

2011

The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them

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THE IMPROPER DISMISSAL OF TITLE VII CLAIMS ON
“JURISDICTIONAL” EXHAUSTION GROUNDS:
HOW FEDERAL COURTS REQUIRE THAT ALLEGATIONS
BE PRESENTED TO AN AGENCY WITHOUT THE
RESOURCES TO CONSIDER THEM

*Katherine A. Macfarlane**

INTRODUCTION

Title VII of the Civil Rights Act of 1964 represents a watershed moment in American history.¹ With Title VII’s passage, Congress acknowledged the need to “back” the civil rights movement with “federal legislative power.”² Title VII was meant to eliminate practices that inhibit employment opportunity equality.³ Beyond eliminating those practices, Title VII was also designed to assure equality of employment opportunities and to eliminate conduct that “fostered racially stratified job environments to the disadvantage of minority citizens.”⁴ This Title renders unlawful the refusal or failure to hire 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 ori-

* Litigation associate, Quinn Emanuel Urquhart & Sullivan LLP. I would like to thank the gracious and talented editors of the George Mason University Civil Rights Law Journal for their careful work on this article. I would also like to thank my mentor, Professor Allan Ides, for the many helpful comments he provided while this article gestated. Finally, unending thanks and love to my patient fiancé Tom Nolan, who reads my law review articles and still finds it in his heart to make me dinner.

¹ Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 *MERCER L. REV.* 651, 669 (2000).

² Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 *HOFSTRA LAB. & EMP. L.J.* 627, 627-28 (2005).

³ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (“Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.” (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971))).

⁴ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (quoting *McDonnell Douglas Corp.*, 411 U.S. at 800).

gin, or to limit, segregate or classify any employee” for the same improper reasons.⁵ A prima facie Title VII violation may be established through policies or practices that are neutral on their face but have a discriminatory effect.⁶

Recent appointees to the federal bench are skeptical of civil rights cases in general, and employment discrimination cases in particular,⁷ and they are not alone. There are many who still think that employment discrimination plaintiffs are “whiners.”⁸ However, the public’s perception of employment discrimination plaintiffs may be evolving faster than the judiciary’s.

Anita Hill’s experiences are telling. In 1991, following Hill’s testimony in the Clarence Thomas confirmation hearings, she received letters from men who thought that sexual harassment was no more than “the fantastic, vengeful invention of disgruntled employees or spurned lovers.”⁹ However, sixteen years later, after a former New York Knicks employee won an \$11.6 million jury award in a sexual harassment case, Ms. Hill received very different letters. Over half of the people who wrote were men, who, “through their own observations or the stories told them by their mothers, sisters, wives, and daughters understand the problem [of sexual harassment at work] and its harm.”¹⁰

Perhaps the best example of how the tide has turned on employment discrimination is the public reaction to *Ledbetter v. The Goodyear Tire & Rubber Co.*¹¹ A wave of immediate public outrage

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

⁶ Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1546 (1995) (“Unlike Equal Protection plaintiffs, Title VII plaintiffs are generally able to prevail by proving either discriminatory purpose or discriminatory effects.”).

⁷ See Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 495 (2008) (citing evidence that “federal judges have indeed made it increasingly difficult for employment discrimination plaintiffs to prevail”).

⁸ See, e.g., Michael P. Maslanka, *Fire Newly Hired Whiners Quickly*, WORK MATTERS (Feb. 12, 2009), http://texaslawyer.typepad.com/work_matters/2009/02/fire-newly-hired-whiners-quickly.html (Maslanka, managing partner of the 190-attorney law firm Ford & Harrison, explains, with no hint of irony, that “employees who whine about their supervisor — he doesn’t like me, she is rude to me, he doesn’t listen to me — will sooner or later claim that the boss doesn’t like them because they are African American or a woman or over 40”).

⁹ Anita Hill, *Discrimination, Harassment and the NBA*, BOSTON GLOBE, Oct. 15, 2007, at A11.

¹⁰ *Id.*

¹¹ 550 U.S. 618 (2007).

followed the Supreme Court's decision that Lilly Ledbetter's equal pay claim was time-barred.¹² In fact, the decision was so disliked that the Lilly Ledbetter Fair Pay Restoration Act was quickly passed to overturn its holding, and President Obama selected it as the first bill he signed into law.¹³ As President Obama put it,

It is fitting that with the very first bill I sign—the Lilly Ledbetter Fair Pay Restoration Act . . . is upholding one of this nation[']s first principles: that we are all created equal and each deserve a chance to pursue our own version of happiness.¹⁴

The reaction was even more surprising given that the public was reacting to the impact of a procedural rule: the statute of limitations, “a technical legal topic.”¹⁵ Yet outrage over using procedure to defeat civil rights claims is justified by Title VII's history. Title VII was meant “to ‘make it easier for a plaintiff of limited means to bring a meritorious suit.’”¹⁶ Title VII was meant to open, not shut, courthouse doors.

Thus, a plaintiff should have no trouble establishing that a federal court has jurisdiction over a claim for employment discrimination brought pursuant to Title VII of the Civil Rights Act of 1964.¹⁷ Title VII is a law of the United States. Correspondingly, jurisdiction should vest as a result of 28 U.S.C. § 1331.¹⁸ Yet some federal courts require much more than straightforward federal question jurisdiction to establish subject matter jurisdiction in Title VII cases. To establish subject matter jurisdiction for a Title VII claim in the District of Hawaii, “(1) the plaintiff must timely file his claim with the EEOC; and (2) the plaintiff must timely institute his action after receipt of a right-to-sue notice.”¹⁹ Other courts have further held that subject matter jurisdic-

¹² Young Eun Lee, *Creating a Proper Incentive Structure: A Case Study of Ledbetter v. Goodyear Tire & Rubber Co.*, 15 *CARDOZO J.L. & GENDER* 117, 117 (2008).

¹³ Christina Bellantoni, *Obama Signs Ledbetter Fair Pay Act*, *WASH. TIMES*, Jan. 29, 2009, <http://www.washingtontimes.com/news/2009/jan/29/obama-signs-ledbetter-fair-pay-act/>.

¹⁴ *Id.*

¹⁵ Charles A. Sullivan, *Raising the Dead: The Lilly Ledbetter Fair Pay Act*, 84 *TUL. L. REV.* 499, 500 (2010).

¹⁶ *Slade for Estate of Slade v. U.S. Postal Serv.*, 952 F.2d 357, 361 (10th Cir. 1991) (quoting *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980)).

¹⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

¹⁸ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 505 (2006).

¹⁹ *Gao v. Haw. Dept. of Atty. Gen.*, Cv. No. 09-00478, 2010 WL 99355, at *2 (D. Haw. Jan. 12, 2010).

tion in Title VII cases only extends over allegations of discrimination “‘like or reasonably related’ to the allegations” alleged in the initial charge filed with the Equal Employment Opportunity Commission (EEOC).²⁰

If these three “jurisdictional” requirements—that a timely claim be filed with the EEOC, that the EEOC issue a right-to-sue notice, and that the allegations in the federal complaint track those made in the original EEOC claim (presentment)—are satisfied, a plaintiff has administratively exhausted his or her claim.²¹ Requiring exhaustion makes little sense given the current understaffing of the already overburdened EEOC and the procedures followed by that agency to pursue the initial filed charge; yet the circuits agree that administrative exhaustion in Title VII cases is required.²² However, there is substantial disagreement over whether the presentment requirement, which requires that the scope of the allegations presented in federal court mimics the scope of the allegations in the EEOC claim, is a requirement that may be excused under certain circumstances.²³

Why would any federal court add to the “procedural minefield”²⁴ a Title VII plaintiff must overcome to take her claim to trial by requiring compliance with administrative procedures before an agency that lacks the ability to enforce Title VII? This Article attempts to answer that question. Part I discusses the administrative exhaustion doctrine in the context of administrative law, explaining how the doctrine protects an agency’s ability to enforce the very laws it was created to enforce.²⁵ Part II examines Title VII and the EEOC, and contends that, far from enforcing Title VII, the EEOC is no more than an administrative waiting room.²⁶ Part II also tracks how a charge would be processed if the EEOC had sufficient resources to handle each

²⁰ *Epps v. Phoenix Elementary Sch. Dist.*, No. CV-07-1024, 2009 WL 996308, at *2 (D. Ariz. Apr. 14, 2009) (quoting *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003)).

²¹ See *infra* Part III.A-B.

²² *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009); *Doe v. Oberweis Dairy*, 456 F.3d 704, 708 (7th Cir. 2006); *Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005); *Francis v. City of N.Y.*, 235 F.3d 763, 768 (2d Cir. 2000); *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997); *Tolbert v. United States*, 916 F.2d 245, 247 (5th Cir. 1990).

²³ See *infra* Part III.B.

²⁴ *Sullivan*, *supra* note 15, at 507 (“It is fair to say that the run-up to a Title VII suit is a procedural minefield, which is especially unfortunate given that the structure is designed to be initiated by individuals without the assistance of private attorneys.”).

²⁵ See *infra* Part I.

²⁶ See *infra* Part II.

charge filed.²⁷ Part II concludes that while these procedures are admirable, their benefits are illusory.²⁸

Part III describes how federal courts have incorrectly taken the administrative procedures that begin and end the EEOC's processing of a charge and converted them into "administrative exhaustion" requirements for Title VII suits in federal court.²⁹ Courts believe that these requirements are justified in terms of the notice they provide to both accused employers and the EEOC itself.³⁰ Ideally, if the EEOC has notice of a charge, then it also has the opportunity to resolve the charge informally. This comports with the original purpose of Title VII—that it was meant to be enforced informally, and not through litigation.³¹ However, because the EEOC is in effect unable to investigate charges or bring suit on the filer's behalf, this justification is unpersuasive.

Part IV focuses on presentment, arguing that the circuits that treat presentment as a jurisdictional requirement are wrong on several grounds.³² First, Supreme Court precedent indicates that presentment should be treated as a prudential requirement.³³ Those circuits that consider presentment a jurisdictional requirement violate Supreme Court precedent regarding the waivability of exhaustion requirements.³⁴ Second, far more fundamental concepts, such as personal jurisdiction, are waivable; there is no reason to elevate any aspect of administrative exhaustion above personal jurisdiction.³⁵ Third, requiring that a Title VII plaintiff allege every claim that it brings in federal court in its EEOC charge enforces an impermissible standard of heightened notice pleading on Title VII plaintiffs.³⁶

Part V explains that treating any aspect of administrative exhaustion as a prerequisite to subject matter jurisdiction has a dire effect on a Title VII plaintiff's chances of prevailing on the merits and perpetuates an error in law.³⁷ Because a subject matter jurisdiction defense is

²⁷ See *infra* Part II.B.

²⁸ See *infra* Part II.C.

²⁹ See *infra* Part III.

³⁰ See *infra* Part III.C.

³¹ See *infra* Part III.C.

³² See *infra* Part IV.

³³ See *infra* Part IV.A.

³⁴ See *infra* Part IV.B-C.

³⁵ See *infra* Part IV.D.

³⁶ See *infra* Part IV.E.

³⁷ See *infra* Part V.

never waived and may be raised by a federal court *sua sponte*, the labeling of administrative exhaustion as “jurisdictional” is far more than a matter of semantics; rather, treating any aspect of exhaustion as a jurisdictional prerequisite defeats otherwise meritorious claims at every stage of litigation.³⁸ Furthermore, because subject matter jurisdiction objections are procedural objections, every time the defense is invoked, courts do not reach the merits of a Title VII claim and do not develop the substantive law.³⁹

Part VI suggests that inexperienced writers are the reason that improper exhaustion requirements are propagated in Title VII cases.⁴⁰ The treatment of the exhaustion issue in existing Title VII opinions, and the increasing likelihood that law clerks and externs write the subject matter jurisdiction portions of opinions, often foreclose further inquiry into the correctness of the rule.⁴¹ Moreover, because federal judges do not receive Title VII training as they are immune from Title VII suits, the judiciary is prevented from gaining a deeper understanding of the effects of the law that it creates.⁴²

I. THE ADMINISTRATIVE EXHAUSTION DOCTRINE

The notion that administrative exhaustion is a prerequisite to subject matter jurisdiction requires some explanation. That a plaintiff with a claim arising under federal law must take additional steps to establish that a court may hear its claim is counterintuitive, whether in the context of Title VII or any other established federal statutory right. Therefore, before arguing that Title VII plaintiffs should be able to bring claims in federal court even if the facts underlying those claims were not presented to the EEOC, this Article begins by explaining why a plaintiff’s conduct before the EEOC or any other administrative agency may later affect a federal court’s jurisdiction.

Congress created some administrative agencies, like the EEOC, for the express purpose of enforcing certain statutes, like Title VII.⁴³ Although the EEOC is a well-known agency, its function remains a bit

³⁸ See *infra* Part V.

³⁹ See *infra* Part V.

⁴⁰ See *infra* Part VI.

⁴¹ See *infra* Part VI.

⁴² See *infra* Part VI.

⁴³ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (stating Congress created EEOC to enforce Title VII).

of a mystery to the public. The National Labor Relations Board (NLRB), another federal agency better known to the public, was also created by Congress to administer a federal statute, the National Labor Relations Act (NLRA).⁴⁴ The NLRA protects employees' rights to organize and bargain collectively.⁴⁵ In fact, the NLRA created the NLRB to enforce its substantive provisions.⁴⁶ The NLRB acts as a quasi-judicial body with jurisdiction to decide labor issues arising under the NLRA.⁴⁷

Exhaustion, an administrative law doctrine, requires parties with claims arising under certain statutes to pursue their claims first with an agency like the EEOC or the NLRB before seeking judicial relief.⁴⁸ Exhaustion allows agencies the first chance "to resolve issues over which [they have] primary responsibility."⁴⁹ Indeed, if exhaustion were not required, the agencies would be rendered meaningless because litigants could bypass the agency and file directly in federal court.

Exhaustion requires that every administrative process the agency has created to remedy a violation be engaged, and the agency must be allowed to reach a final decision regarding the alleged violation. Exhaustion gives agencies the opportunity to "develop the necessary factual background upon which decisions should be based" without judicial interruption.⁵⁰

The exhaustion requirement has been likened to the final judgment rule, which limits the category of cases that may be appealed before the entry of a final judgment in federal district court.⁵¹ Appeals that come before judgment "may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrel-

⁴⁴ *Fact Sheet*, NATIONAL LABOR RELATIONS BOARD, http://www.nlr.gov/about_us/overview/fact_sheet.aspx (last visited Dec. 22, 2010).

⁴⁵ *Id.*

⁴⁶ Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 82 (2003).

⁴⁷ NATIONAL LABOR RELATIONS BOARD, *supra* note 44.

⁴⁸ *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

⁴⁹ 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8397 (1st ed. 1982).

⁵⁰ *McKart*, 395 U.S. at 194.

⁵¹ *Id.* ("The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.").

evant by the end of trial.”⁵² The concerns with respect to judicial intervention before an agency has completed its review are similar: judicial review of agency action, like interlocutory review, may be both premature and disruptive.

While important and generally mandatory, “[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.”⁵³

Federal courts require exhaustion for one of two reasons. First, exhaustion may be mandated by statute. This kind of exhaustion is labeled “jurisdictional exhaustion.” When Congress inserts an exhaustion requirement into a statute, and as a result, “requires resort to the administrative process as a predicate to judicial review,” Congress has created a jurisdictional exhaustion requirement.⁵⁴ This form of exhaustion is not related to courts’ prudential powers, but rather is based on Congress’ power to control federal courts’ jurisdiction.⁵⁵ To require mandatory exhaustion, a statute must contain “[s]weeping and direct’ statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.”⁵⁶ Mandatory exhaustion, as its name suggests, is not waivable. A jurisdictional administrative exhaustion requirement establishes subject matter jurisdiction because the statutory provisions conferring federal jurisdiction do so only with respect to administratively-exhausted claims. Because jurisdictional exhaustion must be expressly created, the presumption is that exhaustion is not jurisdictional.⁵⁷

Second, courts have created a judicial doctrine of prudential exhaustion to require parties “who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court.”⁵⁸ Prudential exhaustion serves a similar purpose to jurisdictional exhaustion, “giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies’

⁵² *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987).

⁵³ *McKart*, 395 U.S. at 193.

⁵⁴ *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

⁵⁵ *Id.* (citing *EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 963-64 (D.C. Cir. 1999)).

⁵⁶ *Id.* at 1248 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975)).

⁵⁷ *Id.* (citing *I.A.M. Nat’l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984)).

⁵⁸ *Id.* at 1247 (citing 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 15.2 (4th ed. 2002)).

expertise, [and] compiling a record adequate for judicial review[.]”⁵⁹ However, because prudential exhaustion is not required by statute, it may be waived on numerous grounds, including if “the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.”⁶⁰

This Article focuses on one particular aspect of administrative exhaustion—the “presentment” requirement—and contends that it is non-jurisdictional for Title VII plaintiffs. Under the presentment rule, “one must raise issues with the agency or lose the right to challenge those issues on review.”⁶¹ Presentment is a key part of the exhaustion doctrine, and Title VII is not the only statute for which courts have implied a presentment requirement.⁶² Yet the Supreme Court has cautioned that although the requirement that an issue be presented to an agency is a common non-jurisdictional exhaustion requirement, it is not appropriate to require it in all instances.⁶³

“The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.”⁶⁴ That is, issues not raised at the trial level should not be heard for the first time on appeal because the trial court is better equipped to conduct fact finding.⁶⁵ In the administrative context, “courts require administrative issue exhaustion ‘as a general rule’ because it is usually ‘appropriate under [an agency’s] practice’ for ‘contestants in an adversary proceeding’ before it to develop fully all issues there.”⁶⁶ However, when an administrative proceeding is not adversarial, the need for issue exhaustion dissipates.⁶⁷

In *Sims v. Apfel*, the Supreme Court considered whether the administrative proceedings that determine whether Social Security

⁵⁹ *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992); *Marine Mammal Conservancy, Inc. v. Dep’t of Agric.*, 134 F.3d 409, 414 (D.C. Cir. 1998)).

⁶⁰ *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (quoting *McCarthy*, 503 U.S. at 146).

⁶¹ *WRIGHT & KOCH*, *supra* note 49, at § 8398.

⁶² *See id.*

⁶³ *Sims v. Apfel*, 530 U.S. 103, 108-10 (2000).

⁶⁴ *Id.* at 108-09.

⁶⁵ *Id.* at 109 (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

⁶⁶ *Id.* (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)).

⁶⁷ *Id.* at 110.

benefits should be awarded are adversarial.⁶⁸ The Court concluded they were not.⁶⁹ A party seeking Social Security benefits presents its reasons to an administrative law judge (ALJ), who must “investigate the facts and develop the arguments both for and against granting benefits.”⁷⁰ A party denied benefits may appeal to the Social Security Appeals Council, but the party’s opponent, the Social Security administration, “has no representative before the ALJ to oppose the claim for benefits, and . . . [does not] oppose[] claimants before the Council.”⁷¹ And accordingly, “A person whose claim for Social Security benefits is denied by an [ALJ]” has not waived issues he did not include in his appeal request to the Social Security Appeals Council.⁷² An issue not raised before the Appeals Council may be raised in federal court for the first time. In the context of Social Security benefits proceedings, “a judicially created issue-exhaustion requirement is inappropriate.”⁷³

II. HOW THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCES TITLE VII: THEORY AND PRACTICE

Federal courts enforce administrative exhaustion requirements in Title VII cases. However, when they do so, they pay homage to an administrative agency that is very different than the actual EEOC. The federal courts’ insistence that plaintiffs resort to the EEOC demonstrates a lack of understanding of how the EEOC’s investigation of a charge begins, let alone why the EEOC’s investigation, mediation, and potential litigation is essential to Title VII’s enforcement, or if the EEOC has a chance to investigate every charge brought before it. Before critiquing federal courts’ approach to administrative exhaustion, this Article briefly reviews Title VII’s purpose,⁷⁴ the EEOC’s role in Title VII enforcement, and what should,⁷⁵ and actually does,⁷⁶ happen when a charge is filed. This Part contends that the EEOC is

⁶⁸ See *Sims v. Apfel*, 530 U.S. 103 (2000).

⁶⁹ See *id.* at 105.

⁷⁰ *Id.* at 110-11 (citing *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971))

⁷¹ *Id.* at 111.

⁷² *Id.* at 104-05.

⁷³ *Id.* at 112.

⁷⁴ See *infra* Part II.A.

⁷⁵ See *infra* Part II.B.

⁷⁶ See *infra* Part II.C.

so ineffective that the deference federal courts give its procedure is nonsensical.

A. *The Purpose of Title VII and the EEOC*

As mentioned above, Title VII of the Civil Rights Act of 1964 represents a watershed moment in American history.⁷⁷ With Title VII's passage, Congress acknowledged the need to "back" the civil rights movement with "federal legislative power."⁷⁸ Title VII is in many ways a radical statute, created "to combat a deficiency in the market, namely inappropriate discrimination, which had the effect of placing parties in unequal bargaining positions."⁷⁹ Title VII makes it easier to prove an employment discrimination claim than to prove an equal protection claim based on sex or race—unlike an equal protection claim, a *prima facie* Title VII violation may be established through policies or practices that are neutral on their face, but have a discriminatory effect.⁸⁰

Title VII was meant to eliminate practices that inhibit employment opportunity equality.⁸¹ Title VII renders unlawful the refusal or failure to hire 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 to limit, segregate or classify" any employee for the same improper reasons.⁸² Alongside Title VII, Congress created the EEOC. The EEOC was designed to act as Title VII's lead enforcement agency⁸³ instead of regular litigation. Rather, the EEOC was

⁷⁷ Belton, *supra* note 1, at 669.

⁷⁸ Barnard & Rapp, *supra* note 2, at 627-28.

⁷⁹ Rangel v. El Paso Natural Gas Co., 996 F. Supp. 1093, 1097 (D.N.M. 1998).

⁸⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."); Biegel, *supra* note 6, at 1546 ("Unlike Equal Protection plaintiffs, Title VII plaintiffs are generally able to prevail by proving either discriminatory purpose or discriminatory effects.").

⁸¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs*, 401 U.S. at 429-30))).

⁸² 42 U.S.C. § 2000e-2(a)(1) – (2) (2006).

⁸³ See *Gardner-Denver Co.*, 415 U.S. at 44 (stating Congress created EEOC to enforce Title VII); H.R. Rep. No. 88-914, at 11 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

meant to serve a unique purpose in Title VII's enforcement, giving employers and employees the chance to settle disputes informally.⁸⁴ The EEOC was given the power to mediate employment disputes in order to render litigation rare.⁸⁵ In fact, Title VII was not a statute intended to "breed litigation;" rather, it was intended to encourage "voluntary resolution of all but the most serious types of discrimination."⁸⁶

At first, the EEOC could only investigate an attempt to informally settle, or "conciliate," discrimination charges.⁸⁷ But with the passage of the Equal Employment Opportunity Act of 1972, the EEOC was given the power to file suit against public and private employers and labor unions for Title VII violations.⁸⁸ The 1972 Act also "authorized the EEOC to award compensatory damages in [certain] Federal Government employment discrimination cases," as well as the power to require reinstatement or hiring of employees with or without back pay.⁸⁹ However, the EEOC cannot award damages, reinstate employees, or award back pay in private sector disputes.⁹⁰ Moreover, litigation only proceeds after informal settlement fails. If the EEOC worked as intended, Title VII litigation would be infrequent. However, as of 2006, Title VII cases represented six percent of the federal civil docket.⁹¹

⁸⁴ See *Gardner-Denver Co.*, 415 U.S. at 44 (noting Congress intended "[c]ooperation and voluntary compliance [to be] . . . the preferred means" for settling disputes).

⁸⁵ See *id.*; *Edwards v. N. Am. Rockwell Corp.*, 291 F. Supp. 199, 203 (C.D. Cal. 1968).

⁸⁶ Lauren LeGrand, Note, *Proving Retaliation After Burlington v. White*, 52 ST. LOUIS U. L.J. 1221, 1223 (2008) (citing H.R. Rep. No. 88-914, at 3, 11 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2392, 2401).

⁸⁷ See *Gardner-Denver Co.*, 415 U.S. at 44 ("Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.").

⁸⁸ *Id.* The Act gave federal employees the same rights as private individuals bringing employment discrimination claims. *Ellis v. Naval Air Rework Facility, Alameda, Cal.*, 404 F. Supp. 377, 388 (N.D. Cal. 1975). This Article examines administrative exhaustion rules that are applied to both private and public sector claims. Where there are differences, they are noted.

⁸⁹ *West v. Gibson*, 527 U.S. 212, 217-18 (1999).

⁹⁰ See Marcia L. McCormick, *The Truth is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 202 n.53 (2009) ("The EEOC also has the power to adjudicate federal claims, but not adjudicate private sector disputes.").

⁹¹ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103-04 (2009) (finding that in

B. *Filing an Employment Discrimination Charge with the EEOC: In Theory*

The EEOC's website proclaims that the EEOC "enforces [f]ederal laws prohibiting employment discrimination."⁹² To receive the EEOC's help, an individual who believes that he or she was discriminated against on the job must first file a "charge" with the EEOC describing the allegedly discriminatory conduct.⁹³ A charge is a written, sworn statement that alleges a violation of Title VII has occurred.⁹⁴ The charge is directed against a "respondent" who is either a person or an organization bound by Title VII.⁹⁵ The charge may be filed in person at the EEOC's Washington, D.C., offices, with any designated EEOC representative, or at any EEOC district or area office.⁹⁶ The EEOC charge must be filed within 180 days of the alleged discriminatory practice.⁹⁷

The EEOC requires that the charge contain: (1) the name, address and telephone number of the person making the charge; (2) the name and address of the person against whom the charge is made, if known; (3) "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment prac-

2006, such cases represented nearly six percent of the federal docket and that in 2001, such cases were the largest share of federal civil cases).

⁹² *Employees and Job Applicants*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/index.cfm> (last visited Dec. 24, 2010).

⁹³ EMP. COORDINATOR, EMP. PRACS. § 84:3 (West 2010).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at § 84:21 (citing 29 C.F.R. § 1601.8. (2009)).

⁹⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) (2006). In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place," but that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination." 550 U.S. 618, 628 (2007). Congress passed the Fair Pay Act to overturn *Ledbetter*. See *Onyiah v. St. Cloud State Univ.*, 655 F. Supp. 2d 948, 961 (D. Minn. 2009). "[T]he Fair Pay Act changed the definition of unlawful employment practices, as it relates to pay discrimination claims under Title VII," providing:

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Id. (quoting 42 U.S.C. § 2000e-5(e)(3)(A)).

tice; (4) [i]f known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and (5) [a] statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws”⁹⁸ Despite these requirements, the EEOC will not dismiss a charge prior to commencing an investigation so long as the charge is “sufficiently precise to identify the parties, and to describe generally the action or practices complained of.”⁹⁹

These minimal requirements stand in stark contrast to the standards federal courts impose upon the charge. Federal courts require that the charge give both the EEOC and employers “notice” of the sort of discrimination claim that the charging party *might* eventually bring in federal court. Once the charge is brought in federal court, federal courts impose a rule akin to Rule 8 of the Federal Rules of Civil Procedure onto the charge, a document created before the litigation commenced.¹⁰⁰

However, according to the EEOC, all that must be listed in a charge to avoid pre-investigation dismissal is contact information for the charging party and the employer, but only “if known;” a statement of relevant *facts and dates*, not claims; and, “if known,” information regarding the number of persons the employer employs.¹⁰¹ The requirements are general and lenient. Notably, most EEOC charges are completed by the complaining parties themselves, not lawyers.¹⁰²

Once the charge is received, the EEOC must notify the respondent accused of discriminatory conduct within 10 days.¹⁰³ After notice is sent, the EEOC’s investigation begins. The EEOC will arrange for an in-person intake interview with the individual who filed a charge, conducted by an Equal Opportunity Specialist (EOS). “This interview begins with a counseling session at which the EOS answers ques-

⁹⁸ 29 C.F.R. § 1601.12(a) (2009).

⁹⁹ 29 C.F.R. § 1601.12(b) (2009).

¹⁰⁰ *See, e.g.*, *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 776, 779 (7th Cir. 2007) (finding that an EEOC complaint must satisfy the standard in Fed. R. Civ. P. 8(a)(2) requiring a “short and plain statement of the claim showing that the pleader is entitled to relief.” (quoting Fed. R. Civ. P. 8(a)(2)).

¹⁰¹ 29 C.F.R. § 1601.12(a) (2009). *See* text accompanying note 98.

¹⁰² *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994) (citing *Taylor v. W & S. Life Ins. Co.*, 966 F.2d 1188, 1195 (7th Cir. 1992)).

¹⁰³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1)(2006).

tions regarding the EEOC's operations," and explains the extent of the EEOC's power.¹⁰⁴ During the interview, the EOS is not limited to asking questions about the charge-filer's allegations. The EOS may inquire about any discrimination, including violations affecting other individuals.¹⁰⁵ In the course of its investigation, the EEOC may request that both the charging party and the respondent employer provide information regarding the charge's allegations.¹⁰⁶ For example, an employer may be asked to submit a "statement of position" through which it describes its version of events.¹⁰⁷ The EEOC may also conduct an on-site visit of the employer's offices.¹⁰⁸

The EEOC's investigation is not curtailed by the scope of the allegations in the charge.¹⁰⁹ The EEOC may look into violations that are not alleged in the charge. For example, the EEOC *requires* EEOC employees investigating Title VII allegations who also uncover uncharged Equal Pay Act violations in the course of the Title VII investigation to pursue the Equal Pay Act violation "regardless of the scope of the charge."¹¹⁰ Further, during an investigation, the EEOC is entitled to examine any evidence relevant to the charge¹¹¹ and has access "to virtually any material that might cast light on the allegations against the employer."¹¹² If an employer refuses to provide the requested information voluntarily, Title VII authorizes the EEOC to issue a subpoena and to seek an order enforcing it.¹¹³ The EEOC in no way imposes a presentment requirement on the contents of the charge. If it deems an issue relevant, it makes no difference whether that issue was included in the charge initially.

After it completes its investigation, the EEOC will decide whether there is reasonable cause to believe a charge's allegations are valid. If the EEOC decides that a charge has no merit, then it will be

¹⁰⁴ EMPLOYMENT COORDINATOR, *supra* note 93, at § 84:28 (citing EEOC, COMPLIANCE MANUAL § 2.4(a) (2009)).

¹⁰⁵ *Id.*

¹⁰⁶ *The Charge Handling Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/process.cfm> (last visited Dec. 23, 2010).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See EEOC, COMPLIANCE MANUAL, *supra* note 104, at § 22.3(a).

¹¹⁰ *Id.* (describing investigation scope).

¹¹¹ EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984).

¹¹² *Id.*

¹¹³ Univ. of Pa. v. EEOC, 493 U.S. 182, 191 (1990) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9 (2006)).

dismissed, and the charging party will receive notice that he or she has the right to file suit in federal court.¹¹⁴ If the EEOC finds that there is reasonable cause to believe that discrimination did occur, the parties may be invited to participate in informal settlement of their dispute.¹¹⁵ If no compromise can be reached, the EEOC may elect to prosecute the charge itself, or will notify the charging party that it may sue on its own behalf.¹¹⁶

A federal lawsuit alleging Title VII violations may only be filed if a charging party first receives notice of a right to sue, also known as a right-to-sue letter.¹¹⁷ A right-to-sue letter will be issued if the EEOC finds that a charge lacks merit, or if no informal settlement can be reached.¹¹⁸ A charging party may also receive a right-to-sue letter in two additional instances. He or she may request a right-to-sue letter, and the EEOC must issue one, if more than 180 days have passed since the charge was filed.¹¹⁹ A right-to-sue letter will also issue *before* 180 days have passed if the EEOC determines that it will be unable to complete its investigation within 180 days.¹²⁰

Therefore, receipt of a right-to-sue letter has no connection to the completion of an EEOC investigation. Rather, receipt of a right-to-sue letter communicates that the EEOC can do nothing more with a particular charge, and that the charging party should file suit on its own behalf if it wishes to pursue its allegations any further. Yet, receipt of a right-to-sue letter in federal court establishes an element of administrative exhaustion, *even if no administrative action was taken*.

¹¹⁴ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *The Charge Handling Process*, *supra* note 106; *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Dec. 23, 2010).

¹¹⁵ Kara M. Farina, Comment, *When Does Discrimination "Occur?": The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII*, 38 GOLDEN GATE U. L. REV. 249, 254-55 (2008) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b)).

¹¹⁶ *Id.* (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-f(1)).

¹¹⁷ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Filing a Lawsuit*, *supra* note 114.

¹¹⁸ *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/charge.cfm> (last visited Dec. 23, 2010).

¹¹⁹ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Filing a Lawsuit*, *supra* note 114.

¹²⁰ *Id.*

Once a claimant receives a notice of the right to sue, the EEOC “will close the case and take no further action.”¹²¹ After a right-to-sue letter is received, a charging party has 90 days to file suit.¹²²

A right-to-sue letter is itself evidence that the EEOC has authorized a claimant to bring suit.¹²³ The EEOC’s letter must expressly state that it is a document authorizing suit, and that any suit in federal court must be filed within 90 days.¹²⁴ The letter must also include “[a]dvice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate,” as well as a copy of the initial charge and “[t]he Commission’s decision, determination, or dismissal.”¹²⁵

C. *Filing an Employment Discrimination Charge with the EEOC: In Practice*

If effective, the EEOC procedures would reduce Title VII litigation and enable mediation for employment discrimination suits falling under the statute. However, the EEOC’s powers are limited, not just by statute but also by its own lack of resources. The EEOC cannot award damages, reinstate employees, or award back pay in private sector disputes.¹²⁶ It also cannot issue regulations that have the force of law.¹²⁷ Practically, the EEOC is unable to effectively discharge its duties within the time frame provided by statute.

On April 2, 2009, Gabrielle Martin, the president of the union that represents EEOC employees, testified before the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies regarding the proposed fiscal year 2010 budget for the EEOC.¹²⁸ Martin begged the committee to save the EEOC, painting a picture of an agency in disarray. Her testimony highlighted the following problems:

¹²¹ *Id.*

¹²² 42 U.S.C. § 2000e-5(f)(1) (2006).

¹²³ *See* 29 C.F.R. § 1601.28(e)(1) (2009).

¹²⁴ *Id.*

¹²⁵ 29 C.F.R. § 1601.28(e)(2)-(4) (2009).

¹²⁶ *See* McCormick, *supra* note 90, at 202 n.53.

¹²⁷ *Id.*

¹²⁸ *Statements of Members of Congress and Other Interested Individuals and Organizations: Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. On Appropriations, 111th Cong. 38 (2009) (statement of Gabrielle Martin, President, National Council of EEOC Locals).*

- Since 2001, the EEOC has lost over twenty-five percent of its employees, ending 2008 “with only 2,174 employees on board nationwide”;¹²⁹
- The EEOC has only 600 available investigators, who, in 2008, “received 95,402 new charges of discrimination, the highest number ever received in agency history”;¹³⁰
- In 2008, “for the second year in a row the backlog of cases jumped 35%: to 73,941”;¹³¹
- Each EEOC investigator has an inventory of “as high as 250 cases,” an “unreasonably high caseload[]” that “do[es] not allow investigators to do an effective job of interviewing witness[es], reviewing documents, attempting conciliation”;¹³²
- The EEOC’s charge backlog “has grown from 39,000 in [2006] to 54,000 in [2007] and to 73,941 in [2008]”;¹³³
- The charge backlog represents “an enormous pile” of “people who believe they were discriminated against on the job, still waiting for help”;¹³⁴
- “[T]he amount of time it takes to process a case [from initial charge to the issuance of a right-to-sue letter] has increased to 229 days”;¹³⁵
- “[I]n the summer of 2008, EEOC scrapped its requirement that 72% of its charges be processed within 180 days” instead requiring that “only 48% of charges be processed within 180 days”;¹³⁶
- In 2009, the EEOC “beg[an] enforcement of two new laws, the Genetic Information Non Discrimination Act (GINA) and the Americans with Disabilities Amendments Act”;¹³⁷

¹²⁹ *Id.* at 41.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (internal citation omitted).

¹³³ *Id.*

¹³⁴ *Statements of Members of Congress and Other Interested Individuals and Organizations: Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. On Appropriations, 111th Cong. 41 (2009)* (statement of Gabrielle Martin, President, National Council of EEOC Locals).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

- “[W]hile additional staff have not been hired to assist with the new work, existing staff have not been trained on the complexities of the new laws.”¹³⁸

Mainstream media outlets have also noticed the EEOC’s problems, reporting, for example, that in 2008, 95,400 charges of job bias in the private sector were filed, but only 290 suits were brought.¹³⁹ “[T]he backlog at the end of fiscal year 2010 is projected to be 87,807 cases.”¹⁴⁰ According to a 2009 internal audit, “The EEOC has not embarked on major program initiatives to reduce the inventory or to reduce the growth of the inventory in over 10 years.”¹⁴¹ The EEOC itself was found to have violated the Fair Labor Standards Act on a nationwide basis with respect to how it paid its own employees.¹⁴²

EEOC employees face added pressure due to limited staffing. The loss of over twenty-five percent of its staff “includ[es] investigators and lawyers who handle the cases.”¹⁴³ During the Bush administration, “[r]esources . . . languished” and “[t]he agency’s requests to hire support staff, investigators, attorneys, administrative judges and mediators to replace those who departed the agency [were] largely unheeded.”¹⁴⁴ The agency received an additional \$23 million in late 2009 and was planning to hire 200 new investigators.¹⁴⁵

The number of backlogged charges is the most striking statistic, even though exactly what a backlogged charge is remains unclear. A backlogged charge may simply be a charge for which an investigation cannot be completed within 180 days, but it may also be a charge for which no investigation has begun. In 2008, “fewer than half of private sector discrimination charges filed in [2008] were resolved within 180 days.”¹⁴⁶ That is, most charges filed in 2008 were not processed within

¹³⁸ *Id.*

¹³⁹ Steve Vogel, *EEOC Struggles With Huge Workload, Diminished Staff*, WASH. POST, Feb. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020202452.html>.

¹⁴⁰ Jenna Greene, *Has Obama Redirected the Regulatory System?*, NAT. L.J., Jan. 18, 2010, available at Westlaw 1/18/2010 NAT’L L.J. 11 (Col. 1).

¹⁴¹ *Id.*

¹⁴² Steve Vogel, *EEOC Willfully Violated Pay Law, Arbitrator Rules*, WASH. POST, March 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/30/AR2009033002901.html>.

¹⁴³ *Id.* (quoting an annual report by EEOC Inspector General Aletha Brown).

¹⁴⁴ Vogel, *supra* note 139.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

180 days, meaning no investigation was completed or possibly even started.

The EEOC's website represents that as of 2004, it took *nearly* six months, that is, less than 180 days, to complete an average charge investigation; at the completion of such an investigation, a right-to-sue letter would issue if the EEOC did not bring suit itself.¹⁴⁷ In light of Martin's testimony and the media coverage, this estimate is outdated. That most investigations will not be completed within 180 days is a key fact. Right-to-sue letters may be issued at the claimant's request after 180 days have passed and the EEOC has yet to complete an investigation. By virtue of allowing right-to-sue letters to be issued at the 180-day mark, when most investigations will not have been resolved, the EEOC has created a mechanism to allow the majority of charges filed to bypass an EEOC investigation entirely. In essence, the EEOC's investigatory and conciliatory powers have been rendered meaningless. The press has noticed, and Congress has heard testimony about the problem. Yet the federal courts require plaintiffs to resort to the EEOC as though it still has the ability to resolve Title VII violations using its full procedural capabilities.

III. COMPLIANCE WITH ADMINISTRATIVE PROCESSES AS PREREQUISITE TO FEDERAL SUIT

Despite the realities of EEOC enforcement, federal courts pay lip service to the EEOC's ability to resolve Title VII disputes. The administrative procedures that encompass the EEOC's involvement in resolving a charge's allegations are referred to in federal jurisprudence as the elements of "administrative exhaustion."¹⁴⁸ Two of these exhaustion elements can be traced to statutory language.¹⁴⁹ The third, presentment, is judicially created.¹⁵⁰ Some courts consider these administrative exhaustion elements mandatory prerequisites to filing a Title VII suit in federal court.¹⁵¹ However, neither a right-to-sue letter

¹⁴⁷ *The Charge Handling Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/process.cfm> (last visited Dec. 25, 2010) ("How long the investigation takes depends on a lot of different things, including the amount of information that needs to be gathered and analyzed. It took us – on average – nearly 6 months to investigate a charge in 2004.")

¹⁴⁸ See *infra* Part III.A.

¹⁴⁹ See *infra* Part III.A.

¹⁵⁰ See *infra* Part III.B.

¹⁵¹ *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972) ("A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964 . . . may not maintain a suit for redress in

nor the initial claims made to the agency is an outcome that necessarily indicates the full extent of agency processing of a Title VII claim. Rather, an agency can issue a right-to-sue letter even if the agency is unable to investigate a claim.¹⁵² Further, claimants can change their initial claims during the course of investigation by an agency.¹⁵³

A. *Filing a Timely Charge and Receiving a Right-to-Sue Letter*

Federal courts describe administrative exhaustion in Title VII cases as a two-step process: first, a timely charge must be filed with the EEOC; second, a right-to-sue letter must be received, and suit must be brought within a certain amount of time after the letter's receipt.¹⁵⁴ According to federal jurisprudence, both the right-to-sue letter requirement and the timely filing requirement are essential to establishing "administrative exhaustion," which in turn is a prerequisite to bringing a Title VII suit.¹⁵⁵ These two requirements come from Section 2000e-5 of the Title VII statute.¹⁵⁶

B. *Presentment*

Plaintiffs may face another important hurdle to bringing a Title VII claim in federal court. Some federal courts will only consider discrimination allegations that are like or reasonably related to the allegations in an initial EEOC charge.¹⁵⁷ This requires an individual filing a charge with the EEOC to look ahead to the claims it may wish to bring in a federal lawsuit at the time the charge is filed. However, Congress did not include a presentment requirement in Title VII's statutory language. Rather, federal courts created the presentment requirement.

Whether a charge was timely filed or a right-to-sue letter was issued are relatively straightforward inquiries. Timely filing can be

federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief.").

¹⁵² 29 C.F.R. § 1601.28(a)(2) (2009).

¹⁵³ *Id.*

¹⁵⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

¹⁵⁵ *See, e.g., Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005).

¹⁵⁶ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2006).

¹⁵⁷ *See, e.g., B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100 (9th Cir. 2002) ("Allegations of discrimination not included in the plaintiff's administrative charge may not be considered by a federal court unless the new claims are like or reasonably related to the allegations contained in the EEOC charge.") (internal quotation marks omitted).

proven by comparing the date a charge was filed with the date of the original discriminatory conduct alleged in a federal complaint. If a plaintiff can produce a right-to-sue letter, then she will have satisfied the right-to-sue letter requirement. Enforcing the presentment requirement, however, requires courts to compare the facts underlying an EEOC charge with the allegations presented in a federal complaint.

In *Hungate v. Winter*, a 2007 Southern District of California case, one of the plaintiff's discrimination claims was dismissed for lack of jurisdiction because it was not presented to the EEOC.¹⁵⁸ *Hungate* is an example of how a federal court determines whether the presentment element is satisfied.¹⁵⁹ Maria Alicia Hungate, a Mexican American woman, worked for the Navy for 17 years.¹⁶⁰ During that time, she suffered from ankle, wrist, hand, and spinal disc problems.¹⁶¹ Hungate was fired in August 2004.¹⁶² Believing that she had been terminated as the result of unlawful discrimination, she contacted her unit's Human Resources department.¹⁶³

The *Hungate* court dismissed one of Hungate's federal claims for lack of subject matter jurisdiction by retracing her actions after her initial contact with Human Resources.¹⁶⁴ The court noted that Hungate filed a "written complaint" with the EEOC on September 27, 2004.¹⁶⁵ The court noted that in that complaint, Hungate "checked a box indicating that she wished to allege disability discrimination."¹⁶⁶

¹⁵⁸ *Hungate v. Winter*, 05CV2296, 2007 WL 1975436 (S.D. Cal. May 3, 2007).

¹⁵⁹ *Id.* at *7.

¹⁶⁰ *Id.* at *1.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Hungate v. Winter*, 05CV2296, 2007 WL 1975436, at *7 (S.D. Cal. May 3, 2007).

¹⁶⁵ The rules applicable to federal employees like Hungate are substantively similar to those that apply to private sector employees. See *Mathirampuzha v. Potter*, 548 F.3d 70, 75 (2d Cir. 2008) (stating that "the requirement that a federal employee bring a complaint to his or her EEO for resolution . . . [is] analogous to the requirement that a private sector employee first bring a complaint to the attention of the [EEOC] for resolution." (quoting *Terry v. Ashcroft*, 336 F.3d 128, 150 (2d Cir. 2003))). The document that triggers an investigation for federal employees who complain of discriminatory conduct is referred to as a formal complaint, as opposed to a charge. *Filing a Formal Complaint*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm (last visited Dec. 18, 2010). A charge must contain the same information as a formal complaint. Compare *id.* (formal complaint) with *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Dec. 18, 2010) (charge).

¹⁶⁶ *Hungate*, 2007 WL 1975436, at *2.

On November 19, 2004, Hungate was interviewed by an Equal Employment Opportunity counselor.¹⁶⁷ The counselor prepared a written report following the interview, which described the basis of Hungate's complaint as "harassment due to physical disability."¹⁶⁸ However, the report also noted that Hungate described several incidents of discrimination and that "[o]ne of the incidents . . . alleged was an incident where [Hungate's] supervisor, Gloria Case, asked [Hungate] to speak English after hearing [Hungate] speaking Spanish at work."¹⁶⁹

Hungate filed another complaint with the EEOC on December 30, 2004, and again checked a box indicating that she had been discriminated against on the basis of her physical disabilities.¹⁷⁰ The EEOC dismissed Hungate's complaint as untimely.¹⁷¹ When Hungate appealed, she did not allege that her complaint should have been construed as alleging anything other than disability discrimination.¹⁷²

In her federal complaint, brought after the EEOC dismissed her administrative complaint, Hungate alleged two claims: (1) disability discrimination; and (2) that "Defendant also harassed and discriminated against Plaintiff on the basis of Plaintiff's race, national origin, and/or ancestry in violation of Title VII."¹⁷³

Hungate's disability claim was dismissed as untimely.¹⁷⁴ The court also dismissed Hungate's claim that she was discriminated against on the basis of race, national origin, or ancestry for lack of subject matter jurisdiction because the claim had not been presented to the EEOC.¹⁷⁵ To find that the claim had not been presented to the EEOC, the court relied upon its construction of the administrative documents Hungate filed: "Plaintiff repeatedly failed to check available boxes indicating a claim for discrimination on the basis of race, color, or national origin, and did not mention the basis for liability in her narrative on the complaint form."¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Hungate v. Winter*, 05CV2296, 2007 WL 1975436, at *2 (S.D. Cal. May 3, 2007).

¹⁷³ *Id.* at *1.

¹⁷⁴ *Id.* at *6-7.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *6.

The court rejected Hungate's argument that she had exhausted her administrative remedies as to her Title VII discrimination claim "by relating the incident where she was told to speak English at work to [the EEO Counselor]."¹⁷⁷ The court held that action did not satisfy Hungate's duty to "reveal her intent and provide notice of her claims."¹⁷⁸ According to the court, her "mere mention of the incident where [Hungate's] supervisor told [her] to speak English at work did not put the EEOC or Defendant on notice of a claim for discrimination on the basis of race, color, or national origin."¹⁷⁹ In concluding that Hungate's race, color, national origin, or ancestry allegations were not "like or reasonably related to" the disability allegations, the court again based its conclusions on Hungate's EEOC filings, concluding that her "administrative actions were based on Plaintiff's allegations of disability discrimination" alone.¹⁸⁰

The *Hungate* order demonstrates that presentment turns on the content of an administrative charge and later written administrative materials. Communicating a claim of race discrimination to a counselor is not enough to present a claim. Presentment, according to *Hungate*, requires that both the potential defendant and the EEOC be given a very specific kind of notice to allow the plaintiff to later bring a claim in federal court. That is, it is not enough to give verbal notice; written administrative documents are the only way to provide notice and satisfy the presentment requirement.¹⁸¹

C. *Notice Even When No One Is Listening: The Current Justifications for Administrative Exhaustion Requirements Fail*

Like the *Hungate* court, other federal courts adjudicating Title VII claims place great importance on the administrative processes that precede the filing of a Title VII case and repeatedly mention the importance of "notice" to both the EEOC and an accused

¹⁷⁷ *Id.* at *5.

¹⁷⁸ *Hungate v. Winter*, OSCV2296 2007 WL 1975436, at *5 (S.D. Cal. May 3, 2007).

¹⁷⁹ *Id.* at *6.

¹⁸⁰ *Id.* at *2.

¹⁸¹ A recent Ninth Circuit memorandum disposition emphasizes that in determining presentment courts look to the contents of a written charge and nothing more. *See Gonzalez v. Nat'l R.R. Passenger Corp.*, No. 09-35422, 2010 WL 1539755, at *1 (9th Cir. Apr. 19, 2010) (comparing allegations in the complaint before it and finding that they were "not described in the EEOC retaliation charge").

employer.¹⁸² The Supreme Court has explained that filing an administrative charge “place[s] the EEOC on notice that someone . . . believes that an employer has violated” Title VII.¹⁸³ Notice is purportedly key because once the EEOC learns of a plaintiff’s allegations, employers may be contacted about settling disputes, and, ideally, litigation will be avoided.¹⁸⁴ Courts have further justified their notice rationale by explaining that Title VII was not meant to create litigation, but rather to eliminate unlawful employment practices through informal settlement.¹⁸⁵ Under this rationale, informal settlement is presumably impossible without pre-litigation notice of a charge’s allegation.

Some courts have averred that the presentment requirement is also justified in terms of notice.¹⁸⁶ Putting employers on notice of all charges against them at the administrative level has been said to promote resolution of disputes without resort to litigation.¹⁸⁷ Violating the presentment requirement by “[a]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge” would “circumvent” the EEOC’s ability to informally resolve a charge.¹⁸⁸ These justifications fail for several reasons.

First, the presentment requirement bears no resemblance to the EEOC’s actual investigation. Enforcing the presentment requirement in no way defers to the EEOC’s investigatory powers. The presentment requirement allows only those claims like or reasonably related to the allegations in the charge filed with the EEOC. The “reasonably related to” claims are not necessarily those that the EEOC investigated.¹⁸⁹ If the EEOC declines to investigate a charge, that decision “has no bearing on whether the plaintiff has exhausted her adminis-

¹⁸² See, e.g., *Schnellbaecher v. Baskin Clothing Co.* 887 F.2d 123, 126-27 (7th Cir. 1989).

¹⁸³ *EEOC v. Shell Oil*, 466 U.S. 54, 68 (1984).

¹⁸⁴ *Edwards v. North Am. Rockwell Corp.*, 291 F. Supp. 199, 203 (C.D. Cal. 1968).

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., *Sommato v. United States*, 255 F.3d 704, 709-10 (9th Cir. 2001) (citing *Cooper v. Bell*, 628 F.2d 1208, 1211 (9th Cir. 1980) (noting that an employee’s complaint must be presented in a way that provides sufficient notice to allow for administrative measures which might avoid litigation)).

¹⁸⁷ *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878-79 (5th Cir. 2003) (citing *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1327 (10th Cir. 1999); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998)).

¹⁸⁸ *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985).

¹⁸⁹ *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100 (9th Cir. 2002) (accepting jurisdiction only over “allegations of discrimination that either ‘fell within the scope of the EEOC’s actual investigation or an EEOC investigation which *can reasonably be expected* to grow out of the

trative remedies with regard to that claim.”¹⁹⁰ Therefore, a charge that the EEOC found meritless may still be brought in federal court. Federal courts are willing to overlook the EEOC’s decision that a certain claim lacked merit so long as their analysis finds that the claim was “reasonably related” to the contents of the EEOC charge. Why allow claims that the EEOC passed on to be brought in federal court: Because the “like or reasonably related to” test bears no relation to the EEOC’s actual practices.

Second, the “like or reasonably related to” test does not limit the EEOC. The EEOC may look beyond the charge filed when conducting an investigation.¹⁹¹ It may investigate discrimination affecting the person who filed the charge, as well as discrimination affecting others it discovers in the course of its investigation of a single charge.¹⁹² Its investigatory powers are so unfettered that it may “contin[ue] to investigate a charge of systemic discrimination even after the charging party has filed suit” to pursue its obligation to serve the public interest.¹⁹³ The claim the *Hungate* court so easily dismissed is one the EEOC could have investigated and attempted to resolve had the agency come across the claim in the course of its investigation because the EEOC is not limited to only the subject matter of its initial investigations.

Thus, the presentment requirement ignores the realities of Title VII enforcement. The EEOC lacks the resources to enforce Title VII, and therefore, private litigants stand in the shoes of the EEOC. If private litigants stand in the EEOC’s shoes, they too should not be constrained by the contents of the initial charge. As they gather facts and uncover additional claims, they too should be allowed to amplify the scope of their investigation. That is, if a claim was not reasonably related to the initial charge, there should be no bar to bringing it in a federal complaint. Although the EEOC lacks the funds to enforce Title VII in the way it was intended to and private plaintiffs are left to stand in its stead, private plaintiffs, even those that have the resources

charge of discrimination”) (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)).

¹⁹⁰ *Id.* at 1099 (citing *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1480 (9th Cir. 1997)).

¹⁹¹ See EEOC, COMPLIANCE MANUAL, *supra* note 104, at § 22.3.

¹⁹² *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 852-53 (9th Cir. 2009).

¹⁹³ *Id.* at 852.

which the EEOC lacks to investigate, are left more restricted than the agency whose role they are performing.

Third, the “like or reasonably related to” requirement purports to defer to the EEOC’s superior skill in mediating Title VII claims, forbidding the circumvention of its tried and true procedures. Yet the EEOC itself has created a mechanism through which an EEOC investigation can be circumvented. The EEOC cannot complete most of its investigations in under 180 days.¹⁹⁴ The EEOC will issue a right-to-sue letter after 180 days if an investigation is still pending and the plaintiff asks for the letter.¹⁹⁵ Therefore, if a certain amount of time has passed, the EEOC acknowledges that its investigation is not worth the wait, and its procedures may be circumvented. Holding a plaintiff to the charges she filed in her initial complaint, when that plaintiff’s charges were not pursued by the agency, shortchanges the plaintiff at both ends. The plaintiff is denied the thorough EEOC investigation she was due under Title VII and, furthermore, she is limited to claims that she may have filed without the help of a lawyer.

Fourth, because the EEOC can neither investigate every charge filed nor bring suit in every instance in which it determines that a charge has merit, omitting allegations later brought in a federal complaint from a charge presented to the EEOC does not rob the EEOC of the opportunity to resolve claims. The EEOC is not able to take action on every allegation presented to the agency, so “notice” at the charge-filing stage is meaningless. That an allegation is not included in an original charge does not render the allegation less meritorious or prevent the EEOC from investigating it. If the EEOC learns of a key allegation as the result of an employee’s federal complaint, it is not barred from taking action based on that knowledge.

Finally, allowing a plaintiff to bring allegations in a federal complaint does not thwart out-of-court settlement. Parties to Title VII lawsuits may still engage in court-sponsored settlement and mediation.

¹⁹⁴ *Statements of Members of Congress and Other Interested Individuals and Organizations: Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. On Appropriations*, 111th Cong. 41 (2009) (statement of Gabrielle Martin, President, National Council of EEOC Locals).

¹⁹⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Filing a Lawsuit*, *supra* note 114.

IV. RENDERING PRESENTMENT JURISDICTIONAL VIOLATES SUPREME COURT PRECEDENT AND FUNDAMENTAL PROCEDURAL PRINCIPLES

The manner in which administrative exhaustion requirements are enforced varies across the federal circuits.¹⁹⁶ Circuits that require presentment violate the Supreme Court's approach to exhaustion requirements; furthermore, they render presentment, a meaningless exercise, unwaivable even though personal jurisdiction, a more fundamental requirement, may be waived.¹⁹⁷ Finally, they improperly impose heightened pleading requirements on Title VII plaintiffs.¹⁹⁸

A. *The Supreme Court's View on Pre-Filing Requirements*

As explained above, there are several aspects of administrative exhaustion in Title VII cases. First, a timely charge must be filed with the EEOC; second, a plaintiff must receive a right-to-sue letter; and third, the allegations relating to Title VII claims in federal court must track the scope of the EEOC charge.¹⁹⁹ The first two requirements are derived from the language of Title VII itself.²⁰⁰

Title VII requires plaintiffs to seek administrative remedies before filing suit in federal court.²⁰¹ Statutes like Title VII that provide federal jurisdiction over a certain class of claim may also delineate the steps a plaintiff must complete before filing suit.²⁰² These pre-filing requirements describing what a plaintiff must do before filing suit are referred to as a statute's exhaustion requirements.²⁰³

By way of review, if an exhaustion requirement in a federal statute is deemed "jurisdictional in nature," a failure to exhaust that administrative remedy typically will deprive a federal court of jurisdiction.²⁰⁴ Other exhaustion requirements, by contrast, are prudential.

¹⁹⁶ See *infra* Part IV.B.

¹⁹⁷ See *infra* Part IV.A-D.

¹⁹⁸ See *infra* Part IV.E.

¹⁹⁹ See *supra* Part III.A-B.

²⁰⁰ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5).

²⁰¹ See *Id.* at 47.

²⁰² *Id.*

²⁰³ *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

²⁰⁴ See, e.g., *Vasquez v. County of L.A.*, 349 F.3d 634, 644-46 (9th Cir. 2003) (treating exhaustion as jurisdictional and dismissing the case when exhaustion had not been satisfied).

For example, exhaustion requirements that are judicially created are prudential.²⁰⁵ Courts have also found some statutory exhaustion requirements to be prudential as well.²⁰⁶ These “prudential” requirements can be bypassed under certain circumstances, including by waiver, estoppel, tolling, or futility.²⁰⁷ If exhaustion requirements are jurisdictional, they are “a prerequisite to a court’s subject matter jurisdiction,” and “[r]egardless of whether there is a compelling reason a plaintiff failed to exhaust, a court is without subject matter jurisdiction to hear the plaintiff’s claim.”²⁰⁸

Title VII is not the only statute for which courts have implied a presentment requirement.²⁰⁹ The Supreme Court has cautioned that although the requirement that an issue be presented to an agency is a common non-jurisdictional exhaustion requirement, it is not appropriate to require it in all instances: “The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.”²¹⁰ That is, in order to be heard on appeal, issues must be raised at the trial level because the trial court is better equipped to conduct fact finding.²¹¹ In the administrative context, “courts require administrative issue exhaustion ‘as a general rule’ because it is usually ‘appropriate under [an agency’s] practice’ for ‘contestants in an adversary proceeding’ before it to develop fully all issues there.”²¹² However, when an administrative proceeding is not adversarial, the need for issue exhaustion dissipates.²¹³

In *Zipes v. Trans World Airlines, Inc.*,²¹⁴ the Supreme Court held that Title VII’s timely charge requirement “is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”²¹⁵ The Court noted that “[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and

²⁰⁵ *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007).

²⁰⁶ *Id.* at 175 (citing *Buck v. Hampton Twp Sch. Dist.*, 452 F.3d 256, 262 (3d Cir. 2006)).

²⁰⁷ *Id.* at 174.

²⁰⁸ *Id.*

²⁰⁹ See WRIGHT & KOCH, *supra* note 49, at § 8398.

²¹⁰ *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000).

²¹¹ See *id.* at 109.

²¹² *Id.* (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)).

²¹³ *Id.* at 110.

²¹⁴ 455 U.S. 385 (1982).

²¹⁵ *Id.* at 393.

it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”²¹⁶ Because the timely filing requirement was clearly unrelated to Title VII’s jurisdictional provisions, it was a not a jurisdictional prerequisite to suit, but, rather, was waivable.²¹⁷

B. *Presentment as Jurisdictional Requirement: Circuit Split*

The circuits are split on whether the presentment requirement is a jurisdictional prerequisite. According to the Fifth Circuit, *Zipes* did not address “exhaustion.”²¹⁸ Rather, it addressed “filing deadlines.”²¹⁹ In the Fifth Circuit, whether a claim is exhausted is based solely on whether the presentment requirement has been met.²²⁰ However, the question of whether presentment is jurisdictional is still open in the Fifth Circuit.²²¹ Unfortunately, this conundrum—establishing subject matter jurisdiction without presentment, but failing to show exhaustion without presentment—is still good law in the Fifth Circuit.

The Seventh Circuit considers the presentment requirement “analogous to timely filing requirements and is thus not a jurisdictional rule.”²²² In *Babrocky v. Jewel Food Co.*, the Seventh Circuit explained:

The requirement of scope also differs substantially from more common elements of subject matter jurisdiction, such as whether a complaint presents a federal question or adequately establishes diversity of citizenship and the requisite amount in controversy. Subject matter jurisdiction generally can be determined facially. In contrast, an inquiry into the scope of the charge always entails an inquiry beyond

²¹⁶ *Id.* at 394.

²¹⁷ *Id.* at 398.

²¹⁸ *Pacheco v. Mineta*, 448 F.3d 783, 788 n.7 (5th Cir. 2006).

²¹⁹ *Id.*

²²⁰ *Id.* at 788-89. In this respect, the Fifth Circuit stands on its own. Even the circuits that limit *Zipes*’ application to issues that do not relate to the timeliness of a charge acknowledge that *Zipes* is a decision about exhaustion. See *Wilson v. MVM, Inc.*, 475 F.3d 166, 174-75 (3d Cir. 2007) (stating that *Zipes* addressed an exhaustion requirement, and citing decisions from “sister circuits who have commented upon the nature of Title VII exhaustion requirements” in *Zipes*).

²²¹ *Pacheco*, 448 F.3d at 788 n.7 (“Neither the Supreme Court nor this court sitting *en banc* has ruled that the *exhaustion* requirement is subject to waiver or estoppel, and our panels are in disagreement over that question.”).

²²² *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (quoting *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985)).

the face of the complaint into the legal characterizations that surround the barebones of the factual allegations contained in the charge. In addition, such an inquiry may require evidence of the breadth of the EEOC investigation that followed the filing of the charge to determine whether the charge was adequate to support all of the allegations advanced in the complaint.²²³

Thus, presentment is not a jurisdictional requirement in the Seventh Circuit.

In the Tenth Circuit, an unpublished case has held that presentment is a jurisdictional requirement. Specifically, that court held that “[a] plaintiff’s claim in federal court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC.”²²⁴

The Ninth Circuit has acknowledged that “the failure to file a timely EEOC administrative complaint is not a jurisdictional prerequisite to a Title VII claim, but is merely a statutory requirement subject to waiver, estoppel and equitable tolling.”²²⁵ Also, the failure to obtain a federal right-to-sue letter is not jurisdictional.²²⁶ However, “substantial compliance with the presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite.”²²⁷ That is, the statutory prerequisites are not jurisdictional in the Ninth Circuit, but the sole prerequisite that has no statutory basis has been deemed jurisdictional. In the Ninth Circuit, “Subject matter jurisdiction [only] extends to all claims of discrimination that fall within the scope of the EEOC’s actual investigation or an EEOC investigation that could reasonably be expected to grow out of the charge.”²²⁸

But the Ninth Circuit has done further damage. Although the Supreme Court has explained that the timely charge requirement is not jurisdictional, an oft-cited Ninth Circuit case discusses exhaustion

²²³ *Babrocky*, 773 F.2d at 863.

²²⁴ *Dalvit v. United Airlines, Inc.*, 359 F. App’x. 904, 911 (10th Cir. 2009) (quoting *Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1183 (10th Cir. 2007)).

²²⁵ *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)).

²²⁶ *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008).

²²⁷ *Sommatino*, 255 F.3d at 708.

²²⁸ *Vasquez v. County of L.A.*, 349 F.3d 634, 644 (9th Cir. 2003) (citing *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th Cir. 2002)).

without explaining which aspect of exhaustion is jurisdictional.²²⁹ In *Lyons v. England*, a leading case decided in 2002, the Ninth Circuit described the administrative exhaustion requirement in the following terms:

To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative remedies before seeking adjudication of a Title VII claim. Exhaustion of administrative remedies under Title VII requires that the complainant file a timely charge with the EEOC, thereby allowing the agency time to investigate the charge.²³⁰

This rule statement preceded the *Lyons* court's analysis of whether incidents of discrimination not included in an EEOC charge, but alleged in a federal claim, were "like or reasonably related to the allegations contained in the EEOC charge."²³¹ However, *Lyons* never explains that the "timely" requirement is not jurisdictional. As a result, despite *Zipes*, district courts in the Ninth Circuit describe both the "timely" requirement and the "presentment" requirement as jurisdictional issues.²³²

Because of this lack of clarity in post-*Lyons* opinions, the Ninth Circuit has effectively converted all aspects of exhaustion into jurisdictional requirements. It has explained that although it "do[es] not recognize administrative exhaustion under Title VII as a *jurisdictional requirement per se*," the question is reviewable de novo as an issue of subject matter jurisdiction.²³³ In other words, each challenge to exhaustion is treated as a challenge to a court's subject matter jurisdiction, whether or not the requirement in question is jurisdictional.

However, this take on exhaustion by the Ninth Circuit conflicts with its prior precedent. A 1973 case that is still good law, *Oubichon v. North Am. Rockwell Corp.*, does not treat presentment as an issue of subject matter jurisdiction.²³⁴ In *Oubichon*, the Ninth Circuit reversed a district court order that granted dismissal for lack of sub-

²²⁹ *Lyons v. England*, 307 F.3d 1092, 1103-04 (9th Cir. 2002).

²³⁰ *Id.* (citations and internal quotations omitted).

²³¹ *Id.* at 1104 (quoting *Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1475-76 (9th Cir. 1989)).

²³² *See, e.g., Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) (explaining that a claim must ordinarily be presented to the EEOC before a district court can have jurisdiction over that claim).

²³³ *Vinieratos v. United States*, 939 F.2d 762, 768 n.5 (9th Cir. 1991).

²³⁴ *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 570-71 (9th Cir. 1973).

ject matter jurisdiction.²³⁵ The district court held that the federal court complaint could not encompass any conduct not alleged in the initial charge.²³⁶ The appellate court reversed, instead holding that “it is not always clear whether later incidents are reasonably related to or grow out of earlier incidents on which complaint is made.”²³⁷ As a result, the presentment dispute could not be resolved “as a matter of law”; rather, a trial was needed to resolve the factual disputes regarding whether allegations in the federal complaint were “like or reasonably related” to the underlying charge.²³⁸ Under *Oubichon*, the presentment requirement was a question of fact. It was open to debate. It was not an unwaivable issue of subject matter jurisdiction.

Oubichon does not stand on its own. In 1990, *Albano v. Schering-Plough Corp.*, a Ninth Circuit case that is also still good law, provided that “equitable considerations may excuse a claimant’s noncompliance with the scope requirement, and resulting failure to exhaust administrative remedies”²³⁹ Therefore, the subject matter rule stated in *Lyons* is not *stare decisis* in the Ninth Circuit—it’s merely misrepresentation of earlier precedent.

Even more disturbing, the Ninth Circuit’s approach, and that of other appellate and districts courts that require presentment to establish subject matter jurisdiction, is not following the analysis the Supreme Court set forth in *Zipes*.

C. *Presentment Is a Prudential, Not Jurisdictional, Requirement*

Several circuits entertain or explicitly set forth the idea that the presentment requirement, and potentially other exhaustion requirements, are jurisdictional requirements.²⁴⁰ However, holding that the presentment requirement is jurisdictional conflicts with Supreme Court jurisprudence regarding exhaustion requirements.

²³⁵ *Id.* at 571.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Albano v. Schering-Plough Corp.*, 912 F.2d 384, 387 (9th Cir. 1990). “It is well-settled that the failure to file an EEOC charge is not jurisdictional but is merely a condition precedent to suit. A claimant’s failure to amend his charge to include a new claim is essentially the same as a claimant’s failure to file an EEOC charge for the new claim. Framed in this manner, it is clear that equitable considerations may generally apply to excuse a claimant’s failure to amend his EEOC charge.” *Stache v. Int’l Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988).

²⁴⁰ *Vasquez v. County of L.A.*, 349 F.3d 634, 644 (9th Cir. 2003).

First, a jurisprudential presentment requirement conflicts with the Supreme Court's holding in *Zipes*.²⁴¹ Title VII does not set forth a presentment requirement. It requires that the initial charge made to the EEOC "be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."²⁴² Just like the timely filing requirement, the content of the charge is not mentioned in Title VII's jurisdictional sections. Indeed, when any Ninth Circuit opinion notes that the presentment requirement is jurisdictional, it does so without citation to a statute, even though to be "jurisdictional," the requirement must be based on a statutory provision.²⁴³

Applicable regulations provide some guidance regarding what must be included in an initial charge.²⁴⁴ However, the regulations make no mention of the requirement that a federal complaint track the allegations made in the initial charge.²⁴⁵ Even if they did, any such requirement would not be jurisdictional because the EEOC's regulations are not binding.²⁴⁶ Because the presentment requirement is unrelated to Title VII's jurisdictional provisions, it is not a jurisdictional prerequisite to suit, but waivable.

Furthermore, although *Sims* has not been applied in the Title VII context, the Court's conclusions in that case merit consideration in this context. Like the proceedings before the Social Security Administration, a claimant's relationship with the EEOC is not adversarial. As noted in *Sims*, when an administrative proceeding is not adversarial, the need for issue exhaustion dissipates.²⁴⁷ Claimants should be able to raise new issues for the first time in federal court under Title VII.

²⁴¹ *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

²⁴² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (2006).

²⁴³ See *supra* text accompanying notes 214-217.

²⁴⁴ See 29 C.F.R. § 1601.12(a) (2009).

²⁴⁵ See *id.*

²⁴⁶ *Burns v. Coca-Cola Enters.*, 222 F.3d 247, 257 n.6 (6th Cir. 2000) ("Although the Supreme Court has held that courts may look to the EEOC's regulations for guidance, it has cautioned that the regulations are not binding authority.").

²⁴⁷ *Sims v. Apfel*, 530 U.S. 103, 110 (2000).

D. *Exhaustion Is No More Significant Than Personal Jurisdiction, Which Is Waivable*

In addition to incorrectly labeling presentment a jurisdictional requirement, courts that deem presentment a jurisdictional requirement elevate this aspect of administrative exhaustion above other fundamental procedural principles. For example, although the presentment requirement is not waivable, personal jurisdiction is. This is true even though personal jurisdiction is “an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication.”²⁴⁸ The Supreme Court has explained that personal jurisdiction is waivable because it represents a restriction on judicial power with respect to individual liberty.²⁴⁹ Subject matter jurisdiction, on the other hand, “serve[s] institutional interests,” and keeps the federal courts “within the bounds the Constitution and Congress have prescribed.”²⁵⁰

Forcing Title VII plaintiffs to present all allegations they wish to bring in federal court before an administrative agency that will likely never have the opportunity to consider them serves no practical, let alone constitutional, purpose. Moreover, unlike personal jurisdiction, which is waivable, the presentment requirement is not related to any identifiable liberty. If personal jurisdiction is waivable, the presentment requirement of administrative exhaustion should be as well.

E. *Requiring Presentment Violates Principles of Notice Pleading*

A Title VII defendant has ample opportunity to complain about whether he received notice of the charges against him. Rule 8 of the Federal Rules of Civil Procedure requires that a federal pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁵¹ This aspect of Rule 8 “indicates that a basic objective of the rules is to . . . require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader’s claim and a general indication of the

²⁴⁸ *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)) (internal quotations omitted).

²⁴⁹ *Id.* (“Therefore, a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court’s exercise of adjudicatory authority.”).

²⁵⁰ *Id.* at 583.

²⁵¹ FED. R. CIV. P. 8.

type of litigation that is involved.”²⁵² A defendant is entitled to a complaint sufficient enough to provide him with the ability to respond to its charges, and no more.²⁵³

Requiring that all allegations presented to a federal court also be presented in an EEOC charge, which is later provided to an employer, creates a rule of duplicative notice above and beyond what the federal rules require. Presentment has become, in effect, a heightened pleading standard, even though the Supreme Court has emphatically held that there is no heightened pleading requirement in Title VII cases.²⁵⁴

V. PROCEDURAL IMPLICATIONS OF CONVERTING EXHAUSTION INTO A SUBJECT MATTER JURISDICTION REQUIREMENT

Subject matter jurisdiction is a heady concept. Federal courts are courts of limited jurisdiction. Courts limit the subject matter of the cases they hear to “keep the federal courts within the bounds the Constitution and Congress have prescribed.”²⁵⁵ For that reason, a subject matter jurisdiction objection survives trial and appeal; it survives as long as the litigation itself.²⁵⁶ The edict is clear: “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”²⁵⁷

A subject matter jurisdiction objection is a much more powerful tool for a defendant to have in his arsenal than a mere affirmative defense. When an appellate court announces that the presentment requirement is a matter of subject matter jurisdiction, it subjects a Title VII claim to the risks associated with subject matter jurisdiction. What is more disconcerting is that the Ninth Circuit introduces the concept of administrative exhaustion in general as one that determines the scope of a court’s subject matter jurisdiction without explaining that the timely filing requirement is not jurisdictional. In doing so, the Ninth Circuit has exposed all aspects of administrative

²⁵² 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 (3d ed. 2004).

²⁵³ *Id.*

²⁵⁴ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569-70 (2007).

²⁵⁵ Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

²⁵⁶ Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006) (“The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.”).

²⁵⁷ FED. R. CIV. P. 12(h)(3).

exhaustion to a subject matter jurisdiction objection. This Part explains the various consequences that a “subject matter jurisdiction” label imposes.

Deeming administrative exhaustion a prerequisite to subject matter jurisdiction is much more than a matter of semantics. A subject matter jurisdiction objection or defense can be raised at any time. It is a “protected” defense.²⁵⁸ In contrast, an affirmative defense, like a statute of limitations objection, cannot be raised for the first time on appeal.²⁵⁹ In most federal courts, failure to plead an affirmative defense in a responsive pleading results in the waiver of that defense for the course of the litigation.²⁶⁰

This difference can have a tremendous impact on Title VII plaintiffs. Title VII plaintiffs are employees or job applicants suing their employers or potential employers. In a Title VII case, their livelihood is often on the line. Because a Title VII claim is essentially a claim of employee versus employer, the employee is generally at a disadvantage because the employer is normally in a more financially advantageous position than the employee. Lack of financial resources may force a Title VII plaintiff to appear pro se.²⁶¹ If not appearing pro se, a Title VII plaintiff may hire a lawyer who will only work for a contingency fee. That lawyer may refuse to incur costs that are not advanced by his financially-strapped client.

At the very early stages of litigation, Title VII plaintiffs may survive even a motion to dismiss if all aspects of administrative exhaustion are treated as affirmative defenses. In this scenario, affirmative defenses would be raised in Rule 12(b)(6) motions to dismiss.

²⁵⁸ Erin Murray Watkins, Comment, *The Scope of Employment Requirement of the Federal Tort Claims Act*, 17 GEO. MASON L. REV. 533, 546-47 (2010) (“Lack of subject matter jurisdiction is a protected defense, which means that even if a defendant fails to raise it immediately, he does not waive the ability to raise it later on.”) (citing FED. R. CIV. P. 12(h)(3)).

²⁵⁹ *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (“Failure to raise an affirmative defense below results in waiver.”) (citing *Harbeson v. Parke-Davis, Inc.*, 746 F.2d 517, 720 (9th Cir. 1984)).

²⁶⁰ WRIGHT & MILLER, *supra* note 252, at § 1278 (“It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case”).

²⁶¹ Suzy Fox & Lamont Stallworth, *How Effective is an Apology in Resolving Workplace Bullying Disputes?*, 61 DISP. RESOL. J. 54, 60 n.19 (2006) (“A party with less economic power may be forced to appear without counsel.”) (citing Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y. L. SCH. J. HUM. RTS., 1 (1994)).

Defendants cannot win such motions by raising factual challenges,²⁶² and whether administrative remedies have been exhausted will be a question of fact.²⁶³ For example, presentment will be decided based on comparing the charge presented to the EEOC to the federal complaint. Categorizing administrative exhaustion as a waivable defense aids disadvantaged plaintiffs at the motion to dismiss stage because all they must do is raise the argument that the issue is a factual one that should not be decided by a pleadings motion. They need not gather discovery to make this argument.

Moreover, defendants who raise administrative exhaustion at this stage will have the burden of pleading it.²⁶⁴ All facts will be construed in a plaintiff's favor.²⁶⁵ By contrast, if administrative exhaustion is a matter of subject matter jurisdiction, the burden of establishing jurisdiction will lie with the plaintiff.²⁶⁶

A Title VII plaintiff's chances worsen as a case proceeds. If administrative exhaustion is a matter of subject matter jurisdiction, it can be raised at the summary judgment stage and beyond.²⁶⁷ At summary judgment, discovery will have already commenced.²⁶⁸ A plaintiff's lawyer working on a contingency fee will not have the same incentives to gather discovery as will a defense lawyer paid by the hour.²⁶⁹ Pro se plaintiffs, even if they do gather discovery, will be

²⁶² *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (“[F]actual challenges to a plaintiff’s complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6).”).

²⁶³ *Performance Contracting, Inc. v. Seaboard Sur. Co.*, 163 F.3d 366, 369 n.3 (6th Cir. 1998) (stating that whether administrative remedies have been exhausted is a question of fact).

²⁶⁴ *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997) (“Because untimely exhaustion of administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving it.”) (citing *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985)).

²⁶⁵ *Lee*, 250 F.3d at 679 (“All factual allegations set forth in the complaint ‘are taken as true and construed in the light most favorable to plaintiffs.’”) (quoting *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999)).

²⁶⁶ *Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997).

²⁶⁷ *See, e.g., Brown v. State*, No. 08-00470, 2009 WL 2744013, at *5 (D. Haw. Aug. 28, 2009) (questioning whether the exhaustion requirement is jurisdictional, but nevertheless granting summary judgment as to the claim that was not presented in the administrative charge).

²⁶⁸ *See, e.g., Glaude v. Gates*, No. C08-04317, 2009 WL 2485731, at *1 (N.D. Cal. Aug. 7, 2009) (discussing presentment aspect of administrative exhaustion raised by defendant at summary judgment after pro se plaintiff testified about the scope of his claims in a deposition).

²⁶⁹ *See Andrea J. Paterson, Fee Agreements: Structuring Alternative Fee Agreements to Enhance Recovery of Fees and Align Interests of Attorneys and Clients*, 35 TEX. ADVOC. 10 (2006) (arguing “most plaintiffs’ attorneys cling to the contingency fee agreement . . . The contingency fee lawyer has an incentive to cut corners. Conversely, a lawyer paid by the hour has an incentive to ‘over-prepare’ for trial and conduct discovery that might be of marginal utility.”).

much less skilled than their paid adversaries.²⁷⁰ Moreover, studies have shown that defendants' summary judgment motions are granted more often in civil rights and employment cases than in other civil cases.²⁷¹

Even if a defendant fails to raise the issue in his summary judgment papers, this oversight can be remedied by any court that does not like the plaintiff's case or believes that it must raise the issue to ensure that it has jurisdiction. Any issue implicating subject matter jurisdiction may be raised *sua sponte*.²⁷² Labeling administrative exhaustion a matter of subject matter jurisdiction empowers federal courts to dismiss a Title VII claim whenever they find an issue with administrative exhaustion—thus, a jurisdictional issue.²⁷³

²⁷⁰ Jessica Case, Note, *Pro Se Litigants at the Summary Judgment Phase: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701, 703-04 (2002) (arguing “summary judgment can be particularly difficult for a pro se litigant because the requirements of the [federal summary judgment] rule are somewhat complex and the pro se litigant may not be aware of her obligation to submit reply affidavits.”).

²⁷¹ Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 549 (2010) (“Federal Judicial Center studies of summary judgment practice have determined that summary judgment is granted disproportionately to dismiss civil rights and employment cases. (citing Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, 3 (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/\\$file/insumjre.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf)). In the most recent study conducted by the Federal Judicial Center, 77% of summary judgment motions in employment discrimination cases and 70% of summary judgment motions in other civil rights cases were granted, in whole or in part, as compared with 61% of summary judgment motions in torts cases, and 59% of summary judgment motions in contracts cases. *Id.* (citing Cecil & Cort, *supra*, at 9 tbl. 4). Further, 20% of employment discrimination cases and 10% of other civil rights cases had at least one summary judgment motion granted, in whole or in part, as compared with 5% of tort and 6% of contracts cases. *Id.* (citing Cecil & Cort, *supra*, at 16 tbl.11). Additionally, 15% of employment discrimination cases and 6% of other civil rights cases were terminated by summary judgment, as compared with 3% of torts and 4% of contracts cases. *Id.* (citing Cecil & Cort, *supra*, at 17 tbl.12).

Another recent study of Federal Judicial Center database cases for fiscal year 2006 showed that an employment discrimination plaintiff faced an over 80% likelihood that a summary judgment motion would be granted in whole or in part. Joseph A. Senier, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1013, 1033 tbl.C (2009).

²⁷² *Snell v. Cleveland, Inc.*, 316 F.3d 822, 826 (9th Cir. 2002) (“Federal Rule of Civil Procedure 12(h)(3) provides that a court may raise the question of subject matter jurisdiction, *sua sponte*, at any time during the pendency of the action, even on appeal.”); *Summers v. Interstate Tractor & Equip. Co.*, 466 F.2d 42, 49-50 (9th Cir. 1972).

²⁷³ See, e.g., *Glaude*, 2009 WL 2485731, at *6 (granting defendant's motion for summary judgment on grounds of lack of subject matter jurisdiction even though “[n]either party raised the question of subject-matter jurisdiction in their motion papers or during the motion hearing” because “a federal court may address a lack of subject-matter jurisdiction *sua sponte*” (citing FED. R. CIV. P. 12(h)(3))).

A Title VII plaintiff also faces an uphill battle on appeal. The subject matter jurisdiction objection remains available. If administrative exhaustion were a question of fact, and the district court had found in favor of the plaintiff, the issue would be reviewed for abuse of discretion. However, a question of law is reviewed *de novo*.²⁷⁴ Therefore, even if a plaintiff won a favorable subject matter jurisdiction ruling in district court, an appellate court may be more willing to overturn such a ruling than it would be to overturn a factual determination.²⁷⁵ If a plaintiff wins a favorable verdict, he will still be reversed more often than a plaintiff in any other sort of civil case.²⁷⁶

Furthermore, if presentment implicates subject matter jurisdiction, fewer decisions will be reached on the merits. Federal courts were intended to play a “crucial role” in Title VII’s enforcement.²⁷⁷ They should be developing standards about what is and is not a Title VII violation rather than aggressively eliminating cases before any such decision can be reached. Yet if a case is dismissed for lack of subject matter jurisdiction, there will never be any decision on the merits. Rather, there will be reams of paper devoted to discussions of whether a plaintiff has exhausted his administrative remedies, but little discussion of whether the elements of a Title VII claim have been met.

²⁷⁴ See *Leong v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003) (“The district court’s determination that it lacks subject matter jurisdiction because the plaintiff failed to exhaust administrative remedies is reviewed *de novo*.” (citing *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th Cir. 2002))).

²⁷⁵ See Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423, 473 (1994) (explaining that with *de novo* review, the underlying decision “is protected by a gossamer film, so languid and diaphanous that a reviewing court finds little to prevent it from substituting its views for those [below]” whereas under the abuse of discretion standard, the underlying decision “is safeguarded by a kevlar shield, theoretically all but impregnable to the reviewing court’s prodding, provided that the [underlying] decision has been forged in a process in which it considered all relevant factors and balanced those factors in a rational fashion.”).

²⁷⁶ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 111 (2009) (“[T]he appellate courts reverse plaintiffs’ wins below far more often than defendants’ wins below. The statistically significant differential exists for appeals from wins at the stage of pretrial adjudication (thirty percent compared to eleven percent), and it becomes more pronounced for appeals from wins at the trial stage (forty-one percent compared to nine percent).” (citing Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 450 (2004))).

²⁷⁷ *Loe v. Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985) (citing *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 825-29 (1976)).

VI. THE DOUBLE WHAMMY OF INEXPERIENCE: TWO POSSIBLE REASONS WHY COURTS IMPROPERLY REQUIRE PRESENTMENT TO ESTABLISH SUBJECT MATTER JURISDICTION IN TITLE VII CASES

As detailed above, the proposition that the presentment requirement is necessary to establish subject matter jurisdiction stands on shaky ground. There are several possible reasons why it has yet to be questioned.

First, the presentment rule is often introduced as an established rule of law. In *Lyons*, the subject matter jurisdiction rule appears in a paragraph just below the court's restatement of the standard of review.²⁷⁸ It precedes any analysis of the facts of the case before the court. Just like the rule of law set forth in the standard of review, the paragraph representing the subject matter jurisdiction rule lends itself well to cutting and pasting by authors of later opinions and orders.

The subject matter jurisdiction section is also the portion of an opinion that may be delegated to a law clerk or, at times, to a judicial extern still in law school. When a law clerk or extern needs to state a rule of law, the rule of law already stated in *Lyons* fills a need. The rule in *Lyons*, in fact, may already exist in earlier opinions or orders the law clerk or extern has already written for his or her judge—opinions and orders which are Shepardized, but are otherwise not subject to much scrutiny. This subject matter jurisdiction rule is precisely the kind of rule that may confuse a law clerk or extern who has never studied employment discrimination let alone administrative exhaustion. It is easier to just restate the rule as it was applied in an earlier case.

A second reason hovers over this area of the law. Much has been written about “the ideological predilections of federal judges,” and that “many federal judges have expressed the view that employment discrimination and civil rights cases are often weak and without merit.”²⁷⁹ However, there may be a related yet slightly different reason for the judiciary's treatment of Title VII cases.

When Congress amended Title VII in 1972 to provide coverage to certain federal employees, it only covered employees in the “competi-

²⁷⁸ *Lyons v. England*, 307 F.3d 1092, 1103-04 (9th Cir. 2002).

²⁷⁹ Schneider, *supra* note 271, at 519 (citing Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557 (2001)).

tive service” of the judicial branch.²⁸⁰ However, most court employees are not in the competitive service.²⁸¹ In fact, “judicial employees are among the few remaining groups to be deprived of coverage under Title VII.”²⁸²

If most court employees are not protected by Title VII, then their supervisors likely do not receive Title VII training. The effect of shielding federal judges from the category of American supervisors who receive discrimination training may be enormous. If judges are never subject to sexual harassment training, for example, the only access to complaints about discriminatory behavior they see are in the cases before them.

Scholars have noted that “federal judges appointed over the last few years appear to . . . not identify with employment discrimination or civil rights plaintiffs—whether because of race, gender, disability, age difference, or a lack of sensitivity to problems in the workplace,” viewing these kinds of cases as “petty, involving whining plaintiffs complaining about legitimate employment or institutional matters, rather than important civil rights issues.”²⁸³ If judges were subject to training in their own workplace, they might receive added insight into what modern employment discrimination looks like outside of a courtroom.²⁸⁴ When employers receive sexual harassment or other discrimination training, the training often involves hypotheticals regarding the very workplace whose employees are receiving the training. Judges may see Title VII plaintiffs in a different light if they are shown how discrimination may happen in their own chambers. They may

²⁸⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a) (2006) (“All personnel actions affecting employees or applicants for employment . . . in those units of the judicial branch of the Federal Government having positions in the competitive service . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.”).

²⁸¹ Lynn K. Rhinehart, Note, *Is There Gender Bias in the Judicial Law Clerk Selection Process?*, 83 GEO. L.J. 575, 595 (1994) (citing Eric Neisser, *Affirmative Action in Hiring Court Staff: The Ninth Circuit's Experience*, 26 HOW. L.J. 53, 56 (1983)).

²⁸² *Id.* at 596.

²⁸³ Schneider, *supra* note 271, at 564 (internal footnote omitted).

²⁸⁴ Barnard & Rapp, *supra* note 2, at 667-68 (“The significance of Title VII lies not just in the legislated mechanisms created to monitor discrimination in the workplace, but also in the radical changes to the American work environment inspired by the policies underlying that legislation. . . . Title VII has also drastically shifted notions about generally acceptable versus unacceptable conduct toward co-workers. Thus, in addition to modified workplace protocol has come an even more radical shift: Title VII has not just changed the face of the American workforce, but the minds of that workforce as well.” (internal footnotes omitted)).

become more willing to let Title VII cases be heard on the merits if Title VII plaintiffs become even the slightest bit more relatable.

CONCLUSION

The presentment requirement does not, at first blush, seem insurmountable. All a Title VII plaintiff must do, after all, is include incidents of discrimination in his EEOC charge to have those same incidents considered by a federal court. Courts construe EEOC charges “‘with utmost liberality since they are made by those unschooled in the technicalities of formal pleading.’”²⁸⁵ In fact, a court “will consider a plaintiff’s claims to be reasonably related to allegations in the charge ‘to the extent that those claims are consistent with the plaintiff’s original theory of the case.’”²⁸⁶

However, these lenient standards are misleading. Some courts analyze the presentment requirement in particular and administrative exhaustion in general as though it were a prerequisite to a court’s subject matter jurisdiction. As a result, any objection a defendant has to the manner in which a Title VII plaintiff exhausted administrative remedies may be raised at any time—pretrial, post-trial, and on appeal. It is never waived. If it were a waivable affirmative defense, defendants would have one opportunity to raise the objection, and would generally raise it at the motion to dismiss stage, when plaintiffs have a fair chance of defeating it.

This type of rule is unsound on several grounds. It conflicts with Supreme Court precedent, and in at least one circuit (the Ninth), has the effect of unintentionally overruling precedent. More importantly, it ignores the reality of the EEOC’s enforcement power. Title VII plaintiffs are required to present their allegations to an agency that lacks the resources to investigate and resolve them. Yet the rule that administrative exhaustion establishes subject matter jurisdiction is copied and pasted into one opinion after another without regard for what exhaustion actually entails.

The impact of labeling the presentment requirement a prerequisite to subject matter jurisdiction ensures that an objection to whether a plaintiff has presented his allegations to the EEOC before bringing

²⁸⁵ *Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir. 2002) (quoting *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th Cir. 2002)).

²⁸⁶ *Id.* at 1104 (quoting *B.K.B.*, 276 F.3d at 1100).

them to federal court survives every stage of litigation. If a plaintiff wins at the trial level, he or she may have to defend the scope of the allegations in a federal complaint at the appellate level. Title VII cases should not be subject to uncertainty at every stage of litigation. Litigation should be the last resort for a Title VII plaintiff. If it worked as it is intended to work, the EEOC would either resolve administrative charges, or bring suit itself. There is no question that delayed litigation in which a plaintiff's verdict is always vulnerable was not the intent behind Title VII.²⁸⁷

The practical effect of the Ninth Circuit's rule is worth considering. The Ninth Circuit treats all of the exhaustion requirements as jurisdictional, a rule with tremendous implications for Title VII cases. In the 12-month period ending December 30, 2008, more civil rights cases were filed in district courts in the Ninth Circuit than in district courts in any other circuit.²⁸⁸

This sledgehammer of a technical rule—the presentment requirement is in essence a notice requirement that precedes the federal case to which it applies—comes down especially hard on Title VII plaintiffs. Title VII was designed to be enforced by private litigants of limited means, many of whom will continue to appear pro se. Courts should not require “absolute compliance with formal pleading requirements” of these plaintiffs.²⁸⁹ “Suit thresholds warrant interpretation with sensitivity to Title VII's remedial aims.”²⁹⁰ Title VII was meant to be accessible to those without legal sophistication. Those that forget its history “slight the legislature's central command.”²⁹¹

²⁸⁷ *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

[T]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into ‘voluntary compliance’ and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them. In a better world, perhaps, lawsuits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of litigation would not be as important a consideration.

Id.

²⁸⁸ *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2008*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2008/dec08/C03Dec08.pdf> (last visited Dec. 26, 2010).

²⁸⁹ *Chung v. Pomona Valley Cmty. Hosp.*, 667 F.2d 788, 790 (9th Cir. 1982).

²⁹⁰ *Loe v. Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985).

²⁹¹ *Id.* (citations omitted).

Thus, Title VII claims should be easy for private litigants to bring.²⁹² The Ninth Circuit has stated that “it would falsify the Act’s hopes and ambitions to require verbal precision and finesse from those to be protected,”²⁹³ The presentment requirement is the very kind of technical defense that should not be rigidly enforced against Title VII plaintiffs, who are meant to act as “private attorney[s] general,”²⁹⁴ and are “the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority.”²⁹⁵

²⁹² *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”).

²⁹³ *Chung*, 667 F.2d at 790 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970)).

²⁹⁴ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994) (quoting *Piggie Park*, 390 U.S. at 402).

²⁹⁵ *Id.* (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)).

