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## Relief from Retaliation: Does Title VII Allow a Private Right to Preliminary Injunctive Relief

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# RELIEF FROM RETALIATION: DOES TITLE VII ALLOW A PRIVATE RIGHT TO PRELIMINARY INJUNCTIVE RELIEF?

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>1</sup> expressly forbids employer retaliation against employees who oppose discriminatory employment practices or who participate in any investigation of charges of discrimination filed pursuant to the Act.<sup>2</sup> The need for such a statutory proscription against retaliation is clear: The purpose of Title VII to prevent employer discrimination based on race, color, religion, sex, or national origin can hardly be realized if employers remain free to punish employees who protest such discrimination. However, effective and meaningful enforcement of the proscription against retaliation remains a problem. Nearly all the states have their own fair employment practices statute and administrative enforcement agency designated by the Equal Employment Opportunity Commission (EEOC) as a "706 Agency."<sup>3</sup> In those states, a claimant must first file a discrimination complaint with the appropriate state or local agency;<sup>4</sup> otherwise, the complaint is to be filed directly with the EEOC.<sup>5</sup> In Oklahoma, enforcement of fair employment

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1. 42 U.S.C. §§ 2000e-2000e-17 (1982).

2. 42 U.S.C. § 2000e-3(a) (1982). See Denis, *How to Identify Employment Discrimination Retaliation Claims*, 66 CHI. B. REC. 168 (1984).

3. 29 C.F.R. § 1601.80 (1988). There is at least one certified designated 706 Agency in all but six of the states: Alabama, Arkansas, Georgia, Louisiana, Mississippi, and North Dakota. *Id.* To be designated a 706 Agency, the state (or local government) must enact a fair employment law forbidding discrimination based on race, color, religious affiliation, sex, or national origin and must establish an enforcement authority. *Id.* at § 1601.70(a). The conclusions of certified 706 Agencies on discrimination claims are not automatically reviewed by the EEOC unless requested by one of the parties. *Id.* at § 1601.76. North Dakota has a 706 Agency that is not certified, while Georgia has a designated 706 Agency for claims of Georgia state employees only. *Id.* at § 1601.74, 1601.80.

4. 42 U.S.C. § 2000e-5(c)-(e) (1982); 29 C.F.R. § 1601.13(a)(3)-(e) (1988); Comment, *The Role of Preclusion Rules in Title VII: An Analysis of Congressional Intent*, 71 IOWA L. REV. 1473, 1473 (1986).

5. 42 U.S.C. § 2000e-5(c) (1982); 29 C.F.R. § 1601.13(a)(1) (1988). The EEOC has provided an alternate procedure to avoid statute of limitations problems caused by confusion over where an initial complaint should be filed. 29 C.F.R. § 1601.13(a)(4) (1988). Under this regulation, claims incorrectly filed first with the EEOC are forwarded to the appropriate state agency. *Id.* at § 1601.13(a)(4)(i) (1988). See Comment, *Procedural Prerequisites for Bringing a Title VII Action—42 U.S.C. § 2000e-5*, 27 HOW. L.J. 437 (1984), for a detailed discussion of filing procedures; See also Harlton, *Filing Requirements Under the Equal Employment Opportunity Act*, 55 OKLA. B. J. 2666 (1984); Stone & Johnson, *Time Limitations for Title VII Charges*, LAB. & EMPLOYMENT REV., Jan. 1985, at 47.

practices is the province of the Oklahoma Human Rights Commission.<sup>6</sup> After filing a discrimination charge with the state fair employment opportunity agency, the claimant must wait sixty days before filing a claim with the EEOC.<sup>7</sup> In 1972, Congress amended Title VII to allow the EEOC 180 days after a filing to investigate the complaint, to attempt a reconciliation between the employer and employee, and ultimately to decide whether to pursue an action against the employer in the federal courts.<sup>8</sup> Should the EEOC decide not to pursue the claim at the close of the 180-day period, it must issue a "right-to-sue" notice to the claimant.<sup>9</sup> The claimant then has ninety days in which to bring a private action under Title VII against the employer in federal court.<sup>10</sup>

Although Title VII encourages the EEOC to seek preliminary injunctive relief against retaliatory conduct,<sup>11</sup> in practice this authority is seldom used.<sup>12</sup> In the face of this lack of administrative enforcement

6. 29 C.F.R. § 1601.80 (1988). The Oklahoma Human Rights Commission was created in 1963 to investigate and to prevent discrimination based on "race, color, creed, national origin, age, handicap, or ancestry" by Oklahoma state departments or agencies. OKLA. STAT. tit. 74, § 954 (1981 & Supp. 1985). In 1968, the Oklahoma Legislature extended this protection beyond state government employees and included sex discrimination; prohibitions against handicap discrimination and age discrimination followed in 1981 and 1985. OKLA. STAT. tit. 25, § 1302 (1981 & Supp. 1985). Oklahoma statutes now prohibit discrimination by employers of more than 15 persons, employment agencies, labor organizations, places of public accommodation, and housing; the Human Rights Commission is the enforcement mechanism for all such claims of discrimination. OKLA. STAT. tit. 25, §§ 1101-1505 (Supp. 1985). If unable to negotiate a conciliation agreement, the Commission is empowered to issue cease and desist orders; however, such orders are not enforceable unless a district court issues an enforcement order. *Id.* at §§ 1505-06.

7. 42 U.S.C. § 2000e-5(c) (1982).

8. 42 U.S.C. § 2000e-5(f)(1) (1982).

9. *Id.* Of course, a plaintiff may bring an action for sex discrimination or retaliatory discharge in state court if the jurisdiction recognizes such a cause of action. Under the common law employment-at-will doctrine, both the employer and employee have the right to terminate the employment at any time. *E.g.*, *Hinson v. Cameron*, 742 P.2d 549, 552 (Okla. 1987). However, several jurisdictions have recognized various causes of action for terminating an employee maliciously or in bad faith or in contravention of public policy. *E.g.*, *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The deterioration of the employment-at-will doctrine in Oklahoma has been the subject of considerable controversy. In the most recent Oklahoma Supreme Court case on the subject, *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989), the court recognized a tort cause of action for termination of an employee in contravention of public policy as established by constitutional law, a statute, or case law. *Id.* at 28. Based on this decision, a plaintiff fired in retaliation might now opt to sue in Oklahoma state court.

10. 42 U.S.C. § 2000e-5(f)(1) (1982). See Note, *When Does the Ninety Day Complaint Filing Period Begin for 42 U.S.C. § 2000e-5(f)(1)?* *Harvey v. City of New Bern Police Department*, 45 WASH. & LEE L. REV. 781 (1988). There is disagreement among the circuits regarding the date on which the 90-day period begins to run. At least two circuits follow a "flexible rule" which allows an equitable tolling of the 90 days; the Seventh Circuit follows a more restrictive "actual receipt rule." *Id.* at 782-83. For a discussion of the problems inherent in the alternating jurisdiction of employment discrimination claims between state and federal courts, see Comment, *supra* note 4.

11. 42 U.S.C. § 2000e-5(f)(2) (1982); 118 CONG. REC. 7168 (1972).

12. See Ashton, *The Availability of Preliminary Injunctive Relief to Private Plaintiffs Pending*

against retaliation, the United States Courts of Appeals remain split on the questions of whether the employee has the right to seek preliminary injunctive relief and whether courts may exercise jurisdiction over these types of cases pending administrative consideration of the original discrimination charge. In the interest of fairness and according to the purpose of Title VII, a district court should have jurisdiction to consider a private action for immediate relief from retaliation without requiring the private plaintiff to wait the six months required for EEOC consideration of the original claim.

## II. THE PROBLEM OF RETALIATION

Prior to the 1972 amendments to Title VII, the EEOC had no direct power to enforce the provisions of the Act.<sup>13</sup> Although an action by the private plaintiff was the primary means of enforcing the law, the statute did not indicate whether the claimant had the right to seek preliminary injunctive relief against any retaliatory action suffered as a result of filing discrimination charges.<sup>14</sup> No pre-1972 cases upheld a private right to preliminary injunctive relief,<sup>15</sup> but some courts have subsequently stated their belief that such a right did indeed exist.<sup>16</sup>

After the 1972 amendments, section 2000e-5 specifically authorized the EEOC to seek preliminary injunctions against retaliation, but the amendments made no mention of whether the claimant had any personal right to seek injunctive relief.<sup>17</sup> The right to preliminary injunctive relief became more important because of the increased "waiting period" allowed the EEOC. The amendments lengthened this period from thirty to

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*Equal Employment Opportunity Commission Action Under Title VII of the Civil Rights Act of 1964*, 8 LOY. U. CHI. L.J. 51, 53-55 (1976), for a discussion of EEOC internal practice and procedures relating to preliminary injunctive relief. In 1989, the EEOC received 59,411 charges of discrimination and sued or intervened in 599 actions. The EEOC sought preliminary injunctive relief only 11 times. Telephone interview with Barbara Roberts, Information Division, EEOC (Feb. 12, 1990).

13. 42 U.S.C. § 2000e-6(a) (1970).

14. *Id.*

15. Ashton, *supra* note 12, at 64. An opinion of the Second Circuit suggests that the availability of injunctive relief to a private plaintiff was not an issue prior to the 1972 amendments because the waiting period for EEOC consideration of the claim was only 30 days (as compared to the current 180-day requirement). Sheehan v. Purolator Courier Corp., 676 F.2d 877, 882 (2d Cir. 1981).

16. Drew v. Liberty Mut. Ins. Co., 480 F.2d 69, 72-73 (5th Cir. 1973) (The court of appeals stated "prior to the 1972 amendment, it is clear that a victim of such forbidden conduct as was here alleged had a clear right to seek equitable relief without having to await the convenience of the EEOC."), *cert. denied*, 417 U.S. 935 (1974); Sheehan, 676 F.2d at 882-83.

17. 42 U.S.C. § 2000e-5(5) (1982).

180 days,<sup>18</sup> which is a significant length of time to endure employer retaliation. Unfortunately, the EEOC rarely seeks preliminary relief on behalf of a claimant suffering retaliation despite statutory authority to do so.<sup>19</sup>

While the primary issue to claimants concerns whether a district court has subject-matter jurisdiction to consider a private plaintiff's suit for preliminary injunctive relief, such a suit must also satisfy the prerequisites for equitable relief. The traditional elements that a court weighs in a suit for equitable relief include: (1) a substantial likelihood of success on the merits of the claim; (2) a probability of irreparable injury to the plaintiff absent injunctive relief; (3) the potential for harm to other parties; and (4) the public's interest.<sup>20</sup> Other courts employ a modification of the traditional test wherein the plaintiff must show either probable success on the merits and irreparable injury, or must show that the plaintiff's suit raises serious issues and that the balance of hardships tips in favor of the plaintiff.<sup>21</sup> The heart of the controversy concerns whether retaliatory actions constitute irreparable injury.<sup>22</sup> Of those cases upholding subject-matter jurisdiction over private suits for equitable relief, nearly all held that the plaintiff was unable to satisfy the prerequisites for such relief.<sup>23</sup> Thus, the fortunate plaintiff who seeks preliminary relief in

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18. 42 U.S.C. § 2000e-6(a) (1970); *Sheehan*, 676 F.2d at 882.

19. Roberts interview, *supra* note 12.

20. *E.g.*, *Wagner v. Taylor*, 836 F.2d 566, 575 (D.C. Cir. 1987).

21. *Duke v. Langdon*, 695 F.2d 1136, 1137 (9th Cir.), *reh'g granted*, 701 F.2d 768 (1983); *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517, 522 (N.D. Cal. 1980). Another example of a modified test for injunctive relief is that employed by the Fourth Circuit: while the traditional four factors are to be considered, the irreparable injury and probability of harm factors are considered most important. "If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success." *Guerrero v. Reeves Bros., Inc.*, 562 F. Supp. 603, 606 (W.D.N.C. 1983) (quoting *Blackwelder Furniture Co. v. Sellig Mfg. Co., Inc.*, 550 F.2d 189, 196 (4th Cir. 1977)).

22. Under *Sampson v. Murray*, 415 U.S. 61, 90 (1974), mere lost wages do not constitute irreparable injury. For a more detailed treatment of the requisite standard for equitable relief, see Drachler, *Burdens of Proof in Retaliatory Adverse Action Cases Under Title VII*, 35 LAB. L.J. 28 (1984); Weintraub, *Employment Discrimination Cases Under Title VII: The Presumption of Irreparable Harm in Preliminary Injunction Motions*, 12 MEM. ST. U.L. REV. 197 (1982); Note, *Irreparable Injury: Improper Standard for Preliminary Injunctive Relief in EEOC Cases?*, 38 STAN. L. REV. 1163 (1986).

23. *Wagner*, 836 F.2d at 576; *Duke*, 695 F.2d at 1137; *McCarthy v. Cortland County Community Action Program, Inc.*, 487 F. Supp. 333, 343 (N.D.N.Y. 1980); *Guerrero*, 562 F. Supp. at 607. One circuit court remanded the case to the district court for consideration of the merits of the preliminary injunctive suit. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 887 (2d Cir. 1981). In *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983), the court was able to avoid deciding the issue of whether it had jurisdiction to award the plaintiff relief by holding that the plaintiffs were unable to show irreparable injury. However, in *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517, 524-26 (N.D. Cal. 1980), the plaintiff met the standard for preliminary injunctive relief by showing a likelihood of ultimate success on the merits and irreparable injury. The

a jurisdiction that does recognize such a private right of action still faces a second battle to meet the stringent standard required for a preliminary injunction.

Jurisdictions are split, and the Tenth Circuit is silent, on the question of whether a private plaintiff has the right to seek a preliminary injunction against employer retaliation. Only one reported district court decision from within the Tenth Circuit has squarely addressed this issue, but the decision is now fifteen years old.<sup>24</sup> The court followed the more conservative position that no private right to equitable relief existed prior to issuance of a right-to-sue letter.<sup>25</sup> In general, other courts within the Tenth Circuit appear to construe strictly the procedural requirements set out in Title VII.<sup>26</sup> In contrast to such rigid interpretations, courts within this circuit should look to the overall purpose of Title VII and should allow private plaintiffs to seek preliminary injunctive relief against retaliation while the EEOC considers the underlying discrimination complaint.

### III. DECISIONS FAVORING INJUNCTIVE RELIEF FOR PRIVATE PLAINTIFFS

*Drew v. Liberty Mutual Insurance Co.*<sup>27</sup> is frequently cited as the leading case upholding the right of a private plaintiff to seek injunctive relief prior to the close of the 180-day period during which the EEOC considers the original discrimination complaint.<sup>28</sup> In *Drew*, the plaintiff sought a preliminary injunction for reinstatement after being fired by her employer allegedly in retaliation for the discrimination claim she had filed with the EEOC.<sup>29</sup> Because *Drew's* dismissal had occurred immediately after she filed her charges, the EEOC had not issued her a right-to-sue notice, although it did issue her the notice a month later.<sup>30</sup> In addition, the EEOC also filed suit seeking the same preliminary injunctive

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court found irreparable injury demonstrated both by virtue of the Ninth Circuit rule that such injury is presumed by a preliminary finding of a Title VII violation and because the employer's acts constituted an infringement of plaintiff's first amendment right to freedom of religion. *Id.* at 525.

24. *Collins v. Southwestern Bell Tel. Co.*, 376 F. Supp. 979 (E.D. Okla. 1974).

25. *Id.* at 983.

26. *See, e.g., Mills v. Jefferson Bank E.*, 559 F. Supp. 34 (D. Colo. 1983).

27. 480 F.2d 69 (5th Cir. 1973), *cert. denied*, 417 U.S. 935 (1974).

28. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 886 n.15 (2d Cir. 1981); *Doerr v. B. F. Goodrich Co.*, 484 F. Supp. 320, 321 (N.D. Ohio 1979).

29. *Drew*, 480 F.2d at 71.

30. *Id.*

relief as *Drew*.<sup>31</sup> As a result, the district court granted the EEOC's application for injunctive relief but dismissed *Drew*'s claim on the ground that no jurisdiction existed under Title VII to grant such relief to a private plaintiff.<sup>32</sup> On appeal of the dismissal of *Drew*'s complaint, the Fifth Circuit broadly stated that an individual who met the traditional requirements for injunctive relief had the right to seek injunctive relief in order to "maintain the status quo," pending EEOC review of the underlying discrimination claim.<sup>33</sup>

Because of the unusual facts of the case, in which the EEOC did eventually issue a right-to-sue letter and actually joined in the private claimant's suit for equitable relief, the precedential value of the *Drew* decision in supporting a private right to equitable relief prior to the 180-day waiting period has been questioned.<sup>34</sup> Courts have also questioned the interpretation in *Drew* of congressional intent underlying the original 1964 Act and the 1972 amendments.<sup>35</sup> Nevertheless, other courts soon followed the lead of the Fifth Circuit.

In *Berg v. Richmond Unified School District*,<sup>36</sup> the Ninth Circuit upheld a district court's jurisdiction over a private plaintiff's suit for injunctive relief. The district court granted the injunction until the plaintiff received a right-to-sue letter authorizing her to pursue her action on the merits.<sup>37</sup> Although the court of appeals first upheld the district court's action based on the plaintiff's claim under 42 U.S.C. § 1983, the court also looked to *Drew* and stated that the district court had jurisdiction under Title VII.<sup>38</sup> However, the court somewhat undermined the effectiveness of this holding by stating that any possible jurisdictional defect was "cured" by the plaintiff's subsequent receipt of her "right-to-sue" notice, which enabled her to supplement her complaint on the merits.<sup>39</sup>

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31. *Id.*

32. *Id.* at 71-72.

33. *Id.* at 72. The Fifth Circuit concluded:

in the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ultimate success has been established, . . . the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.

*Id.*

34. *McGee v. Purolator Courier Corp.*, 430 F. Supp. 1285, 1288 (N.D. Ala. 1977); *Nottelson v. A. O. Smith Corp.*, 397 F. Supp. 928, 932 (E.D. Wis. 1975); *Collins v. Southwestern Bell Tel. Co.*, 376 F. Supp. 979, 983 (E.D. Okla. 1974); *See also Ashton, supra* note 12, at 58.

35. *Collins*, 376 F. Supp. at 981-82.

36. 528 F.2d 1208 (9th Cir. 1975), *cert. granted*, 429 U.S. 1071, *vacated*, 434 U.S. 158 (1977).

37. *Id.* at 1211.

38. *Id.* at 1211-12.

39. *Id.* at 1212. One district court interpreted this decision as expressing doubt regarding the

Nevertheless, and despite the fact that the United States Supreme Court vacated and remanded the *Berg* decision<sup>40</sup> on other grounds, the established position of the Ninth Circuit remains that jurisdiction exists to consider a private plaintiff's application for preliminary injunctive relief prior to the end of the 180-day waiting period.<sup>41</sup>

In a brief footnote, the Eighth Circuit also upheld a district court's assumption of jurisdiction over a plaintiff's claims for injunctive relief prior to issuance of a right-to-sue letter by the EEOC.<sup>42</sup> Although the footnote does not appear to be strictly necessary to the court's overall holding in the case, it is accepted as the official position of the Eighth Circuit by other courts.<sup>43</sup>

In *McCarthy v. Cortland County Community Action Program, Inc.*,<sup>44</sup> the United States District Court for the Northern District of New York offered several compelling reasons for holding that district courts may consider private suits for injunctive relief prior to completion of EEOC administrative proceedings. First, the court questioned whether the 1972 amendments' grant to the EEOC of the right to seek injunctive relief impliedly repealed the private right to equitable relief already in existence, "particularly since repeals by implication are not favored and will not be assumed absent a clear manifestation of legislative intent."<sup>45</sup> The court also rejected an interpretation of the 1972 amendments which would "encourage employers to profit" from retaliatory conduct by making preliminary injunctive relief inaccessible to the majority of Title VII claimants.<sup>46</sup> Moreover, the *McCarthy* court pointed to the policy of the Second Circuit to avoid strict interpretations of procedural requirements which would "defeat the fundamental purposes" of Title VII.<sup>47</sup>

One year after the *McCarthy* decision, the Second Circuit officially adopted the position that federal courts do have jurisdiction to grant preliminary injunctive relief to private plaintiffs prior to issuance by the

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"propriety and jurisdictional basis" of this type of action. *McGee v. Purolator Courier Corp.*, 430 F. Supp. 1285, 1288 (N.D. Ala. 1977).

40. 434 U.S. 158 (1977).

41. *Duke v. Langdon*, 695 F.2d 1136, 1137 (9th Cir.), *reh'g granted*, 701 F.2d 768 (1983).

42. *McNail v. Amalgamated Meat Cutters*, 549 F.2d 538, 542 n.10 (8th Cir. 1977).

43. *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 886 n.15 (2d Cir. 1981); *Guerrero v. Reeves Bros., Inc.*, 562 F. Supp. 603, 605 (W.D.N.C. 1983); *McCarthy v. Cortland County Community Action Program, Inc.*, 487 F. Supp. 333, 337 (N.D.N.Y. 1980).

44. 487 F. Supp. 333 (N.D.N.Y. 1980).

45. *Id.* at 338 (citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).

46. *Id.* at 338.

47. *Id.* at 338-39.



EEOC of a right-to-sue notice.<sup>48</sup> In *Sheehan v. Purolator Courier Corp.*,<sup>49</sup> the Second Circuit based such jurisdiction both on the spirit of Title VII and on the traditional equitable powers exercised by courts. According to the court, Congress enacted the 1972 amendments "to expand, not to contract, the avenues of enforcement of Title VII."<sup>50</sup> Granting the EEOC the power to seek injunctive relief was intended to supplement, rather than supplant, the private plaintiff's right to sue discriminatory employers.<sup>51</sup> Moreover, the Second Circuit cited a long line of Supreme Court decisions upholding the power of a court to issue injunctive relief in situations where that court will eventually have jurisdiction to review the merits of the case.<sup>52</sup> Finally, the court stated that "[u]nimpeded retaliation" would frustrate the purpose of Title VII by decreasing the likelihood of employer-employee reconciliation and by chilling employees from protesting employer discrimination.<sup>53</sup>

After *Sheehan*, courts in at least two additional jurisdictions adopted the rule that private plaintiffs are entitled to preliminary injunctive relief against retaliation. In 1983, the United States District Court for the Western District of North Carolina followed the Second, Fifth, Eighth, and Ninth Circuits in accepting jurisdiction of such claims, in the absence of any guidance to the contrary from the Fourth Circuit.<sup>54</sup> In 1987, the District of Columbia Circuit became the most recent circuit court to find that jurisdiction exists over private requests for injunctive relief in retaliation cases.<sup>55</sup> As the Second Circuit had in *Sheehan*, the District of Columbia Circuit in *Wagner v. Taylor* found that both congressional intent and the "inherent equitable power" of the courts supported the conclusion that a federal district court may grant injunctive relief where the plaintiff meets the requisite traditional elements.<sup>56</sup>

In addition to the five circuits which now support a private right to

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48. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 881 (2d Cir. 1981).

49. *Id.* at 877.

50. *Id.* at 883.

51. *Id.* In support of this argument, the court relied on *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980), in which the Supreme Court stated that "[t]he amendments did not transfer all private enforcement to the EEOC and assign to that agency exclusively the task of protecting private interests . . . [t]he EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded." *General Tel. Co.*, 446 U.S. at 326 (citations omitted).

52. *Sheehan*, 676 F.2d at 884 (citing *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966)).

53. *Sheehan*, 676 F.2d at 885.

54. *Guerrero v. Reeves Bros., Inc.*, 562 F. Supp. 603, 606 (W.D.N.C. 1983).

55. *Wagner v. Taylor*, 836 F.2d 566, 570 (D.C. Cir. 1987).

56. *Id.* at 571-76.

equitable relief, the First Circuit in *Bailey v. Delta Air Lines, Inc.*<sup>57</sup> expressed some approval of the trend but did not adopt the rule. The court refused to bar private suits for preliminary injunctive relief, stating that it could find no evidence that Congress intended to preclude district courts from exercising their "customary equitable authority."<sup>58</sup> However, the court was able to avoid ruling on the issue by narrowly holding that the plaintiffs did not show the irreparable injury necessary to justify granting a preliminary injunction.<sup>59</sup>

Therefore, while not all circuit courts have considered the issue, nearly half of the circuits have adopted the position that district courts have subject-matter jurisdiction enabling them to grant equitable relief to private plaintiffs while the EEOC action remains pending. These courts generally base their holdings on the congressional intent underlying the enactment of Title VII and on the inherent power of the courts to award equitable relief where they will have final jurisdiction over the merits. Moreover, these courts have recognized that such preliminary injunctive relief is necessary to discourage employers from retaliating against Title VII claimants.

#### IV. DECISIONS FINDING NO JURISDICTION EXISTS TO AWARD RELIEF TO PRIVATE PLAINTIFFS

In contrast to the *Drew-Sheehan* line of cases, a number of courts have taken the more conservative approach that a Title VII claimant may not seek preliminary injunctive relief prior to completion of the EEOC administrative process. It is interesting to note, however, that only one court of appeals, the Sixth Circuit, has issued an opinion refusing to allow such suits, and no court has followed this approach since 1979.<sup>60</sup>

*Jerome v. Viviano Food Co.*<sup>61</sup> appears to be the first opinion rejecting preliminary relief to a private plaintiff and the only such opinion issued by a court of appeals. In *Jerome*, the plaintiff sought preliminary injunctive relief prior to receiving a right-to-sue notice from the EEOC. The plaintiff's EEOC complaint alleged that the Viviano Food Co. refused to hire her because of her sex.<sup>62</sup> Because there was no existing employment

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57. 722 F.2d 942 (1st Cir. 1983).

58. *Id.* at 944.

59. *Id.*

60. *E.g.*, *Doerr v. B. F. Goodrich Co.*, 484 F. Supp. 320, 323 (N.D. Ohio 1979).

61. 489 F.2d 965 (6th Cir. 1974).

62. *Id.* at 966.

relationship, the court was easily able to distinguish *Drew*.<sup>63</sup> Although the *Jerome* court upheld the district court's denial of equitable relief on the narrow grounds that the plaintiff had failed to establish irreparable harm,<sup>64</sup> the court also expressed disapproval of the plaintiff's attempt "to obviate the statutorily required cooling off and conciliation period."<sup>65</sup> The court made clear that it supported strict adherence to the time limitations and procedural formalities set forth in Title VII.

In *Troy v. Shell Oil Co.*,<sup>66</sup> the United States District Court for the Eastern District of Michigan pointed to the disapproving language in *Jerome* as proof that "judicial activism"<sup>67</sup> of the kind exhibited by the Fifth Circuit in *Drew*,<sup>68</sup> would not be tolerated in the Sixth Circuit.<sup>69</sup> The *Troy* court was most critical of the Fifth Circuit's comparison of the situation in *Drew* with that of the plaintiff in *Sanders v. Dobbs Houses, Inc.*,<sup>70</sup> a race discrimination suit based on 42 U.S.C. § 1981. In deciding *Drew*, the Fifth Circuit had looked to *Sanders* as support for its argument that, as with section 1981 plaintiffs, Title VII plaintiffs had also possessed an unqualified right to seek equitable relief prior to the 1972 amendments.<sup>71</sup> The *Troy* court did not address the most compelling issue discussed in

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63. *Id.* Because there was no existing employment relationship between the parties, the plaintiff was seeking injunctive relief to *compel* Viviano Foods to act by hiring her, as opposed to the usual retaliation case where the plaintiff requests preliminary injunctive relief to *prevent* the employer from acting. Therefore, although *Jerome* has been cited as precedent for rejecting equitable relief for private plaintiffs (*Guerrero v. Reeves Bros., Inc.*, 562 F. Supp. 603, 605 (W.D.N.C. 1983)), at least one court has criticized the use of this opinion as precedent for denying equitable relief in retaliation cases. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 886 n.15 (2d Cir. 1981).

64. *Jerome*, 489 F.2d at 966.

65. *Id.*

66. 378 F. Supp. 1042 (E.D. Mich. 1974).

67. *Id.* at 1047.

68. 480 F.2d 69 (5th Cir. 1973). See *supra* notes 20-23 and accompanying text.

69. *Troy*, 378 F. Supp. at 1047 (citing *Jerome v. Viviano Food Co.*, 489 F.2d 965, 966 (6th Cir. 1974)).

70. 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

71. *Troy*, 378 F. Supp. at 1046-47. However, in its critique of the Fifth Circuit's comparison of the *Drew* case with that of *Sanders*, the *Troy* court misses the major point of the *Drew* analysis. In *Troy*, the court states that "[t]he obvious flaw in this analysis is that neither Ms. Drew nor Ms. Troy are at all in the position of Ms. Sanders . . . [who] sued under 42 U.S.C. § 1981 . . . [which] is directed exclusively at discrimination based on race or alienage, and has no application in cases of sex-based discrimination." *Troy*, 378 F. Supp. at 1046. However, the most significant point of the *Drew-Sanders* comparison was not that the two causes of action were similar, but that § 1981 and the Civil Rights Act of 1964 each forbade discrimination while leaving enforcement solely to private individuals. *Drew*, 480 F.2d at 73. Based on this comparison, the Fifth Circuit stated that "[w]e have no doubt . . . that, prior to the amendment of 1972, Ms. Drew could have filed the suit for an injunction pending the consideration to be given to her charges by the EEOC." *Id.* Thus, the central issue in the *Drew* analysis concerned whether, in passing the 1972 amendments allowing the EEOC to seek preliminary relief, Congress intended to foreclose the previously existing private right to seek equitable relief. *Id.* at 73-74.

*Drew*: whether the 1972 amendments giving the EEOC enforcement powers were intended to foreclose the previously existing private right to equitable relief.<sup>72</sup> The court also criticized the “concept of partial jurisdiction” upheld in *Drew*, stating that “[l]acking jurisdiction over the underlying cause of action, the court is without authority to provide relief of any sort[.]”<sup>73</sup> without conceding that the only barrier to jurisdiction over the merits of such a Title VII claim would be cured by the passing of time. Therefore, although the court recognized that precluding private equitable relief was less than desirable, it nevertheless denied the plaintiff’s request for an injunction.<sup>74</sup>

Two other district courts from within the Sixth Circuit generally followed the analysis found in *Troy* in rejecting the availability of private equitable relief.<sup>75</sup> In *Doerr v. B. F. Goodrich Co.*,<sup>76</sup> the United States District Court for the Northern District of Ohio found several persuasive decisions, including *Jerome* and *Troy*, which rejected jurisdiction over private claims for preliminary injunctive relief as contrary to the Title VII scheme “mandating initial administrative efforts at conciliation and voluntary settlement.”<sup>77</sup> The court in *McGee v. Purolator Courier Corp.*,<sup>78</sup> also refused to flout its interpretation of the established congressional scheme. First, the court cited *McDonnell Douglas Corp. v. Green*,<sup>79</sup> in which the Supreme Court stated that both a properly filed claim with the EEOC and a receipt of a right-to-sue notice were “the jurisdictional prerequisites to a federal action” under Title VII.<sup>80</sup> The *McGee* court also noted that there appeared to be no pre-1972 cases that granted equitable relief to a private plaintiff prior to issuance of an EEOC right-to-sue letter.<sup>81</sup> Thus, that court could discern no justification to

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72. See *Drew*, 480 F.2d 73-76.

73. *Troy*, 378 F. Supp. at 1048.

74. *Id.*

75. *Nottelson v. A. O. Smith Corp.*, 397 F. Supp. 928 (E.D. Wis. 1975); *Doerr v. B. F. Goodrich Co.*, 484 F. Supp. 320 (N.D. Ohio 1979).

76. 484 F. Supp. 320 (N.D. Ohio 1979).

77. *Id.* at 322. However, one commentator states that “[t]here is no evidence whatever to indicate that the 180-day deferral period was ever intended to be a ‘cooling off’ period in which employers would be free from judicial or EEOC sanctions[.]” but rather was meant to allow the EEOC time to consider the discrimination charge and determine whether it would act on the charge. Ashton, *supra* note 12, at 68.

78. 430 F. Supp. 1285 (N.D. Ala. 1977).

79. 411 U.S. 792 (1973).

80. *McGee*, 430 F. Supp. at 1286 (emphasis in original) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973)). However, *McDonnell Douglas* concerned the prerequisites for plaintiff to file suit on the merits of his discrimination claim, rather than a suit for preliminary injunctive relief. *McDonnell Douglas Corp.*, 411 U.S. at 798.

81. *McGee*, 430 F. Supp. at 1286-87.

conclude, as did the Fifth Circuit in *Drew*, that such a right existed.

## V. THE LAW WITHIN THE TENTH CIRCUIT

The only decision from within the Tenth Circuit on this issue is *Collins v. Southwestern Bell Telephone Co.*<sup>82</sup> In *Collins*, the plaintiff first filed charges with the EEOC alleging that Southwestern Bell had discriminated against him on the basis of his religion. Collins then requested injunctive relief to restore him to his former position.<sup>83</sup> However, the United States District Court for the Eastern District of Oklahoma refused to depart from the express statutory procedures of Title VII. According to the court, the purpose of the 180-day deferral period was to allow sufficient time for conciliation between employer and employee; therefore, Congress intended action in the federal courts to be the last resort available to Title VII claimants.<sup>84</sup> The court also stated that the "comprehensive nature of the legislative scheme embodied in Title VII" indicated that Congress intended to eliminate any private right to preliminary injunctive relief when it extended that right to the EEOC.<sup>85</sup> The court was further persuaded to reject the plaintiff's claim for equitable relief because the plaintiff had also requested a hearing on the merits of his discrimination claim, thereby attempting to circumvent the EEOC administrative procedures altogether.<sup>86</sup>

Unfortunately, no appeal was taken from the *Collins* decision; thus, one can only speculate as to what the decision of the Tenth Circuit might have been. Some district court opinions on Title VII matters from within the circuit exhibit a conservative, procedure-bound approach. For example, in *Mills v. Jefferson Bank East*,<sup>87</sup> the United States District Court for the District of Colorado dismissed the plaintiff's Title VII complaint on the ground that the right-to-sue letter from the EEOC was defectively issued prior to the close of the 180-day deferral period, thus defeating subject-matter jurisdiction.<sup>88</sup> The court's reasoning was that issuance of a right-to-sue notice prior to the 180-day period violated congressional intent that the EEOC have 180 days to effect a conciliation between the parties.<sup>89</sup> This decision was also not appealed to the Tenth Circuit.

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82. 376 F. Supp. 979 (E.D. Okla. 1974).

83. *Id.* at 980.

84. *Id.* at 981-82.

85. *Id.* at 983.

86. *Id.* at 980, 983.

87. 559 F. Supp. 34 (D. Colo. 1983).

88. *Id.* at 36.

89. *Id.* Although the *Mills* court cited a number of district court decisions holding that a right-

An examination of Tenth Circuit decisions concerning the procedural requirements of Title VII provides a basis to argue that the court will find a private claim for a preliminary injunction against retaliation to be appropriate. In *Smith v. Oral Roberts Evangelistic Association*,<sup>90</sup> the plaintiff filed a Title VII claim alleging sexual discrimination in the termination of her employment. However, the plaintiff filed the claim after the expiration of the Oklahoma statutory deadline for such claims. The Tenth Circuit held that the Supreme Court's decision in *Mohasco Corp. v. Silver*<sup>91</sup> had impliedly struck down the Tenth Circuit's strict approach on filing deadlines in Title VII cases.<sup>92</sup> Thus, where the plaintiff in *Smith* had missed the Oklahoma deadline for filing a complaint but had filed with the EEOC within the 240-day period approved in *Mohasco*, failure to meet the Oklahoma limitations period would not foreclose the plaintiff's right to sue under Title VII. The court stated "[n]othing in Title VII requires filing with the state or local agency (or the EEOC) within the time periods commanded by state law . . . we cannot construe 42 U.S.C. § 2000e-5(c) or (e) to require filing within state specified time limits. This construction is fully consistent with Title VII's remedial purposes."<sup>93</sup> Therefore, because preliminary injunctive relief is also consistent with the remedial purposes of Title VII, the Tenth Circuit should logically extend its reasoning in *Smith* to allow a private plaintiff to seek such relief.

In *Brown v. Hartshorne Public School District No. 1*,<sup>94</sup> the Tenth Circuit reversed the district court's dismissal of plaintiff's suit which alleged retaliation in violation of Title VII. The plaintiff had originally filed a complaint with the EEOC alleging that the defendant refused to hire her for the 1984-85 school year because of her national origin. The EEOC subsequently issued her a right-to-sue letter. The next year, the school district again refused to hire the plaintiff. Rather than filing another charge with the EEOC, the plaintiff filed suit alleging that the school district refused to employ her for the subsequent school year in retaliation for her 1984-85 EEOC charge. The district court dismissed

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to-sue notice issued prior to the 180-day time period is defective, a number of courts have considered suits based on such early notices. See, e.g., *Drew v. Liberty Mut. Ins. Co.*, 480 F.2d 69 (5th Cir. 1973); *Berg v. Richmond Unified School Dist.*, 528 F.2d 1208 (9th Cir. 1975). Apparently, issuance of early right-to-sue notices is common practice in some district EEOC offices. Ashton, *supra* note 12, at 77.

90. 731 F.2d 684 (10th Cir. 1984).

91. 447 U.S. 807 (1980).

92. *Smith*, 731 F.2d at 690.

93. *Id.* at 687.

94. 864 F.2d 680 (10th Cir. 1988).

her case on grounds that she needed to file another EEOC charge for any discriminatory actions subsequent to the original charge.<sup>95</sup> In reversing the district court's decision, the Tenth Circuit stated that the plaintiff's judicial complaint "may encompass any discrimination like or reasonably related to the allegations of the EEOC charge,"<sup>96</sup> and found that a retaliatory act is "reasonably related" to the EEOC charge which preceded it.<sup>97</sup> Thus, the Tenth Circuit refused to follow a narrow interpretation of the procedural requirements of Title VII. This decision supports the argument that the court would also reject a narrow interpretation of Title VII's provision on preliminary relief in favor of the less restrictive approach followed in the *Drew-Sheehan* line of cases.

When the issue of preliminary injunctive relief against retaliation is brought before the Tenth Circuit, the language of Title VII and its legislative history should convince the court that granting preliminary injunctive relief to a private plaintiff may be necessary. Prior to the 1972 amendments to Title VII, private parties, not the EEOC, possessed the right to seek judicial relief.<sup>98</sup> When Congress enacted the 1972 amendments, it granted the EEOC authority to sue for temporary or preliminary injunctive relief where "prompt judicial action is necessary to carry out the purposes of [the] Act."<sup>99</sup> Thus, the question becomes whether Congress intended this power to be exclusively held by the EEOC.

## VI. LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS

An exclusive EEOC right to injunctive relief seems inconsistent with the remedial nature of the Civil Rights Act of 1964, particularly in retaliatory action cases. The purpose of the section 2000e-3 prohibition against retaliation is to *encourage* employees to resist discriminatory practices. However, an employer who knows that only the EEOC has the power to request immediate relief from the retaliation can rightly conclude that the chances that the EEOC will seek injunctive relief are slight. Although a retaliation victim may eventually receive damages through judicial action, under Title VII damages are not available to

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95. *Id.* at 681-82.

96. *Id.* at 682 (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)).

97. *Id.*

98. Ashton, *supra* note 12, at 51. The United States Attorney General could bring suit if "a pattern or practice of resistance" against Title VII existed. *Id.* at n.4 (quoting 42 U.S.C. § 2000e-6(a) (1970)).

99. 42 U.S.C. § 2000e-5(f)(2) (1982).

compensate the victim for the emotional and mental stress of being fired or otherwise harassed. Retaliatory termination may plunge an employee into poverty, resulting in the loss of home and possessions, and possibly even the disintegration of the employee's family. Employees who know that retaliation may not be remedied for months, even years, are far less likely to oppose employer discrimination. Such realities mean that limiting the right to preliminary relief solely to the EEOC undermines Title VII's prohibition against retaliation.

Of course, all retaliation claims are not equal. Less extreme forms of retaliation, such as denial of promotions or raises, are less catastrophic than termination of employment. Immediate relief from less severe retaliatory conduct may not be integral to enforcement of Title VII's prohibition against retaliation. However, such differences in the necessity for immediate relief need not influence the issue of whether a private plaintiff should be entitled to seek such relief. Regardless of the form of retaliation, the plaintiff's claim must meet the traditional standards for equitable relief, such as irreparable injury and substantial likelihood of success on the merits of the claim.<sup>100</sup>

The legislative history of the 1972 amendments indicates that congressional intent was to enhance enforcement of Title VII. In effect, Congress created two avenues of enforcement under the 1972 amendments: the first through the EEOC and, failing that, through suit by the claimant. Although the statute prescribes at least a six-month delay before a plaintiff may litigate the merits of a discrimination claim, Congress recognized that immediate relief might be necessary when it provided that the EEOC may seek preliminary injunctive relief. In fact, legislative history indicates that Congress deemed preliminary relief to be "central" to the adequate protection of claimants.<sup>101</sup> In granting the EEOC the power of enforcement, Congress preserved the claimant's private right of action "to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim" should the EEOC decline to file suit, and "to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed."<sup>102</sup> If Congress intended that aggrieved persons should not be forced to abandon

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100. *E.g.*, *Baker v. Board of Regents*, 721 F. Supp. 270, 272 (D. Kan. 1989).

101. 118 CONG. REC. 7564 (1972). Apparently when Congress authorized the EEOC to seek preliminary relief it did not consider the backlog at the EEOC, which delays processing complaints. See *supra* note 12.

102. 118 CONG. REC. 7565 (1972). The conference report also states, "the provisions . . . allow



their claims if the EEOC failed to act on the merits, it seems logical that retaliation victims should not be forced to abandon their claims for immediate relief if the EEOC fails to seek an injunction.

Additionally, the conference report on the 1972 amendments states that "in any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated" existing case law would not be disturbed.<sup>103</sup> The language of section 2000e-5(f)(2) does not constitute a "specific contrary intention" against federal court jurisdiction over private claims for preliminary injunctive relief. The language of the statute is not mandatory but permissive: "the Commission . . . *may* bring an action for appropriate temporary or preliminary relief."<sup>104</sup> The fact that suit by the EEOC for preliminary relief is optional, even where such relief "is necessary to carry out the purposes of [the] Act,"<sup>105</sup> indicates that the right to injunctive relief was not intended to be exclusive to the EEOC. Replacing the private right to preliminary relief with an administrative right which is exercised at whim would contradict the remedial purpose of the statute.

## VII. CONCLUSION

In order to eliminate discriminatory employment practices prohibited by Title VII, aggrieved persons who file claims or otherwise oppose discriminatory practices must enjoy immunity from employer retaliation. Retaliatory acts which are not quickly enjoined naturally chill employees from exercising their rights under Title VII. Although the 1972 amendments to Title VII authorized the EEOC to seek preliminary injunctive relief, the statute does not specifically address whether a private plaintiff may seek preliminary injunctive relief to maintain the status quo while the EEOC considers the underlying claim.

The courts of appeals in at least five circuits have held that district courts may consider private actions for equitable relief while the EEOC has jurisdiction over the underlying claim. Only one court of appeals decision has held to the contrary. While the Tenth Circuit has not yet ruled on the issue, an older district court decision from within the circuit followed the conservative view that no jurisdiction exists.

Courts within the Tenth Circuit should follow the majority view

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the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution." *Id.*

103. *Id.* at 7564.

104. 42 U.S.C. § 2000e-5(f)(2) (1982) (emphasis added).

105. *Id.*

that private plaintiffs may seek preliminary relief against retaliation. Jurisdiction over such suits is supported by the language of Title VII and the intent of Congress revealed in the legislative history of the 1972 amendments. Only by providing preliminary injunctive relief to retaliation victims can courts uphold Title VII's proscription against employment discrimination.

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