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Employment Discrimination in State and Local Government: Title VII Amended and Section 1983 Revisited

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EMPLOYMENT DISCRIMINATION: A TITLE VII SYMPOSIUM

"But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Mr. Justice Harlan dissenting in
Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

EMPLOYMENT DISCRIMINATION IN STATE AND LOCAL GOVERNMENT: TITLE VII AMENDED AND SECTION 1983 REVISITED

While the adoption of the Civil War constitutional amendments may have provided the legal basis for legislation to prevent discriminatory state employment practices, Congress did not enforce with specific legislation the mandate of the equal protection clause until the enactment of Title VII of the Civil Rights Act of 1964.[1] Unfortunately, the 1964 Act was a relatively innocuous law, leaving employment discrimination a private wrong to be redressed through voluntary agreement. Further, a constant source of problems under Title VII was its exemption of certain classes of employees, significantly those of state and local governments. Despite strong Southern opposition, Title VII was amended in 1972 to, *inter alia*, encompass the employment practices of state and local governments.[2]

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1. 42 U.S.C. §§ 2000e—2000e-15 (1970). *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972) [hereinafter cited as *Sape & Hart*] for an extensive discussion of the legislative history of Title VII.

2. 42 U.S.C. § 2000e (Supp. 1972): "(a) The term 'person' includes . . . governments, governmental agencies, political subdivisions . . . ."

Id. § 2000e-2: "(a) It shall be an unlawful employment practice for an employer — (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The new measure had been the primary source of contention of Southern legislators who apparently clung to outdated notions of federalism to defend discriminatory employment practices of state government. Their fervid opposition was typified by the comment of Senator Sam Ervin: "[T]he legislative proposal contained in the bill that,

The employment practices of the states have always been subject to federal scrutiny since Congress enacted the Civil Rights Act of 1871, today existing in part as section 1983 of title 42 of the United States Code. Until the amendment of Title VII the basic form of relief for state sanctioned employment discrimination had been section 1983 which provides:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The use of section 1983 with its comprehensive set of remedies has provided a substantial body of federal precedent invalidating state and local employment practices. While probably not binding on Title VII determination these decisions do show the types of discrimination encountered and the remedies which have been found appropriate. Unfortunately, the courts have read certain limitations into the statute which have precluded it from becoming a completely effective remedy against discriminatory state employment practices.

Section 1983 lay dormant for nearly 100 years.[3] The courts at first favored a narrow construction of it and the other Civil Rights Acts, but in *United States v. Classic*,[4] the United States Supreme Court expanded the reach of the statute when it interpreted the language "[e]very person . . . under color of any statute, ordinance, regulation, custom, or usage of any State," as including not only those state officials who act as authorized by state law but also those who act contrary to state law. The Court reiterated its *Classic* construction in *Screws v. United States*[5] when it held that acts under "pretense" of state law were actionable under a statute nearly identical to section 1983.[6] However, in *Monroe v. Pape*,[7] the Supreme Court placed a

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the EEOC be given jurisdiction over the employment practices of all States and of all the political subdivisions of all States constitutes the most drastic assault upon our Federal system which has been proposed in any legislative proposal to come before Congress at any time in its history." 118 CONG. REC. 1677 (1972); *Sape & Hart* at 848 n.145.

3. *See* Note, 66 HARV. L. REV. 1285 (1953) for a discussion of the historical development of section 1983.

4. 313 U.S. 299 (1941).

5. 325 U.S. 91 (1945).

6. 18 U.S.C. § 242 (1964) is a criminal provision corresponding to section 1983 and contains much of the same language.

7. 365 U.S. 167 (1961).

significant limitation on the scope of section 1983 when it held that a municipal corporation was not a "person" subject to suit within the meaning of that statute. Thus, the individual and not the municipal or state agency is held liable, and the action must be brought against the particular state or local official who is directly responsible for the action. Unfortunately, successfully joining the governmental entity can be of great significance in damage and equity claims: The government has a greater source of funds from which to satisfy judgments, and in addition, forcing a governmental entity to satisfy money judgments should create an incentive for it to seek out and correct wrongful employment practices. Equitable relief against an entity may also be far more effective than relief against individual officials, since an injunction against a named governmental official can only be enforced against him; his successors in office would presumably then be free to continue the discriminatory practices.[8]

In *Monroe* the Court examined the legislative history of the Civil Rights Act and concluded that Congress was "so antagonistic" to the concept of holding cities, counties, or parishes liable the Court could not "believe that the word 'person' was used" to include them.[9] Since the *Monroe* case dealt solely with a damage action against a municipality there was considerable disagreement about the scope of the decision. The Seventh Circuit Court of Appeals in *Adams v. City of Park Ridge*[10] treated *Monroe* as a policy decision and refused to follow it with respect to suits in equity:

> The facts in Monroe v. Pape suggests [sic] several inherent reasons for excluding municipalities from liability for damages, such as unauthorized misconduct of the officers, lack of power of city [sic] to indemnify plaintiffs for such misconduct, and a city's governmental immunity . . . . None of the reasons which support a city's immunity from an action for damages . . . applies to this case.[11]

Thus, in a section 1983 action the court enjoined the enforcement of a municipal ordinance and declared it unconstitutional. The court saw no policy reason "why a city and its officials should not be restrained from prospectively violating a plaintiff's constitutional rights pursuant to its own legislative enactment, and an injunction

8. *See* Comment, 43 COLO. L. REV. 105 (1971).

9. 365 U.S. 167, 191 (1961).

10. 293 F.2d 585 (7th Cir. 1961). *See also* Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969).

11. 293 F.2d at 587.

not be granted as provided in section 1983."[12] In finding *Monroe* inapplicable to suits for injunctive or declaratory relief, the Seventh Circuit chose to ignore the famous footnote 50 of the Supreme Court's opinion in which it discussed equitable claims.[13] The Fifth Circuit specifically limited *Monroe* to suits seeking damages in *Harkless v. Sweeney Independent School District.*[14] In that case ten black school teachers brought a section 1983 action against the school district, school trustees, and superintendent for *reinstatement* and *back pay* when their contracts were not renewed after the district was desegregated. The court stated that although state law characterized the school district as a municipality, it would allow the equitable relief sought irrespective of *Monroe.* That case, the court reasoned, is binding precedent only to the extent of its *ratio decidendi*; that is, "no cause of action lies against a municipality under section 1983 for damages under the doctrine of respondeat superior for the conduct of its police officers."[15] In allowing the suit against a municipal corporation under section 1983, equity was not construed as being limited only to suits for declaratory and injunctive relief; claims for back pay were also allowed as elements of the equitable remedy of reinstatement.[16]

Just when it seemed that section 1983 did afford a meaningful remedy against employment discrimination in state and local governments, the United States Supreme Court re-examined the relationship between section 1983 and municipalities. In *City of Kenosha, Wisconsin v. Bruno,*[17] appellees brought an action under section 1983 naming as defendants only the cities of Kenosha and Racine, Wisconsin. For the first time since *Monroe,* the Court specifically addressed the question, only alluded to in footnote 50, of whether a municipality

12. *Id.*

13. In referring to previous cases in which equitable relief had been granted against parties defendant who included cities, the court cautioned: "The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can longer be drawn from those cases." 365 U.S. at 191 n.50.

14. 427 F.2d 319 (5th Cir. 1970).

15. *Id.* at 321.

16. It had been argued that while a municipality may be sued directly for declaratory and injunctive relief, it may not be sued for compensatory damages (*e.g.*, back pay). *See Sape & Hart* at 849 n.155. The United States Supreme Court in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) concluded that the back pay issue was not a separate legal claim but rather a part of the main equitable claim for reinstatement and thus did not require jury determination under the seventh amendment. *See* Johnson v. Georgia H'way Exp., Inc., 417 F.2d 1122 (5th Cir. 1969).

17. 412 U.S. 507 (1973).

is a "person" within the meaning of section 1983.[18] The Court found no justification for lower court decisions, specifically *Adams*, which treated the municipality as a "person" when equitable relief was sought.

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.[19]

Thus it is now clear that municipal corporations are outside the ambit of section 1983 for the purposes of equitable relief as well as for damage claims.

The Supreme Court also laid to rest, last term, a line of cases using section 1988 to do what *Monroe* indicated that section 1983 would not allow. Section 1988 provides that where federal law is deficient in providing a remedy for violating a person's constitutional rights, the law of the forum shall govern.[20] *Monroe*, it was claimed, is based on a legislative history which indicated that Congress intended to avoid interfering with the liability and immunity of municipal governments which were to be left to the control of the states.[21] Thus, in *Carter v. Carlson*,[22] the District of Columbia Court of Appeals reasoned that whenever local law permits a suit for damages against municipalities, federal courts are permitted by section 1988 to adopt that local law when it promotes the policies behind section 1983. This approach would have been especially appealing to a Louisiana employee because of the recent abrogation of the judicially created doctrine of sovereign immunity.[23] But in *Moor v. County*

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18. *See* note 14 *supra*.

19. 412 U.S. 507, 513 (1973).

20. 42 U.S.C. § 1988 (1970): "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the states wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

21. 365 U.S. 167, 187-91 (1961).

22. 447 F.2d 358 (D.C. Cir. 1971).

23. Board of Comm'rs v. Splendour Ship. & Ent. Co., 273 So. 2d 19 (La. 1973).

of Alameda,[24] the United States Supreme Court rejected any such use of section 1988.

Moor and Rundle brought suit against several law enforcement officers and Alameda County for damages for injuries suffered in a civil disturbance. Petitioners did not dispute the holding of *Monroe* concerning the status of municipalities under section 1983, but argued that if section 1983 restricts an aggrieved party from recovery, the section cannot be considered "fully adapted" to the protection of civil rights within the meaning of section 1988. They contended that since the municipality was subject to liability under state law, the federal court ought to "borrow" and apply the state rule under section 1988. The Court flatly rejected this contention. Section 1988, it said, does not enjoy the independent stature of an act of Congress protecting civil rights. The role of section 1988 is only to "complement the various acts which do create federal causes of action for the violation of federal civil rights,"[25] not to create a separate cause of action.

> We cannot infer any congressional intent other than to exclude all municipalities—regardless whether or not their immunity has been lifted by state law—from the civil liability created in . . . § 1983 . . . . § 1988 . . . cannot be used to accomplish what Congress clearly refused to do in enacting § 1983.[26]

At one time, a frequent impediment to the prosecution of suits under the Civil Rights Act had been the requirement that a plaintiff exhaust state remedies before proceeding in federal court. But a trio of cases led by *Monroe* have put to rest such requirement. In *Monroe*, the Court said:

> It is no answer that the state has a law which if enforced would give relief. The federal remedy is *supplementary* to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[27]

The *Monroe* decision dealt with the issue of deference to state judicial

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The court held that "the Board of Commissioners of the Port of New Orleans and other such boards and agencies are not immune from suit in tort." The full impact of the decision is yet to be determined, but because such boards and agencies are generally reputed to be closer to the actual sovereign (*i.e.*, the state) than are municipal corporations, the latter are now undoubtedly subject to liability. *See* Comment, 34 LA. L. REV. 69, 73 (1973).

24. 411 U.S. 693 (1973).

25. *Id.* at 702.

26. *Id.* at 710.

27. 365 U.S. at 183. (Emphasis added.)

remedies in an action for damages by a black who had been abused by the Chicago police. The Supreme Court in *McNeese v. Board of Education*[28] extended this holding to a case involving an inadequate state administrative remedy. It was settled in *Damico v. California*[29] that even adequate state remedies need not be pursued before federal relief will be granted. Thus, there are no exhaustion requirements in suits under sections 1981 and 1983.[30]

The terms of section 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that defendant has deprived him of a right secured by the Constitution and laws of the United States. Second, the plaintiff must show that the defendant deprived him of his constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory."[31] *Castro v. Beecher*[32] demonstrates how statistical imbalance is used to satisfy the first requirement and make out a case of de facto segregation under section 1983. A prima facie case of racial discrimination is established and the burden of persuasion is shifted when it is shown that a particular employer has a work force performing a particular type of work in an area in which there are a large number of persons belonging to a particular ethnic or other minority group and the percentage of that group employed by that employer at that work is substantially lower than the percentage of that area.[33]

Once discrimination is statistically established, the courts have fashioned appropriate remedies under section 1983. In *Carter v.*

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28. 373 U.S. 668 (1963).

29. 389 U.S. 416 (1967). In a per curiam opinion it was held that relief under the Civil Rights Act could not be defeated because of a failure to exhaust administrative remedies provided under state law.

30. Gillian v. Omaha, 459 F.2d 63 (8th Cir. 1972); James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970).

31. United States v. Price, 383 U.S. 787 (1966); Monroe v. Pape, 365 U.S. 167 (1961); Keys v. Sawyer, 353 F. Supp. 936 (D.C. Tex. 1973). *See also* Adickes v. Kress & Co., 398 U.S. 144 (1970)(holding that a mere custom without the force of state law is not "state action.") Section 1983 protects not only constitutional rights, but also federal statutory rights. Gomez v. Florida State Emp. Serv., 417 F.2d 569, 579 (5th Cir. 1969).

32. 459 F.2d 725 (1st Cir. 1972). "In the problem of racial discrimination statistics often tell much and the courts listen." Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962).

33. In *Western Addition Community Organization v. Alioto*, 340 F. Supp. 1351 (N.D. Cal. 1972), this principle was applied to shift the burden of persuasion to the defendant public employer. A stronger version holds that a grossly disproportionate racial disparity in employment is, in itself, a violation of law. NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972).

Gallagher,[34] a class action was brought by five blacks on behalf of themselves and all minority persons similarly situated in the city of Minneapolis alleging discriminatory hiring practices by the fire department. They produced evidence that of the 535 men in the fire department none were black, Indian, or Mexican-American, and that blacks constituted 6.44 percent of the Minneapolis population. The court of appeals found no substantial evidence to rebut the inference of racial discrimination based upon the statistics. Accordingly, the court ordered that one out of every three persons hired by the fire department be a minority person until at least twenty minority persons were hired. In so holding, the court noted that notwithstanding the anti-preference treatment section of Title VII,[35] it is within the power of a court to order affirmative relief to correct the effects of past unlawful discrimination.[36]

Other effective remedies are available under section 1983. *Allen v. City of Mobile*[37] involved a class action brought on behalf of black police officers alleging that the city police department assigned them patrol duties and other work on the basis of race rather than ability; that only black officers were assigned as partners to other blacks to ride patrol cars. The district court agreed and formulated a comprehensive plan for removing all practices of racial discrimination in the department. It imposed patrol zone assignments, pairings of black and white officers, classroom instruction in intergroup relations, a non-discriminatory recruitment program, and a new seniority system.[38]

Now that Title VII has been amended to include coverage of state and local governments, the question arises whether non-Title VII causes of action alleging employment discrimination are still viable. At first, private employers who had been sued under section 1981, contended that Title VII preempted non-Title VII causes of action.[39]

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34. 452 F.2d 315 (1971).

35. 42 U.S.C. § 2000e—2j (Supp. 1972).

36. United States v. Local 86, Ironworkers, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Local 86, Bridge & Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970). *See also* NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972)(requiring Alabama state patrol to hire one minority group member for every non-minority group member until demographic parity is achieved). For more extensive discussion of minority preference in fashioning affirmative relief see this *Symposium*, 34 LA. LAW REV. 552 (1974).

37. 331 F. Supp. 1134 (S.D. Ala. 1971).

38. The use of seniority systems and selection-promotion testing is discussed at length in this *Symposium*, 34 LA. LAW REV. 572 (1974).

39. *See, e.g.*, Smith v. North American Rock. Corp., 50 F.R.D. 515 (N.D. Okla. 1970).

It is now clearly settled that the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedies provided under sections 1981 or 1983.[40] However, the alternative remedies are not absolutely independent of each other as illustrated in the leading case of *Waters v. Wisconsin Steel Works of International Harvester Co.*[41] The Seventh Circuit held that in light of the strong congressional policy favoring the use of conciliation techniques expressed in Title VII, a party seeking to bring suit under section 1981 must first show a "reasonable excuse"[42] for failing to first proceed through Title VII mechanisms. Similar reasoning has been followed with respect to section 1983.[43]

The Fifth Circuit has taken a more liberal approach by permitting a party, who deliberately by-passed EEOC administrative procedures, to seek an independent remedy for employment discrimination under section 1981.[44] The court followed the Third Circuit's opinion in *Young v. International Telephone and Telegraph Co.*,[45] holding that nothing in Title VII imposes any jurisdictional barrier to a suit brought under section 1981. The court in *Young* recommended procedures which would preserve the full remedy of section 1981 while implementing the conciliatory policy at the heart of Title VII. The court pointed to provisions in Title VII giving the district court power to stay any relief until the conciliatory procedures to Title VII are carried out,[46] and to a section authorizing the EEOC to assist the parties in the conciliation process even during the pendency of the lawsuit.[47]

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40. Caldwell v. National Brew. Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Boudreaux v. Baton Rouge Marine Const. Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); Wisc. Steel Wks. of Int'l Harv. Co., 427 F.2d 476 (7th Cir. 1970); O'Brien v. Shrimp, 356 F. Supp. 1259 (D.C. Ill. 1973); Rice v. Chrysler Corp., 327 F. Supp. 80 (E.D. Mich. 1971).

41. 427 F.2d 476 (7th Cir. 1970).

42. *Id.* at 487.

43. "The 'reasonable excuse' standard of *Waters* is somewhat more flexible than the title 42 section 2000e-5(e) standard of EEOC administrative exhaustion. Thus the same conduct in regard to failing to file before the EEOC may on the one hand foreclose a Title VII suit in federal court for failure to exhaust administrative remedies, while on the other hand be 'reasonably excusable' enough under the more liberal standard of *Waters* to allow for a § 1981 or § 1983 suit." O'Brien v. Shrimp, 356 F. Supp. 1259, 1265 (E.D. Ill. 1973).

44. Caldwell v. National Brew. Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972).

45. 438 F.2d 757 (3d Cir. 1971).

46. 42 U.S.C. § 2000e-5(e) (Supp. 1972). Supposedly, conciliation will be more successful when a preliminary injunction preserves the status quo for the aggrieved employee. 438 F.2d at 764.

47. 42 U.S.C. § 2000e-4(f) (Supp. 1972); 438 F.2d at 764 (1971).

The reasoning in these cases, mostly directed to the relationship between section 1981 and Title VII, is equally true for section 1983 which can be similarly reconciled with Title VII as now amended. The legislative history of the 1972 amendments clearly indicates Congress' desire to preserve non-Title VII causes of action with respect to governmental entities.[48]

The amendment of Title VII to include discriminatory employment practices by state and local governments means there are now available alternative grounds upon which to base employee complaints. In fact several courts which heard section 1983 claims prior to the 1972 amendments utilized the jurisprudence that had developed around Title VII litigation against private employers. The court of appeals in *Castro v. Beecher*,[49] while recognizing that the subsequent expanded coverage of Title VII should not govern the purely past conduct of the litigants, nevertheless drew upon cases decided under provisions of Title VII applicable to private employers, such as the Supreme Court decision in *Griggs v. Duke Power Co.*,[50] to strike down racially discriminatory employment requirements and examinations.

> Although differing from the present case in the respect that it was a decision under Title VII of the Civil Rights Act of 1964, . . . Griggs construed broad statutory language proscribing classification of employees 'in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race' . . . . We cannot conceive that the words of the Fourteenth Amendment, as it has been applied in [1983] cases, demand anything less.[51]

Other section 1983 claims against governmental employers, although not governed by Title VII when raised, have been scrutinized against EEOC employment guidelines.[52] Unfortunately this proposition has

48. "In establishing the applicability of Title VII to state and local employees, the committee wishes to emphasize that the individual's right to file a civil action in its own behalf, pursuant to the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected." H.R. REP. No. 238, 92d Cong., 1st Sess. 18-19 (1971).

49. 459 F.2d 725 (5th Cir. 1972).

50. 401 U.S. 424 (1971).

51. 459 F.2d at 733.

52. Chance v. Board of Exam., 458 F.2d 1167 (2d Cir. 1972); Davis v. Washington, 352 F. Supp. 187 (D.D.C. 1972); Commonwealth of Pa. v. O'Neil, 348 F. Supp. 1084 (E.D. Pa. 1972); Western Add. Comm. Org. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972).

also been applied in an undesirable way. An Alabama district court,[53] in a section 1983 action by blacks alleging employment discrimination by the police department, felt constrained to apply "the law specifically adopted by Congress in reference to equal employment opportunity, 42 U.S.C. § 2000e."[54] Although section 1983 and 2000e are equally available to employees who have been discriminated against, the court held:

> the statutes must be construed in light of each other, and it is obvious from a reading of § 2000e that Congress, in its infinite wisdom, concluded that, since 100 years of remedy under § 1983 had accomplished so little, serious consideration should be given to securing 'voluntary' compliance under the equal opportunity law.[55]

This simply is not true; debates culminating in the passage of Title VII strongly support the conclusion that it was not intended to supersede existing remedies. Congress rejected an amendment that would have made Title VII the exclusive federal remedy for employment discrimination.[56]

Finally, given the varying remedies now available to an individual alleging public employment discrimination, the prospective plaintiff faces a strategy decision of whether to pursue section 1983 or seek a Title VII remedy. Both avenues have relative advantages and disadvantages. Title VII requires the victim of an alleged unlawful employment practice to proceed under available state statutes and administrative remedies before a charge can be filed with the EEOC.[57] Similarly, commencement of action before the EEOC is a jurisdictional prerequisite to an employment practices suit under Title VII.[58] Section 1983 does not require exhaustion of state remedies or federal administrative procedures.[59] However, pursual of EEOC

53, Smiley v. City of Montgomery, 350 F. Supp. 451 (M.D. Ala. 1972).

54. *Id.* at 456.

55. *Id.*

56. 110 CONG. REC. 13650-52 (1964); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970). *See* note 49 *supra*.

57. 42 U.S.C. § 2000e-5(b) (Supp. 1972); Abshire v. Chicago & E. Ill. R.R., 352 F. Supp. 601 (D.C. Ill. 1972). In the recent case of *Love v. Pullman Co.*, 404 U.S. 522 (1972), the Supreme Court held that the requirement of section 2000e-5(b) could be met by having the EEOC file a complaint on behalf of the aggrieved party with the appropriate state agency.

58. 42 U.S.C. § 2000e-5(e) (Supp. 1972); Dent v. St. Louis-San Fran. Ry., 406 F. 2d 399 (5th Cir. 1969); O'Brien v. Shrimp, 356 F. Supp. 1259 (E.D. Ill. 1973).

59. "If a party seeks to avoid section 2000e-5 and its exhaustion requirement and instead pursues a perceived grievance through section 1983, which incorporates no such

administrative procedures makes available to the aggrieved individual EEOC investigative reports not available to non-Title VII litigants.[60] Undoubtedly, recent United States Supreme Court decisions render section 1983 a less desirable remedy against public employers than it once promised to be. Claims for back pay, once recoverable under the equitable remedy distinction, probably will be unsuccessful in section 1983 actions. Title VII, on the other hand, specifically authorizes both claims for back pay[61] and attorney's fees.[62]

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requirement, that is his prerogative." O'Brien v. Shrimp, 356 F. Supp. 1259, 1264 (E.D. Ill. 1973). *See* text accompanying note 31 *supra.*

60. 42 U.S.C. § 2000e-8(e) (Supp. 1972). *But see* H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1973).

61. 42 U.S.C. § 2000e-5(g)(Supp. 1972).

62. *Id.* § 2000e-5(k)(Supp. 1972).