated by the Supreme Court in Albemarle Paper Co. v. Moody; the Court stated that the discretion accorded by Title VII's back pay provision, while equitable in nature, must be exercised in light of the deterrence and "make whole" purposes of Title VII. Thus, "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 

The Albemarle Court specifically considered the application of this principle in the context of the equitable defense of laches. Despite the legislative emphasis on the "make whole" purpose of Title VII and in light of the statutory emphasis on discretion, the Court held that a Title VII plaintiff "may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party." Furthermore, the Albemarle Court held that "[t]o deny backpay because a particular cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII." In effect, the Court concluded that the district court's denial of back pay was within its discretionary power, in light of the circumstances peculiar to the case.

In two appellate decisions, a private plaintiff's delay in filing suit was used as the basis for reducing the back pay award pursuant to the defense of laches. In both cases, the plaintiff allowed a discrimination charge to remain before the EEOC long after entitled to a right-to-sue letter and after the EEOC had ceased conciliation efforts. In Kamberos v. GTE Automatic Elec., Inc., the Title VII plaintiff per-

relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 

Id. at 421.

186. 422 U.S. 405 (1975).
187. Id. at 421.
188. Id. at 424.
189. Id.
190. Id.
mitted a discrimination claim to lie dormant with the EEOC for over four years, despite the fact that she was a lawyer and knew that she could request a right-to-sue letter one hundred and eighty days after the filing of the complaint. In light of these circumstances, the Seventh Circuit Court of Appeals held that the plaintiff's award of back pay should have been reduced by subtracting from the end of the back pay period, an amount of time equivalent to the time between the expiration of the 180-day period and the date when the right-to-sue letter was actually received by the plaintiff.193

In *Lynn v. Western Gillette, Inc.*,194 the Ninth Circuit Court of Appeals held that "where the aggrieved party has consulted counsel and is aware of this right [to request a right-to-sue letter], it becomes inequitable at some point for the employee to delay filing suit."195 The court further stated that "it is proper for the district court, in the exercise of its equitable discretion, to take the plaintiff's lack of diligence into account in determining the amount of back pay, if any, to be awarded the plaintiff should he prevail on the merits."196

As these cases illustrate, in particular cases where the Title VII defendant is in fact prejudiced by a plaintiff's unreasonable or unexcused delay in filing suit while waiting for the termination of EEOC proceedings, the district courts can use their discretion and limit the back pay relief to a period of reasonable diligence. This remedy in effect allows the Title VII plaintiff to proceed on the merits of the employment discrimination claim.197 Furthermore, the result is reconcilable with the purpose of Title VII: the Title VII plaintiff is made whole for injuries suffered on account of unlawful employment discrimination and the employer is enjoined from engaging in the unlawful employment practice. The result is also in accordance with the equitable concept of fairness: the Title VII defendant's liability is limited to a reasonable period consistent with the equitable doctrine of laches.

Under this approach, the elements of the laches defense are the same. The result, however, is a less draconian remedy than dismissal. Ultimately, if the district court finds that the Title VII defendant has

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193. *Id.* at 603.
194. 564 F.2d 1282 (9th Cir. 1977).
195. *Id.* at 1287.
196. *Id.* at 1288.
197. In the event the Title VII plaintiff's claim is without merit and the defendant prevails, the court has the authority to assess a reasonable attorney's fee against the plaintiff. 42 U.S.C. § 2000e-5(k) (1982) provides: "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 2000e-5(k).
satisfied both elements of the laches defense (namely, that the delay by the plaintiff is unreasonable and the defendant has been prejudiced in making a defense), it is in the court’s discretion to determine the appropriate equitable relief.

The determination of such equitable relief in Title VII cases hinges on the balancing of the concerns of both parties and the result must reflect the policies of Title VII and the essential element of fairness. Limiting back pay to a period of reasonably diligent pursuit would be consistent with the equitable nature of the doctrine of laches. In addition, because the filing of any charge with the EEOC places an employer on notice of the potential liability and consequent need to preserve testimony, dismissal would seldom be appropriate

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198. It is also consistent with the equitable nature of the laches defense for the district court's determination of the period of "reasonably diligent pursuit" to be made on an ad hoc basis, in light of the particular circumstances of each case. Guided by this ad hoc standard, the district courts may determine the amount of back pay relief appropriate in each case.

For example, in Garrett v. General Motors Corp., the District Court for the Eastern District of Missouri had determined that the plaintiff’s contact with the EEOC was minimal between 1972 and 1980, and that the plaintiff did not actively pursue the discrimination claim until 1984. 844 F.2d at 562. Under such circumstances, the district court could take the plaintiff’s lack of diligence into account in determining the amount of back pay to be awarded. Specifically, the court could subtract, from the end of the back pay period, an amount of time equivalent to the time between 1972 and 1984 that the plaintiff showed a lack of diligence in the pursuit of the employment discrimination claim. See supra notes 119-29 and accompanying text for a discussion of the Eighth Circuit Court of Appeals' decision in Garrett.

Similarly, in Jeffries v. Chicago Transit Auth., the District Court for the Northern District of Illinois had determined that the delay which barred this claim dated from the time the plaintiff spoke with the EEOC in 1975 and the time plaintiff filed suit in 1984. 770 F.2d at 679-80. Applying the back pay limitation approach under these circumstances, the district court could subtract, from the end of the back pay period, an amount of time equivalent to the time between 1975 and 1984 that the plaintiff showed a lack of diligence. See supra notes 130-45 and accompanying text for a discussion of the Seventh Circuit Court of Appeals' decision in Jeffries.

As these cases illustrate, the determination of the appropriate relief in Title VII cases hinges on a balancing of the various equities between the parties. In addition, the result of the district court’s limitation of the back pay relief awarded, should the plaintiff prevail on the merits, is consistent with the "make whole" purposes of Title VII and the fundamental concept of fairness.

199. It should be noted that in Cleveland Newspaper, the court found that the EEOC's notice to the defendant to retain personnel records "was too ambiguous to serve as a valid command." 839 F.2d at 1154. That notice, however, did not name the person or persons bringing the charge. Additionally, the notice asked that the defendant withhold any questions about the complaint until the EEOC’s investigation began. Four years later, the defendant received a copy of the charge filed by the plaintiff. Under these circumstances, the court found that the defendant was prejudiced as a result of the four year delay that occurred before the defendant received a copy of the charge. Moreover, the court determined that prior to receiving an actual copy of the charge, it would be "impossible to
because any prejudice could have been mitigated. Moreover, limiting back pay in particular circumstances where the delay by the employee significantly handicaps the employer is consistent with the broad purposes of Title VII.

CONCLUSION

In conclusion, using the defense of laches as a method to decrease exposure to liability rather than as a complete dismissal of a Title VII action provides for an equitable method for balancing the competing concerns between the Title VII plaintiff and defendant. Although the doctrine of laches has been applied to bar a Title VII claimant from indefinitely awaiting the conclusion of EEOC proceedings before filing suit, in the future laches should seldom be recognized as a complete bar to a Title VII lawsuit. Instead, Title VII claims should be decided on the merits; the laches defense will prove useful to decrease potential liability and will allow the courts to reach "a just result" without lim-

determine which personnel records were 'relevant' to the unknown charge." Id. See supra notes 165-78 and accompanying text for a discussion of the Cleveland Newspaper decision.

In such a case, where the Title VII defendant is not put on notice as to which personnel records are relevant to a particular employment discrimination charge, the defendant is not provided with the opportunity to avoid the prejudice in making a defense which results from the delay in providing notice of the charge. Under these circumstances, dismissal of a plaintiff's claim may be appropriate. As the court emphasized in Cleveland Newspaper, however, this "is an extreme result, and should be accomplished only when the prejudice to the defendant can be avoided in no other way." Id. at 1155.

200. Pursuant to authority conferred upon it by 42 U.S.C. § 2000e-8(c) (1982), the EEOC has promulgated 29 C.F.R. § 1602.14, which requires an employer covered by Title VII to retain all personnel records for six months after they are created and, when a charge of discrimination has been filed against the employer, to retain all records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and to unsuccessful applicants and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

29 C.F.R. § 1602.14 (1988). See supra note 142 and accompanying text. In addition, both Title VII itself and the EEOC regulations authorize the EEOC to have "access to," "the right to copy," and the power to require the production of documents. 42 U.S.C. § 2000e-8(a) (1982); 29 C.F.R. § 1601.16(a) (1988). Both also authorize the power to require the attendance and testimony of witnesses and the production of evidence. Id. § 2000e-8, 29 C.F.R. § 1601.16.
iting the rights of the Title VII plaintiff to an administrative resolution of claims.

Ellen N. Derrig