UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 58 | Number 2 Article 7

1-1-1980

Employment Discrimination -- Hart v. J.T. Baker Chemical Co.: Third Circuit Declares Time Limit to File Discrimination Charge with EEOC Nonjurisdictional

Murray Harris

NOTES

Employment Discrimination—*Hart v. J.T. Baker Chemical Co.*: Third Circuit Declares Time Limit to File Discrimination Charge with EEOC Nonjurisdictional

Title VII of the Civil Rights Act of 1964[1] requires an aggrieved party to file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) within a specified period of time.[2] The statute is silent, however, on the nature of this time limitation, and courts disagree on the effect of a failure to comply.[3] While some courts treat the Title VII filing period as a jurisdictional prerequisite, others treat it as a statute of limitations. The significance of this distinction lies in the availability of equitable relief in cases of late filing. If the time limit is held to be jurisdictional, untimely filing is an absolute bar to the maintenance of a suit notwithstanding equitable considerations such as tolling for fraudulent concealment.[4] If the time limit is analogous to a statute of limitations, however, a claimant can invoke equitable doctrines to excuse the failure to comply.[5] In *Hart v.*

---

1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

2. *Id.* § 2000e-5(e) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . , such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

As originally enacted, the filing deadline was 90 days unless procedures were commenced under state or local law, in which case the deadline was 210 days after the discriminatory act or 30 days after receiving notice of termination of state proceedings, whichever was earlier. Pub. L. No. 88-352, 78 Stat. 241, § 706(d) (formerly codified at 42 U.S.C. § 2000e-5(d) (1970)). The current version was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, § 706(e) (codified at 42 U.S.C. § 2000e-5(e) (1976)).

In addition to the deadline for filing charges with the EEOC, there is a 60-day waiting period before a charge can be filed with the EEOC if prior resort to a state remedy is required under 42 U.S.C. § 2000e-5(c) (1976).

3. *See* notes 67-77 and accompanying text *infra*.

4. "The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, nor yet even by estoppel." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 7 (3d ed. 1976); *see* Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811, 842, 844 n.179 (1979).

5. *See* Smith v. American President Lines, Ltd., 571 F.2d 102, 109 & n.12 (2d Cir. 1978).

J.T. Baker Chemical Co.,[6] the United States Court of Appeals for the Third Circuit held that timely filing with the EEOC is not a jurisdictional prerequisite to a suit in district court.[7] Although this decision adds to the growing weight of authority holding the filing requirement to be nonjurisdictional,[8] the circuits remain split on this issue.[9]

In *Hart*, plaintiff was discharged from her employment as a biochemist on July 29, 1973.[10] She did not file a formal charge with the EEOC, however, until November 17, 1974, which was 477 days after her discharge.[11] Although this filing was untimely, plaintiff alleged that she was unaware of the possible discriminatory motive for her discharge until December 1973, when a state employment counselor informed her of a discriminatory remark made by her former supervisor.[12] On September 22, 1974, within 300 days of discovering this remark, plaintiff sent a letter to the EEOC raising the possibility of a sex-related discharge.[13] This letter informed the EEOC that defendant had not discharged a male biochemist in the same department despite the supervisor's constant complaints about the male employee.[14] Plaintiff's letter of September 22, 1974, however, did not mention the allegedly discriminatory remark,[15] and this omission was repeated in the formal charge filed with the EEOC on November 17, 1974.[16]

Upon receiving a right to sue letter from the EEOC,[17] plaintiff filed a complaint in the United States District Court for the District of

6. 598 F.2d 829 (3d Cir. 1979).

7. *Id.* at 833.

8. *See* text accompanying notes 68, 69 & 77 *infra*.

9. *See* text accompanying notes 67-77 *infra*.

10. 598 F.2d at 830.

11. *Id.* at 830, 834.

12. *Id.* at 830 & n.3. Plaintiff's former supervisor allegedly told an employment counselor that plaintiff was "bowled over by aggressive men at the working level." *Id.* at 830 n.3.

13. *Id.* at 830, 833-34. Plaintiff argued that this letter constituted the filing of a charge, *id.* at 831, even though she subsequently filed a formal charge on November 17, 1974. *Id.* at 830. In holding that the extended 300-day time period did not apply because plaintiff failed to file initially with a state agency, the court used November 17, 1974 as the filing date. *Id.* at 834. The court also stated, however, that the 300-day period would result in a timely filing if the time limit were tolled until December 1973, when plaintiff became aware of the allegedly discriminatory remark. *Id.* In fact, use of the 300-day time period in conjunction with the December 1973 tolling date would still have required filing by the end of October 1974. Therefore, the court seemed to imply that the letter of September 22, 1974, which it characterized as advisory, *id.* at 833, would have sufficed as a timely filing of a charge. On the other hand, this may have been a clerical or mathematical error.

14. *Id.* at 833-34.

15. *Id.* at 834.

16. *Id.*

17. Title VII imposes a 90-day time limit for commencement of civil action after the EEOC has given notice of the right to sue. 42 U.S.C. § 2000e-5(f)(1) (1976).

New Jersey, alleging violation of Title VII.[18] Refusing to toll the filing period, the district court granted summary judgment for defendant,[19]and plaintiff appealed. In affirming the judgment of the district court, the United States Court of Appeals for the Third Circuit held that, although tolling will be allowed in appropriate circumstances, the district court did not err in refusing to toll on the basis of the *Hart* facts.[20] The court affirmed the denial of tolling in *Hart* because plaintiff's charge was based on information within her knowledge at the time of her discharge, rather than on the subsequently discovered remark.[21] This distinction indicates that late discovery of the allegedly discriminatory remark was irrelevant and that plaintiff's suspicions at the time of her discharge would have put a reasonable person on inquiry notice.[22] The court of appeals also agreed with the district court that tolling on these facts might be unfair to defendant, who did not appear to have contributed to the delay.[23]

In holding that tolling was permissible in certain circumstances, the court stated that remedial legislation should be liberally construed in order to fulfill its congressional purposes.[24] Because the purpose of Title VII is the elimination of employment discrimination,[25] the court reasoned, the statute should be interpreted in a "humane and commonsensical manner."[26] In addition, the court noted that it should be

18. 598 F.2d at 830.

19. *Id.* at 830-31. The district court denied defendant's prediscovery motion to dismiss for lack of subject matter jurisdiction. Following discovery, defendant's motion for summary judgment was granted on plaintiff's claims for refusal to rehire and unfavorable references, but was denied on the discriminatory discharge claim. On reconsideration, however, summary judgment was granted on this remaining claim because the court, although finding that the filing requirement might be subject to tolling under certain circumstances, held that the facts of *Hart* did not warrant such equitable relief. Inexplicably, the district court went on to hold that plaintiff's untimely filing deprived it of subject matter jurisdiction. *Id.*

20. *Id.* at 833.

21. *Id.* at 834.

22. *Id.* The court thereby established a standard of diligence for tolling in Title VII cases whereby tolling will be denied if a plaintiff's suspicions would have put a reasonable person on inquiry notice. The Fifth Circuit applies a similar test in delaying the commencement of the filing period "until the claimant knew or should have known the facts which would give rise to his Title VII claim." Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1303 (5th Cir. 1979). *See generally* Jackson & Matheson, *supra* note 4, at 848-50.

23. 598 F.2d at 834.

24. *Id.* at 831.

25. *Id.* at 831-32 (citing H.R. REP. No. 914, 88th Cong., 2d Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401).

26. *Id.* at 831. The court reasoned by analogy to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976), which, as remedial legislation, is entitled to liberal construction. Bonham v. Dresser Indus., Inc., 569 F.2d 187, 192-93 (3d Cir. 1977) (ADEA's 180-day filing period not jurisdictional). In addition, the court acknowledged its prior holding in Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221, 1229 (3d Cir. 1978), that ADEA procedure

flexible in considering procedural errors because the remedial scheme assumes filing by laymen.[27] The court also noted the harsh results of treating the filing requirement as jurisdictional and, therefore, concluded that it was not jurisdictional.[28] In so holding, the court rejected defendant's contention that *Electrical Workers Local 790 v. Robbins & Myers, Inc.*[29] and other United States Supreme Court cases require a determination that the filing requirement is jurisdictional.[30]

Defendant's contention that the Supreme Court had already decided this jurisdictional debate presents one of the main reasons for the disagreement among the circuit courts concerning the nature of the Title VII filing requirement. Specifically, courts disagree whether the Supreme Court decisions in *Electrical Workers, Alexander v. Gardner-Denver Co.*,[31] and *United Air Lines, Inc. v. Evans*[32] are controlling on the nature of the EEOC filing deadline.[33] In *Electrical Workers*, com-

---

should not be interpreted by analogy to Title VII. The court in *Hart* insisted, however, that it was merely relying on the similar substantive policies of Title VII and ADEA, rather than reasoning by analogy to procedural provisions. *But cf.* Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066 (1979) (prior resort requirements of ADEA similar to and patterned after Title VII).

Although Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977) (per curiam), permitted tolling of the ADEA time limit and is often cited by analogy in Title VII cases, the United States Court of Appeals for the Second Circuit has noted that *Dartt*'s affirmance by an equally divided Court reduces its precedential value. Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978).

27. 598 F.2d at 832. The court cited Love v. Pullman Co., 404 U.S. 522 (1972) (no new charge from complainant required for EEOC to begin investigation when EEOC referred complainant's original charge to state agency and formally filed it when state agency declined to act). Concerning the flexible interpretation of laymen's deadlines, the *Love* Court stated:

> The respondent makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

Id. at 526-27 (footnote omitted).

28. 598 F.2d at 832-33.

29. 429 U.S. 229 (1976).

30. 598 F.2d at 832. *See generally* text accompanying notes 31-66 *infra*.

The court held that *Electrical Workers* and other Supreme Court cases were not controlling for four reasons: (1) the rationale of the Supreme Court decisions is unclear; (2) 42 U.S.C. § 2000e-5(f)(3) (1976) grants jurisdiction of Title VII actions to federal courts, but does not deny jurisdiction for late filing; (3) the term "jurisdictional prerequisite" has "crept into Title VII jurisprudence" without explanation or guidance on its applicability and is mere dictum, despite its subsequent use as a basis for Supreme Court holdings; (4) the Court in *Electrical Workers* left tolling an open question as evidenced by its comparison of the facts of that case to those in Burnett v. New York Cent. R.R., 380 U.S. 424, 429 (1965), an improper venue case. *See* Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978).

31. 415 U.S. 36 (1974) (decision of arbitrator under contractual grievance procedure not controlling in Title VII action).

32. 431 U.S. 553 (1977).

33. *See* text accompanying notes 60-66 *infra*.

plainant filed her charge with the EEOC 108 days after her discharge, but only eighty-four days after termination of contractual grievance proceedings.[34] Because she failed to file within the ninety-day limit imposed by Title VII prior to the 1972 amendments,[35] the district court dismissed the complaint and the United States Court of Appeals for the Sixth Circuit affirmed the dismissal.[36] The Supreme Court reversed, holding that the longer 180-day time limit of the 1972 amendments applied to the case because the discriminatory act occurred within 180 days of enactment of the amendments, thereby resulting in a timely filing.[37] In dictum, the Court engaged in a detailed discussion of plaintiff's contention that the Title VII filing requirement should be tolled during contractual grievance proceedings.[38] Although the Court ultimately held that tolling pending contractual proceedings is not permitted,[39] it never stated that the statute absolutely prohibits tolling.[40]

In denying tolling, the *Electrical Workers* Court relied on several factors,[41] some of which imply that the filing period is jurisdictional, and some of which imply that it is a statute of limitations. For example, the Court emphasized that defendant lacked notice of the Title VII charge[42] and stated that the Title VII limitation period was intended to assure "prompt notification to the employer."[43] These factors indicate

34. 429 U.S. at 232.

35. *See* note 2 *supra*.

36. Guy v. Robbins & Myers, Inc., 525 F.2d 124 (6th Cir. 1975).

37. 429 U.S. at 241.

38. *Id.* at 236.

39. *Id.* at 244.

40. The Court in *Electrical Workers* gave the following seven reasons for denying tolling pending contractual proceedings: (1) Title VII actions and contractual proceedings involve independent claims and remedies; (2) the policy of protecting the defendant is not outweighed by the interests of justice as was the case in Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), because plaintiff in *Electrical Workers* was not prevented from asserting her rights, and also did not assert the identical claim in a different forum, thereby giving notice to defendant; (3) the policy of favoring arbitration does not require tolling the Title VII time limit, just as it does not require an arbitration decision to be followed in a Title VII suit as the Court held in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); (4) the danger of conflict in the simultaneous pursuit of remedies does not require tolling because they are separate and independent remedies as was the case in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); (5) courts are not at liberty to excuse a "slight" delay because Congress has specified what delay is acceptable and has defined "Title VII's jurisdictional prerequisites 'with precision' "; (6) by allowing a single, strictly limited extension of time in which to assert a discrimination claim under state law, the logic of negative implication indicates Congress' unwillingness to toll the Title VII time limit pending contractual proceedings; and (7) use of a contractual grievance procedure does not provide prompt notice to defendant of a Title VII charge because it is a different claim, with different issues and standards. *Id.* at 236-40.

41. *See* note 40 *supra*.

42. *See id.*

43. 429 U.S. at 240 n.14. In addition, the Court relied heavily on Johnson v. Railway Ex-

that the filing period is similar to a statute of limitations because equitable considerations of notice and prejudice are irrelevant to a jurisdictional limitation. The Court further suggested that the filing period is similar to a statute of limitations by its reliance on cases in which the running of a limitations period was held not to bar the retroactive application of new legislation to justify its application of the "extended limitation period" of the 1972 amendments.[44] Other considerations relied on by the Court in reaching its decision not to toll indicate, however, that the filing period is jurisdictional.[45] For example, the Court relied on its earlier dictum in *Alexander* that Title VII " 'specifies with precision the *jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit.' "[46]

This dictum in *Alexander* stems from dicta in earlier circuit and Supreme Court cases. In *Beverly v. Lone Star Lead Construction Co.*,[47] the United States Court of Appeals for the Fifth Circuit stated, in dictum, that the only jurisdictional prerequisites for a Title VII suit are filing a complaint with the EEOC and receipt of a notice of the right to sue.[48] Without explanation, the Supreme Court, in dictum in *McDonnell Douglas Corp. v. Green*,[49] added timeliness to the Fifth Circuit's paradigm of jurisdictional prerequisites.[50] The Supreme Court repeated its *McDonnell Douglas* dictum in *Alexander*,[51] and further repeated its *Alexander* dictum in *Electrical Workers*.[52]

---

press Agency, Inc., 421 U.S. 454 (1975), in which the Court refused to toll the state statute of limitations for an action brought under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976), because the complainant's prior filing with the EEOC on an independent claim did not give the defendant adequate notice of the claim under § 1981. 421 U.S. at 467 & n.14. The *Johnson* Court noted that only a timely prior filing of the same cause of action provides the defendant with notice and thereby fulfills the function of the statute of limitations. *Id.*

44. 429 U.S. at 243-44 (citing Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1944); William Danzer Co. v. Gulf & Ship Island R.R., 268 U.S. 633 (1925)).

45. *Id.* at 240.

46. *Id.* (quoting 415 U.S. at 47) (emphasis added).

47. 437 F.2d 1136 (5th Cir. 1971) (EEOC finding of "no reasonable cause" does not prohibit assertion of district court jurisdiction).

48. *Id.* at 1140. The court did not make timeliness a jurisdictional prerequisite, but did cite Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968), in which the court considered timeliness to be jurisdictional.

49. 411 U.S. 792 (1973) (EEOC finding of reasonable cause not a prerequisite to court action).

50. *Id.* at 798. The Court stated that "[r]espondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue." *Id.*; *accord*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

51. 415 U.S. at 47.

52. 429 U.S. at 240. *See* text accompanying note 46 *supra*.

United Air Lines, Inc. v. Evans[53] is a further step in the Supreme Court's multiplication of its own dicta. The *Evans* Court cited *Alexander* and *Electrical Workers* in stating that "[t]imely filing is a prerequisite to the maintenance of a Title VII action."[54] Although the *Evans* Court briefly discussed the time limit as an issue of jurisdiction,[55] it also referred to untimely claims as being "barred by limitations."[56] In *Evans*, the United States District Court for the Northern District of Illinois had dismissed the action on jurisdictional grounds. The Supreme Court, however, did not affirm the dismissal on the express basis of lack of jurisdiction; it merely held that the action was "properly dismissed"[57] and stated that the failure to allege a continuing violation made the complaint "ripe for dismissal under Rule 12(b)(6)."[58] The Court also stated that, without timely filing, a discriminatory act is as legally ineffective as if it had occurred before the statute was passed.[59]

The circuits disagree on whether these Supreme Court cases are definitive statements on the nature of the EEOC filing deadline. The United States Court of Appeals for the Third Circuit has concluded that *Electrical Workers* is not controlling because it dealt with tolling in a particular circumstance instead of completely rejecting its possible use.[60] The United States Courts of Appeals for the Second and Fifth Circuits have reached the same conclusion, reasoning that, because *Electrical Workers* distinguished a plaintiff who voluntarily pursued an alternative contractual remedy from one who was prevented from asserting his rights, the door was left open for tolling in the latter circumstance.[61] The Second Circuit also has concluded, without specifying any particular reason, that the Supreme Court's reference to "jurisdictional prerequisites" in *Alexander* and *McDonnell Douglas* is not controlling.[62] The United States Court of Appeals for the Seventh Circuit,

53. 431 U.S. 553 (1977).

54. *Id.* at 555 n.4.

55. *Id.* at 557 n.9. The Court stated that the plaintiff "cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired," because she waited more than a year after being rehired to file with the EEOC.

56. *Id.* at 560.

57. *Id.* at 557.

58. *Id.* at 556 n.8.

59. *Id.* at 558. This might imply that the filing requirement is jurisdictional because it limits the "temporal reach" of the court. It might, however, be similar to a statute of limitations because of the emphasis on the defendant's repose. *See* note 127 *infra*.

60. Bonham v. Dresser Indus., Inc., 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied*, 99 S. Ct. 87 (1978).

61. Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1299 (5th Cir. 1979); Smith v. American President Lines, Ltd., 571 F.2d 102, 108-09 (2d Cir. 1978).

62. Smith v. American President Lines, Ltd., 571 F.2d 102, 108-09 (2d Cir. 1978).

however, considers the references persuasive but not determinative.[63] Although the Fifth Circuit has since reversed its position,[64] in *McArthur v. Southern Airways, Inc.*[65] it specifically held *Evans* to be controlling on the nature of the filing deadline on the ground that *Evans* reinstated the district court's jurisdictional dismissal and treated a discriminatory act without timely filing as legally ineffective.[66]

Not only do the circuits disagree on whether the Supreme Court's language is controlling, they also disagree on the nature of the Title VII filing period.[67] At the time the Third Circuit decided *Hart*, the United States Court of Appeals for the District of Columbia Circuit was the only circuit court holding the time limit to be nonjurisdictional.[68] Since the *Hart* decision, however, the United States Courts of Appeals for the Fifth and Sixth Circuits have also held that it is subject to equitable modification.[69] On the other hand, the United States Courts of Appeals for the Seventh and Eighth Circuits have adopted the view that the filing requirement is a jurisdictional prerequisite,[70] while the

63. *In re* Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1151 (7th Cir. 1978), *cert. granted*, 99 S. Ct. 2834 (1979). In discussing the Supreme Court's reference to the time period as a "jurisdictional prerequisite," *id.*, the Seventh Circuit cited a footnote in *Evans* that did not use the word "jurisdictional." *See* text accompanying note 54 *supra*.

64. *See* Chappell v. Emco Mach. Works Co., 601 F.2d 1295 (5th Cir. 1979).

65. 569 F.2d 276 (5th Cir. 1978) (per curiam).

66. *Id.* at 277. *But see* notes 69, 152-56 and accompanying text *infra*.

67. Confusion and disagreement on this issue began as far back as 1968. *Compare* Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968) ("jurisdictional precondition") *with* Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390, 1394 (E.D. Cal. 1968) (timely filing not an absolute prerequisite in extenuating circumstances).

68. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

69. Chappell v. Emco Mach. Works Co., 601 F.2d 1295 (5th Cir. 1979); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979).

In *McArthur*, the Fifth Circuit had held Evans to be controlling and treated the filing period as jurisdictional. *See* text accompanying note 66 *supra*. Subsequently, in Bickham v. Miller, 584 F.2d 736 (5th Cir. 1978), the Fifth Circuit held that the 30-day deadline, under 5 C.F.R. § 713.214 (1978) and Air Force Regulations, for a military employee to file an administrative complaint was jurisdictional but that the period could be delayed on equitable grounds. The *Bickham* court relied on Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975), which had permitted equitable tolling of the EEOC filing period. In holding that the Title VII filing period is subject to equitable modification, the *Chappell* court relied in part on the *Bickham* court's retreat from *McArthur*'s harsh jurisdictional approach. 601 F.2d at 1300. The *Chappell* court further held, however, that equitable tolling was inappropriate on the facts of that case and that the district court's jurisdictional dismissal was proper. *Id.* at 1304. Although the *Chappell* court recognized the inconsistency in such a holding, *id.* at 1298, it held that, while the filing requirement was subject to equitable modification, untimely filing deprived the court of jurisdiction. *Id.* at 1304. *See id.* at 1304 (Fay, J., specially concurring).

70. McDonald v. United Air Lines, Inc., 587 F.2d 357, 361 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 2869 (1979); Wood v. Southwestern Bell Tel. Co., 580 F.2d 339, 342 (8th Cir. 1978) (dictum).

Second Circuit has merely concluded that it is an open question.[71] The United States Court of Appeals for the First Circuit has not dealt with the issue,[72] and other circuit courts that have dealt with the issue have been vague.[73] The United States Court of Appeals for the Tenth Circuit, for example, referred to the time limit as one of the "filing period requirements."[74] Similarly, the United States Court of Appeals for the Ninth Circuit stated that "the time limits for filing a charge and giving notice to the employer are a Congressionally established statute of limitations."[75] This language from the Ninth Circuit is inconclusive because the case from which it is taken concerned the applicability of the state statute of limitations, rather than the effect of failure to comply with the EEOC filing deadline. Moreover, the Ninth Circuit had previously stated that the right to sue depends on timely compliance,[76] which can be interpreted to support either position. Since the Third Circuit's decision in *Hart*, the United States Court of Appeals for the Fourth Circuit has implied that the filing period may be subject to equitable modification by its approval of a district court's opinion that relied in part on equitable considerations.[77]

Resolution of the disagreement whether the filing period is juris-

71. Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978). Prior to the decision in Hart v. J.T. Baker Chemical Co., 598 F.2d 829 (3d Cir. 1979), the Third Circuit had also concluded that the question was open. *See* Stuppiello v. ITT Avionics Div., 575 F.2d 430, 432 n.4 (3d Cir. 1978).

72. Two district courts within the First Circuit have, however, taken a stand on the issue. *See* Tarvesian v. Carr Div. of TRW, Inc., 407 F. Supp. 336, 338-39 (D. Mass. 1976) (reference to filing period as jurisdictional); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896 (D. Me. 1970) (timely filing is jurisdictional prerequisite).

73. *See generally* Annot., 4 A.L.R. FED. 833 (1970).

74. Dubois v. Packard Bell Corp., 470 F.2d 973, 974 n.2 (10th Cir. 1972).

75. Kirk v. Rockwell Int'l Corp., 578 F.2d 814, 819 (9th Cir.), *cert. denied*, 432 U.S. 1004.

76. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

77. Bledsoe v. Pilot Life Ins. Co., 602 F.2d 652 (4th Cir. 1979), *aff'g*, 473 F. Supp. 864 (M.D.N.C. 1978) (summary judgment for defendant).

The Fourth Circuit's position on the nature of the filing deadline has been uncertain. In Phillips v. Columbia Gas of W. Va., Inc., 347 F. Supp. 533 (S.D. W. Va. 1972), *aff'd mem.*, 474 F.2d 1342 (4th Cir. 1973), the district court stated that untimely filing deprives the court of jurisdiction. Subsequent district court cases have considered the filing period to be jurisdictional without citing *Phillips*. In Linder v. Litton Systems, Inc., 81 F.R.D. 14 (D. Md. 1978), the court stated that, based on *Alexander*, timely filing is a jurisdictional prerequisite, but reserved for trial a decision on whether the court could consider a discriminatory layoff in addition to a failure to recall when a charge based on the layoff alone would have been time-barred. *Id.* at 18. In Garett v. R.J. Reynolds Indus., Inc., 81 F.R.D. 25 (M.D.N.C. 1978), the court implied that the filing period is jurisdictional by its statement, citing *Evans*, that timely filing is necessary for a complaint to be actionable. *Id.* at 44. In Doski v. M. Goldsecker Co., 539 F.2d 1326, 1329 (4th Cir. 1976), the court merely stated that a plaintiff must have timely filed with the EEOC before filing suit in district court. This vague dictum did not specify whether the failure to timely file deprived the court of jurisdiction. In *Bledsoe*, the United States District Court for the Middle District of North

dictional has not been aided by recourse to the legislative history. In fact, courts have drawn contrary conclusions from this history.[78] This lack of direction has led the Fifth Circuit to remark that the legislative history of Title VII is "virtually . . . incomprehensible."[79] Nevertheless, in *Occidental Life Insurance Co. v. EEOC*,[80] the Supreme Court found meaning in the legislative history and stated that the history of the 1972 amendments[81] indicates that filing with the EEOC and notice to the defendant were seen by Congress as "the statute of limitations problem."[82] According to the Court, Congress' concern for fairness in Title VII was directed to the filing with the EEOC, as well as to notice to the defendant.[83]

Although the legislative history is inconclusive, the procedural regulations of the EEOC are very helpful.[84] These regulations do not treat the Title VII limitation period as jurisdictional.[85] In fact, the EEOC regulations specifically treat untimely filing as a failure to state a claim under Title VII, by providing that a charge that is untimely or that "otherwise fails to state a claim"[86] shall be dismissed by the EEOC.[87] Because dismissal by the EEOC does not vitiate a charge, but merely triggers the running of the ninety-day period to file suit in district court,[88] the EEOC presumably does not consider untimely filing to be

Carolina relied in part on *Doski* in holding that the filing deadline is jurisdictional, but then held that equitable criteria could be considered. 473 F. Supp. at 866.

78. *Compare In re* Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1151 (7th Cir. 1978), *cert. granted*, 99 S. Ct. 2834 (1979) (legislative history does not indicate filing period is nonjurisdictional) *with* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 475 (D.C. Cir. 1976) (legislative history "suggests" time limits are similar to statutes of limitations). *See generally* Jackson & Matheson, *supra* note 4, at 845, 846 & n.191; text accompanying note 82 *infra*.

79. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1138 n.7 (5th Cir. 1971).

80. 432 U.S. 355 (1977).

81. The 1972 amendments extend the filing period and require that notice of the complaint be given to the employer within ten days. *See* note 2 *supra*.

82. 432 U.S. at 371.

83. *Id.* The concern for fairness implies that the time period is a statute of limitations because fairness is an equitable consideration and jurisdictional bars are unaffected by equitable considerations.

84. 29 C.F.R. §§ 1601.1-.74 (1979). These procedural regulations are distinguishable from the EEOC guidelines that were given "great deference" in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

85. *See* 29 C.F.R. § 1601.13(a) (1979). The regulation refers to timeliness as an issue of "satisfying the filing requirements."

86. *Id.* § 1601.19(a).

87. The regulations provide that "[w]here a charge on its face . . . discloses, or where after investigation the Commission determines, that the charge . . . *is not timely filed, or otherwise fails to state a claim* under Title VII, the Commission shall dismiss the charge." *Id.* (emphasis added).

88. 42 U.S.C. § 2000e-5(f)(1) (1976) permits a civil action to be brought within 90 days after the EEOC's dismissal of a charge. The EEOC also treats a finding of "no reasonable cause" as a dismissal under 29 C.F.R. § 1601.19 (1979), and the Supreme Court has held that such a finding

the type of defect that will prevent a suit from being brought. Courts, however, have not relied on these procedural regulations for guidance in interpreting the nature of the Title VII filing requirement.

Because the nature of the Title VII filing requirement is a question of statutory interpretation, the correctness of the *Hart* decision must be evaluated in accordance with established methods of statutory construction, the fundamental principle of which is to effectuate the legislative intent.[89] Only if that intent is unclear from the language of a statute should a court resort to canons of construction.[90] Notwithstanding the unambiguous language of a statute, however, a court may look to the policy behind a statute when a literal interpretation would require a result that is "plainly at variance with the policy of the legislation as a whole."[91] The language of the Title VII filing requirement is, therefore, the logical starting point of analysis. If the language is ambiguous, resort may be had to legislative history, administrative interpretation and overall policy.

The language of section 2000e-5(e),[92] which sets forth the filing requirements, is ambiguous for two reasons: it imposes a requirement but is silent on the effect of a failure to comply,[93] and it contains phraseology that resembles neither a jurisdictional requirement nor a statute of limitations.[94] Nevertheless, the Third Circuit in

---

does not deprive the court of jurisdiction. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

89. *See* United States v. American Trucking Ass'n, 310 U.S. 534, 542 (1940).

90. *See* Hassett v. Welch, 303 U.S. 303, 313 (1938).

91. United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940). *Compare* United Steelworkers v. Weber, 99 S. Ct. 2721, 2726-27 (1979) ("Respondent's reliance upon a literal construction . . . is misplaced . . . . The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.") *and id.* at 2732 (Blackmun, J., concurring) ("The Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. . . . [S]etting aside that principle can be justified where necessary to advance statutory policy . . . .") *with id.* at 2735 (Burger, C.J., dissenting) ("The Court blandly tells us that Congress could not really have meant what it said . . . .") *and id.* at 2753 (Rehnquist, J., dissenting) ("By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind.")

92. 42 U.S.C. § 2000e-5(e) (1976), *quoted at* note 2 *supra*.

93. *But cf. In re* Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1151 (7th Cir. 1978), *cert. granted*, 99 S. Ct. 2834 (1979) ("shall be filed" is clear statutory language; time limit is jurisdictional).

94. 42 U.S.C. § 2000e-5(e) (1976) states that "[a] charge . . . shall be filed within one hundred and eighty days." This language can be compared with that of 28 U.S.C. § 1331(a) (1976), which is undoubtedly a jurisdictional prerequisite: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States . . . ." The Title VII filing period is thus clearly not phrased as a limitation on the power of the court, but neither is it phrased as a typical statute of limitations. For example, the Federal Employers' Lia-

Hart[95]reasoned that, because Title VII's jurisdictional section, section 2000e-5(f)(3),[96] grants federal courts "jurisdiction of actions brought under [Title VII],"[97] without specifically requiring timely filing, the filing requirement is not jurisdictional, and section 2000e-5(e) is therefore unambiguous.[98] The phrase "jurisdiction of actions brought under this subchapter"[99] may, however, incorporate compliance with the procedural requirements of the subchapter. This language, therefore, cannot be relied upon as determinative.

Like the language of the statute, the legislative history of Title VII provides little help in determining the intent of Congress with respect to the nature of the Title VII filing requirement.[100] Thus, it is not surprising that the *Hart* court cited the legislative history only for a statement of the broad purpose of Title VII.[101] Resort to the policies of the statute and administrative interpretation is, therefore, necessary to determine legislative intent.

In determining whether the filing deadline is jurisdictional, the policy underlying Title VII does not provide any clear indication of

bility Act (FELA), 45 U.S.C. § 56 (1976), provides for a statute of limitations as follows: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." Therefore, qualitative analysis of Title VII's phraseology does not indicate whether the time limit is jurisdictional.

95. *See* note 30 *supra*.

96. 42 U.S.C. § 2000e-5(f)(3) (1976) provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."

97. *Id.*

98. 598 F.2d at 832. According to this theory, a charge of employment discrimination could be "brought under this subchapter" regardless of the time of filing. While a court would not have jurisdiction under Title VII of, for example, an action based on discrimination in housing because it would not be brought "under this subchapter," a meritless claim of employment discrimination would be within the jurisdiction of the court, and would require dismissal for failure to state a claim under FED. R. CIV. P. 12(b)(6). If, as the EEOC regulations indicate, untimely filing is treated as a failure to state a claim, a dismissal for untimely filing is not a matter of the court's jurisdiction under Title VII. *See* text accompanying notes 84-88 *supra*.

In contrast, the judicial review section of the Social Security Act, 42 U.S.C. § 405(g) (1976), makes an administrative hearing and final decision explicit prerequisites of judicial review. *See generally* Jackson & Matheson, *supra* note 4, at 847. In construing the provisions of the Social Security Act, the Supreme Court has held that a final decision after a hearing is "central to the requisite grant of subject-matter jurisdiction." Weinberger v. Salfi, 422 U.S. 749, 764 (1975). The Court later held, however, that this requirement has two components—exhaustion of administrative remedies and presentation of a claim for benefits—of which only the second component is "purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case." Mathews v. Eldridge, 424 U.S. 319, 328 (1976). This imprecise use of the term "jurisdiction" is a further indication that the Supreme Court uses the term very loosely. *See generally* text accompanying notes 139-52 *infra*.

99. 42 U.S.C. § 2000e-5(f)(3) (1976).

100. *See* note 78 and accompanying text *supra*.

101. *See* 598 F.2d at 831-32.

congressional intent. As pointed out in *Hart*, the purpose of Title VII is the elimination of employment discrimination.[102] Although both the *Hart* court[103] and other courts[104] have stated that such remedial legislation should be liberally construed,[105]a policy of ending discrimination does not compel a conclusion that time limits are not jurisdictional. Rather, the imposition of strict jurisdictional limits might have been the compromise necessary to secure passage of Title VII, with the result that the time limitations really were intended as jurisdictional.[106] Title VII's remedial purpose, therefore, tells us little about the intent of Congress concerning the specific issue of filing deadlines.

While the *Hart* court made a superficial inquiry into legislative intent, it based its decision on policy factors unrelated to a determination of intent. The *Hart* court based its conclusion, in part, on the undesirable results of treating the deadline as jurisdictional.[107] Hard cases or desired results, however, should not supplant statutory construction in keeping with the legislative intent as the determining factor in resolving the dispute.[108] The *Hart* court further based its decision on how courts should "treat" the filing deadline issue in order to carry out Congress' broader purposes rather than on specific congressional intent with respect to that issue. The court thus concluded that a remedial scheme based on filing by laymen requires flexibility[109] and that, in order to carry out the remedial purposes of Title VII, the time requirements should not be "treated" as jurisdictional.[110] Although this type of analysis may result in judicial amendment of a statute to carry out a

---

102. *Id.*

103. *Id.* at 831.

104. *See, e.g.*, Bonham v. Dresser Indus., Inc., 569 F.2d 187, 193 (3d Cir. 1977); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928 (5th Cir. 1975).

105. *See* notes 24-27 and accompanying text *supra*.

106. *See generally* Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). In *Moore*, the court noted:

> As a part of a compromise which made it possible to pass the Civil Rights Act of 1964, its sponsors agreed to the inclusion of provisions which impose an extremely short limitations period on private claims and require a resort to state procedures, where available, as a condition precedent to a private action in the federal courts.

Id. at 820-21.

107. 598 F.2d at 832.

108. The court, however, might simply have concluded that Congress intended to prevent harsh and inequitable results and therefore established a nonjurisdictional time limit. If that was the court's conclusion, it merely left out two steps in its analysis by failing to state that Congress desired to prevent inequitable results and for that reason intended the time limit to be flexible.

109. 598 F.2d at 832; *see* note 27 and accompanying text *supra*.

110. 598 F.2d at 832.

court's view of broader legislative goals,[111] there may be no alternative when, as here, broad purposes are the only indication of Congress' intent. In fact, in *Love v. Pullman Co.*,[112] the Supreme Court employed this type of analysis in the context of the Title VII filing deadline by permitting a filing procedure that was not technically correct but which complied with the purpose of the filing deadline.[113] In *Love*, however, the Court relied on the specific purpose of the filing deadline[114] in addition to the broad purposes of Title VII as a whole. In contrast, the *Hart* court cited *Love* only for the broad proposition that, because of the remedial purpose of Title VII, courts should be flexible in reviewing filing by laymen, and not for the statement in *Love* concerning the purpose of the filing deadline itself.[115] The *Hart* court's reliance on the remedial purpose of Title VII would have been more persuasive, however, had it been accompanied by a discussion of the EEOC's interpretation of section 2000e-5(e) and a qualitative analysis of the filing deadline.

In construing a statute, the interpretation of the agency responsible for its execution is very persuasive, and should be followed in the absence of compelling contrary indications.[116] The EEOC interprets failure to make a timely filing under Title VII as a failure to state a claim rather than a jurisdictional defect.[117] Failure to state a claim on which relief can be granted[118] obviously differs from lack of subject matter jurisdiction.[119] Moreover, the EEOC treats its dismissal for untimely filing as the type of defect that still allows suit to be brought within ninety days.[120] The EEOC's interpretation that the filing deadline is

111. *See generally* United States v. American Trucking Ass'n, 310 U.S. 534, 544 (1940).

112. 404 U.S. 522 (1972).

113. *Id.* at 526. In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928-29 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit relied on the Supreme Court's goal-oriented analysis in *Love* in concluding that the Title VII filing period is not jurisdictional. *But cf.* McArthur v. Southern Airways, Inc., 569 F.2d 276 (5th Cir. 1978) (per curiam) (time limit is jurisdictional).

114. *See* text accompanying note 132 *infra*.

115. 598 F.2d at 832.

116. *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ."); *see* Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066, 2074 (1979) (EEOC interpretation "entitled to great deference").

117. *See* notes 86-88 and accompanying text *supra*; *accord*, United Air Lines, Inc. v. Evans, 431 U.S. 553, 561 n.1 (1977) (dissenting opinion) (untimely filing treated as a failure to state a claim). *See generally* Jackson & Matheson, *supra* note 4, at 847 & n.194.

118. FED. R. CIV. P. 12(b)(6).

119. FED. R. CIV. P. 12(b)(1).

120. *See* note 88 and accompanying text *supra*.

not jurisdictional should, therefore, be followed because there are no compelling indications that it is wrong.[121] In fact, the EEOC's interpretation coincides exactly with the remedial purposes of Title VII and with the qualitative nature of the filing deadline.

Neither *Hart* nor other courts have analyzed the Title VII limitation period qualitatively to determine whether it partakes of the nature of jurisdiction or repose. One reason courts may avoid such theoretical analysis is that discussions of subject matter jurisdiction become almost metaphysical. For example, the Title VII "jurisdictional" requirements have been variously described in terms of exhausting administrative remedies,[122] being affected by discrimination within ninety days of the filing date,[123] and establishing jurisdiction by reliance on a discriminatory act followed by timely filing.[124] Failure to comply with these "jurisdictional" requirements has been compared to bringing suit on an act of discrimination occurring before Title VII was enacted[125] and to the extinction of the federal right on which federal jurisdiction was based.[126]

The filing requirement arguably limits the "temporal reach" of the court and, therefore, is a restriction on its jurisdiction.[127] On the other hand, the filing period does not share characteristics of requirements generally considered to be jurisdictional.[128] For example, the filing period does not arise from constitutional limitations on federal judicial power, as does a requirement that there be a case or controversy,[129] and

121. *See* text accompanying notes 158-62 *infra*.

122. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1139 (5th Cir. 1971).

123. Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1014 (5th Cir. 1971).

124. United Air Lines, Inc. v. Evans, 431 U.S. 553, 557 n.9 (1977).

125. *See id.* at 558.

126. *See* Jackson & Matheson, *supra* note 4, at 844 n.183. The authors, however, convincingly demonstrate the weakness of this theory.

127. This concept of "temporal reach" might be what the Supreme Court had in mind in *Evans* when it said that

> United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

431 U.S. at 558 (1977). The Court might, however, have been implying that the filing period is a statute of limitations by its reference to the employer's repose.

128. Although FED. R. CIV. P. 8(a) requires a complaint to include "a short and plain statement of the grounds upon which the court's jurisdiction depends," the forms provided under FED. R. CIV. P. 84 do not include any forms for the performance of conditions precedent as a basis of jurisdiction.

129. *See* U.S. CONST. art. III, § 2.

Although most courts base Title VII jurisdiction on 42 U.S.C. § 2000e-5(f)(3) (1976), at least one court based Title VII jurisdiction on 28 U.S.C. § 1343(4) (1976), which contains no require-

does not fundamentally concern the nature of the controversy, as in federal question jurisdiction,[130] or the identity of the parties, as in diversity jurisdiction.[131] Moreover, in *Love v. Pullman Co.*, the Supreme Court analyzed the filing deadline functionally and noted that the purpose of the filing deadline is, "to ensure expedition in the filing and handling of those complaints."[132] This analysis focuses on the purpose of the specific provision, rather than on the broad remedial purposes of the legislation as a whole. Under the functional approach of *Love*, the filing period is not jurisdictional because the purpose of the filing period is to "ensure expedition," and it is, therefore, a matter of efficiency and fairness rather than a restriction on the power of the court.[133] This view is supported by the Court's discussion of the filing period in *Occidental Life Insurance Co.*, which emphasized Congress' concern for fairness,[134] and by the Court's emphasis on notice in *Electrical Workers*.[135] Because the purpose of the Title VII filing period is to ensure efficiency and fairness,[136] it resembles a statute of repose rather than a "door-closing" device.[137] On balance, therefore, the Title VII filing period is not jursidictional from a theoretical perspective. The difficulty in resolving this issue may lie in the lack of any strict qualitative distinction between jurisdictional requirements and statutes of limitation. The only difference between the two that can be stated with certainty is that one type of limitation can be modified whereas the other cannot.[138]

In addition to confusion over the nature of subject matter jurisdiction, the Title VII filing deadline has been beset by what one court referred to as "conceptual confusion."[139] Courts have tolled purport-

ment of timely filing. *See* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977). *See generally* Guay v. Ozark Airlines, Inc., 450 F. Supp. 1106, 1108 n.1 (D. Mass. 1978).

130. *See* 28 U.S.C. § 1331(a) (1976).

131. *See id.* § 1332(a).

132. 404 U.S. at 526.

133. In fact, the statement of purpose in *Love* is immediately followed by the statement that "respondent makes no showing of prejudice to its interests." *Id.*

134. *See* notes 80-83 and accompanying text *supra*.

135. *See* notes 42-43 and accompanying text *supra*.

136. *See* notes 80-83, 132-35 and accompanying text *supra*.

137. In contrast, the Act of March 3, 1863, ch. XCII, § 10, 12 Stat. 765, which required claims cognizable in the Court of Claims to be filed or transmitted within six years after accrual, has been described as limiting the power of the Court of Claims because the limitation period is a qualification on the waiver of sovereign immunity. *See* Finn v. United States, 123 U.S. 227, 229 (1887). *See also* United States v. Wardwell, 172 U.S. 48 (1898). Obviously, a court's power to adjudicate Title VII claims is not restricted by such considerations.

138. *See* notes 4 & 5 and accompanying text *supra*.

139. Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 927 (5th Cir. 1975).

edly jurisdictional limitations,[140] and both courts and commentators use the terms "prerequisite," "jurisdictional prerequisite," "limitation period" and "statute of limitations" interchangeably.[141] The Court in *Electrical Workers*, for example, referred to the deadline for filing a charge with the EEOC as a "statutory period,"[142] a "limitations period,"[143] a "jurisdictional prerequisite"[144] and "the time within which to file a claim."[145] Although the Court in *Electrical Workers* used the phrase "jurisdictional prerequisite," it emphasized the notice function of the filing deadline,[146] which indicates that it is similar to a statute of limitations. *Electrical Workers* denies courts the power to permit "slight" delays,[147] but "slight" delays can be distinguished from "excusable" delays.[148] Moreover, courts and commentators have seized upon the failure of *Electrical Workers* to prohibit tolling entirely as an indication that the time limit may be subject to equitable modification in the proper circumstances.[149] Therefore, *Electrical Workers* cannot be considered a definitive holding that the Title VII filing period is jurisdictional, and its dictum cannot foreclose independent decision by lower courts.

Likewise, *Evans* did not foreclose independent decision. Although the Seventh Circuit cited *Evans* as referring to the time limit as a "jurisdictional prerequisite,"[150] the *Evans* Court merely called it a

---

140. *See id. See generally* Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1304 (5th Cir. 1979); Bethel v. Jefferson, 589 F.2d 631, 641 n.64 (D.C. Cir. 1978).

141. *See* Jackson & Matheson, *supra* note 4, at 842 n.167. For example, one commentator wrote that "[t]he Supreme Court has not decided whether the limitations period of Title VII is to be construed as an absolute jurisdictional bar or a jurisdictional requirement subject to equitable modification." Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119, 122 n.14 (1978).

142. 429 U.S. at 236.

143. *Id.* at 240.

144. *Id.*

145. *Id.* at 241.

146. *See* text accompanying notes 42 & 43 *supra*.

147. 429 U.S. at 240.

148. Jackson & Matheson, *supra* note 4, states:

> What constitutes a "slight" delay because of deferral and what constitutes an "excusable" delay, however, appear to be two different things. The language of *Robbins & Myers* [*Electrical Workers*] indicates that courts may not substitute their judgment for that of Congress on the length of the period in which discriminatees must file their claims. But it is by no means clear that Congress has withdrawn from the courts the discretion to determine whether a delay that causes a title VII plaintiff to miss the filing deadline is excusable.

Id. at 843 (footnotes omitted).

149. *See* notes 60 & 61 and accompanying text *supra*. *See also* Jackson & Matheson, *supra* note 4, at 818.

150. *See* note 63 and accompanying text *supra*.

"prerequisite" rather than a "jurisdictional prerequisite." Thus, the *Evans* Court did not describe the time limit as a "jurisdictional prerequisite," even though it cited *Alexander* and *Electrical Workers*, which did refer to it as such. These considerations may not prove the Supreme Court's intent to abandon the jurisdictional theory, but they do indicate inadvertent use of language that does not demonstrate a clear intent to determine the nature of the filing requirement. *Evans*, which dealt primarily with the continuing violation theory,[151] gave an internally inconsistent treatment to the filing period.[152] In addition, the Fifth Circuit erroneously interpreted the *Evans* holding. *Evans* did not, as the Fifth Circuit believed,[153] reinstate the district court's jurisdictional dismissal; it merely held that the complaint was "properly dismissed,"[154] which might have referred only to the facts of that case. Moreover, the Court indicated that dismissal under Rule 12(b)(6) would have been appropriate.[155] Therefore, *Evans* is also not controlling on the nature of the filing deadline, and the Third Circuit was correct in holding, in *Stuppiello v. ITT Avionics Div.*,[156] that it was an open question.[157]

The Third Circuit was also correct, in *Hart*, in holding that the Title VII filing period is not jurisdictional,[158] but could have given better reasons for its holding, such as the qualitative nature and function of the filing period. Despite the Supreme Court's apparently inadvertent dictum to the contrary,[159] the Court has emphasized that the purposes of the time limit are notice, fairness and efficiency, which indicates that it is similar to a statute of limitations.[160] Moreover, the EEOC's interpretation is that untimely filing is a failure to state a claim rather than a lack of subject matter jurisdiction.[161] Finally, the deadline to file a charge with the EEOC is not the type of requirement commonly thought of as jurisdictional and is not analogous to traditional jurisdictional requirements.[162] This theoretical analysis and the

151. 431 U.S. at 557; *see* note 166 *infra*.
152. *See* text accompanying notes 55-59 *supra*.
153. *See* text accompanying note 66 *supra*.
154. 431 U.S. at 557.
155. *See* text accompanying note 58 *supra*.
156. 575 F.2d 430 (3d Cir. 1978).
157. *Id.* at 432 n.4.
158. *See* notes 20-30 and accompanying text *supra*.
159. *See* notes 139-56 and accompanying text *supra*.
160. *See* notes 133-35 and accompanying text *supra*.
161. *See* notes 84-88 & 116-21 and accompanying text *supra*.
162. *See* notes 128-31 and accompanying text *supra*.

EEOC's interpretation, neither of which was mentioned in *Hart*, strongly reinforce *Hart*'s reliance on the remedial purpose of Title VII, which might be insufficient alone to clearly indicate the legislative intent on this specific provision.

There are a number of practical consequences that should result from the holding of any circuit, such as that of the Third Circuit in *Hart*, that the Title VII filing deadline is nonjurisdictional. First, tolling will now be permitted under certain circumstances.[163] Although the district court in *Hart* held as a matter of law that plaintiff was not entitled to equitable modification on the facts of that case,[164] a trial will be required when there are issues of fact concerning a plaintiff's knowledge and a defendant's representations. This may increase both the volume of litigation and the pressure on a defendant to settle. Moreover, when equitable factors are clearly present on the undisputed facts, a defense of untimely filing will be stricken.[165] Allowing these cases to proceed to trial will increase the number of trials, but may simplify motion practice and appeals by making it unnecessary to allege a continuing violation.[166] Finally, the possibility of trial despite delayed EEOC filing may require defendants to preserve evidence for a longer time. Although an employer may argue that tolling would be inequitable and prejudicial in a case in which records have already been destroyed, employers in the circuits that have held the filing deadline nonjurisdictional are now on notice that suit may be brought on charges filed more than 300 days from the alleged unlawful act.

---

163. The Second Circuit has indicated that tolling may be limited to particular circumstances. Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978). An extensive list of tolling criteria can be found in Jackson & Matheson, *supra* note 4, at 848-50.

164. 598 F.2d at 833.

165. FED. R. CIV. P. 12(f).

166. *See generally* Jackson & Matheson, *supra* note 4. Although courts occasionally confuse tolling and continuing violations, a continuing violation is not a ground for tolling.

> [I]n continuing violation cases it is incorrect to speak of tolling the filing period, at least after *Evans*, because for a continuing violation to be actionable, it is necessary that a present violation exist. If a present violation is alleged, there is no need to expand the time, through tolling, in which the claim must be filed.

Id. at 841 (footnote omitted).

Tolling should also be distinguished from accrual. Under 42 U.S.C. § 2000e-5(e) (1976), the time period begins to run when the unlawful practice occurs. Although tolling is a suspension of the limitation period, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 473 & n.2 (1975) (dissenting opinion), one court excused the complainant's noncompliance by delaying the start of the time period "until the facts . . . were apparent or should have been apparent." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975). *Hart* also indicated that the date of discovery might "trigger the running of the limitation period." 598 F.2d at 834. Because the statute explicitly states when the time period begins to run, equitable modification should suspend the running rather than delay the commencement of the period. If tolling for equitable considerations is denied, a Title VII plaintiff has no claim for delayed accrual.

The Supreme Court could have prevented the excessive litigation and expense generated by the filing deadline issue by deciding it or leaving it open until properly presented, rather than creating confusion through inadvertent dictum in cases such as *Evans* and *Electrical Workers*. It might have been more advantageous for courts, litigants and the public to have had an arbitrary, predictable answer rather than no answer at all. However, while the excesses of litigation and expense were triggered by the High Court's inadvertent use of language, the lower federal courts must share the blame for imputing unintended meaning into the Supreme Court's every word. Since the Third Circuit's decision in *Hart*, there has been a clear trend toward treating the filing requirement as nonjurisdictional,[167] but there is still a split among the circuits. Although this position may eventually be adopted by all the circuits, the pendulum might just as easily swing in the opposite direction unless the conflict is definitively resolved by the Supreme Court. A major impediment to ultimate resolution of the issue may be that decisions such as *Hart*, which permit tolling in the abstract but deny tolling on the facts of the case, are not readily appealable. In such cases, the defendant does not appeal because he has prevailed and the plaintiff is bound by an unfavorable determination of fact that he failed to exercise due diligence. It is to be hoped, however, that the Supreme Court will grant certiorari when a proper case is presented.[168]

DEAN MURRAY HARRIS

167. *See* text accompanying notes 68, 69 & 77 *supra*.

168. The recent Sixth Circuit decision in Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979), may be appropriate for a resolution of this issue because tolling was permitted on the facts of that case.