COMMENTS

Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the *Zipes* Rationale

In Zipes v. Trans World Airlines, *the Supreme Court held that Title VII time periods are like statutes of limitation, which may be equitably modified when the circumstances warrant. Lower courts have grappled with the scope of the* Zipes *decision, attempting to decide which of Title VII's time limits are subject to equitable modification and under what circumstances such modification is appropriate. This Comment examines both of these unresolved areas and concludes that all Title VII filing periods should be treated as statutes of limitation that can be equitably modified to promote Title VII's remedial nature.*

INTRODUCTION

The 1954 Supreme Court decision rejecting school segregation[1] triggered a renewed dedication by civil rights activists to improve the opportunities of black Americans in the education, employment, and political spheres. Strong political pressure and fear of continued and increasingly confrontational urban unrest culminated in legislative action in the early 1960's.[2] The most comprehensive bill arising from this

[1] Brown v. Board of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[2] For a history of this period, see THE CIVIL RIGHTS READER (L. Friedman ed. 1968). Bills passed in the early 1960's that addressed institutionalized racism included the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; the Civil Rights Act of 1964, Pub. L. No. 88-

period was the Civil Rights Act of 1964.[3] The Civil Rights Act contained many controversial provisions, including Title VII, a federal guarantee of equal employment opportunity.[4]

Title VII prevents employers from discriminating against individuals based on their race, color, religion, sex, or national origin in hiring, discharging, or other employment decisions.[5] An employer also is prohibited from using these characteristics to limit, segregate, or classify applicants or employees in a manner that potentially deprives them of "employment opportunities."[6]

During the lengthy and often heated Senate debates on the Civil Rights Act, Southern Democrats opposing the bill focused much attention on Title VII.[7] Opponents argued that it would result in a "drastic intrusion into private businesses [that would] be unjust and coercive to employers and employees alike,"[8] that it threatened unconstitutional interference with private property rights,[9] that no constitutional basis existed for its enactment under either the commerce clause[10] or the four-

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352, 78 Stat. 241; and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[3] 42 U.S.C. §§ 1981 to 2000h-6 (1982).

[4] *Id.* §§ 2000e to 2000e-17 (enacted in 1964, Pub. L. No. 88-352, 78 Stat. 253; *extended in* 1972, Pub. L. No. 92-261, 86 Stat. 103).

[5] 42 U.S.C. § 2000e-2(a)(1) (1982):

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

[6] *Id.* § 2000e-2(a)(2):

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

[7] *See, e.g.*, 110 Cong. Rec. 5810, 5878, 5933, 6053, 6415, 6547, 6562, 7008, 7051, 7198, 7203, 7240, 7385, 7561, 7742, 7770, 7879, 8044, 8169, 8182, 8307, 8311, 8348, 8350, 8353, 8361, 8441, 8617, 8630, 8718, 9123, 9131, 9159, 9283, 9587, 9675, 9790, 9881, 10,513, 10,530, 10,614, 11,719, 11,920, 12,555, 12,593, 13,084, 13,492, 13,825, 13,837, 14,186 (1964) (remarks in Senate).

[8] 110 Cong. Rec. 5810 (1964) (statement of Sen. Stennis).

[9] *Id.* at 5811.

[10] 110 Cong. Rec. 5812 (1964) (statement of Sen. Stennis); 110 Cong. Rec. 5878 (1964) (statement by Sen. Byrd).

teenth amendment,[11] and that it destroyed the right to contract.[12] Proponents of Title VII countered with statistics demonstrating that blacks were the principal victims of employment discrimination, both in their ability to obtain employment and the types of jobs available to them.[13] Senator Thomas Kuchel of California, one of the floor managers of the bill, outlined the necessity of Title VII in relation to the rest of the Civil Rights Act:

> If a Negro or a Puerto Rican or an Indian or a Japanese-American or an American of Mexican descent cannot secure a job and the opportunity to advance on that job commensurate with his skill, then his right to be served in places of public accommodation is a meaningless one — a right which can seldom be exercised when there is a lack of money. And if a member of a so-called minority group believes that no matter how hard he studies, he will be confronted with a life of unskilled and menial labor, then a loss has occurred, not only for a human being, but also for our Nation.[14]

Despite the controversy over Title VII's potential effect, the Bill was enacted into law with the equal employment opportunities provision.[15]

Under Title VII, a complainant (an aggrieved job applicant or employee) must follow elaborate procedural steps to receive a court hearing on the merits of her employment discrimination claim. A charge filed by a complainant must comply with guidelines established by the Equal Employment Opportunities Commission (EEOC), the federal agency created under Title VII to review charges brought by those with grievances against employers.[16] After a discriminatory act occurs, a

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[11] 110 Cong. Rec. 5878 (1964) (statement of Sen. Byrd).

[12] 110 Cong. Rec. 5818 (1964) (statement of Sen. Stennis).

[13] Department of Labor statistics supported Title VII proponents' claims of race-based discrimination with regard to general ability to procure employment and job classification. Available statistics showed unemployment rates among nonwhites to be over twice as high as among whites. Among familes with male heads of households, the unemployment rate was three times as high among nonwhites as among whites. With regard to job classification, 17% of nonwhite workers had white collar jobs, while among white workers the figure was 47%. Likewise, 14% of employed nonwhites had unskilled jobs in nonagricultural industries, compared to 4% of employed whites. 110 Cong. Rec. 6547 (1964) (statement of Sen. Humphrey, citing Department of Labor statistics).

[14] 110 Cong. Rec. 6562 (1964) (statement of Sen. Kuchel).

[15] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[16] The Equal Employment Opportunity Commission (EEOC), created by Title VII, is a five member body appointed by the President and confirmed by the Senate. *Id.* § 2000e-4(b)(1) (1982). The EEOC's function is to administer Title VII's enforcement. *See id.* § 2000e-4(a) to (i) (1982). For a discussion of the EEOC's administrative process, see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION

complainant has a limited time to file a charge with the EEOC: 180 days or 300 days, depending on whether a state agency counterpart to the EEOC exists.[17] Complainants must wait 180 days after filing an EEOC charge before they may request the right to sue in court. Once the EEOC issues a right-to-sue letter, a complainant has only ninety days to file a lawsuit.[18]

Victims of discrimination often miss these deadlines for a variety of reasons. Those with little or no legal knowledge cannot decipher the statute's procedural complexities.[19] Others are unaware of avenues of relief due to obstructionist actions of their employers or third parties. For example, if an employer neglects her statutory duty to post notice of employee Title VII rights at the job site, an aggrieved employee may not know of her employment rights. Consequently, the 180-day filing period may lapse before she learns of her Title VII remedies.[20] Similarly, a plaintiff who acts without the legal advice of trained counsel,[21] or who receives misinformation from the EEOC or another third party may inadvertently miss the 180-day deadline.[22]

In determining the plight of Title VII plaintiffs who missed the filing deadlines, the courts have been unsure whether to treat the time periods as jurisdictional restrictions or as normal statutes of limitation. The character of the time periods is critical because it determines whether the merits of a delinquently filed complaint may ever be heard by a court. Under a jurisdictional interpretation of the time periods, the court lacks jurisdiction to hear the case once the time period expires,[23] and the plaintiff's claim is barred. However, if the time periods are characterized as statutes of limitation, late filing does not automatically bar the plaintiff's claim. Instead, the time periods can be modified — waived,[24] estopped,[25] or equitably tolled[26] — when circumstances war-

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LAW ch. 26 (1983).

[17] *See infra* text accompanying notes 35-38.

[18] *See infra* text accompanying notes 39-45.

[19] District Court Judge Karlton recently commented: "Even for the wary, Title VII's procedural steps constitute a series of land mines." Dees v. Orr, 33 Fair Empl. Prac. Cas. (BNA) 964, 966 (E.D. Cal. 1982).

[20] *See infra* text accompanying notes 126-35.

[21] *See infra* text accompanying notes 139-51.

[22] *See infra* text accompanying notes 152-69.

[23] *See, e.g., infra* text accompanying notes 52-53 and cases cited in note 54.

[24] Waiver involves the "intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." BLACK'S LAW DICTIONARY 1417 (5th ed. 1979) (citing Atlas Life Ins. Co. v. Schrimsher, 179 Okla. 643, 645, 66 P.2d 944, 948 (1937)).

[25] Estoppel "means that a party is prevented by his own act from claiming a right to

rant equitable treatment.

In two recent decisions, the Supreme Court has taken the first steps toward characterizing Title VII's time periods. In *Zipes v. Trans World Airlines*,[27] the Court held that the time requirement for the initial filing of a claim with the EEOC[28] is not jurisdictional. Instead, the time period is "subject to waiver as well as tolling when equity so requires."[29] The *Zipes* Court emphasized the remedial nature of Title VII, noting that the dismissal of meritorious claims due to a strict application of the time limits would be inappropriate.[30] Two years after *Zipes*, the Court established a limited exception to the *Zipes* rule in *Baldwin City Welcome Center v. Brown*.[31] In *Baldwin*, the Court held that, absent legislative history to the contrary, a procedural term not defined in Title VII should receive a standard interpretation under the Federal Rules of Civil Procedure. Consequently, if a procedural term not defined in Title VII is normally considered jurisdictional, that interpretation will control despite the *Zipes* holding.[32]

In *Zipes*, the Court left two issues unresolved: the character of filing periods other than the specific period addressed in *Zipes*, and the factors courts should weigh when deciding whether equitable modification

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[the] detriment of [an]other party who was entitled to rely on such conduct and has acted accordingly." BLACK'S LAW DICTIONARY 494 (5th ed. 1979) (citing Graham v. Asbury, 112 Ariz. 184, 185-86, 540 P.2d 656, 658 (1949)).

[26] Equitable tolling suspends the filing period when a complainant fails to comply with the time period due to circumstances beyond her control. Premium Management v. Walker, 648 F.2d 778, 781 (1st Cir. 1981) (exceptions to New Hampshire's rule that ignorance of cause of action does not ordinarily toll the statute of limitations relate to concealment of plaintiff's cause of action and to late discovery); Yazzie v. Olney, Levy, Kaplan & Tenner, 593 F.2d 100, 102-03 (9th Cir. 1979) (Arizona's two-year statute of limitations for tort claims tolled by plaintiff's reasonable failure to discover facts giving rise to claims); *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 503 F. Supp. 194, 197 (N.D. Cal. 1980) (exceptions to California's rule that statutes of limitation governing personal injury claims commence when wrongful act takes place apply when defendant fraudulently concealed facts from plaintiff and in cases involving pathological effect without perceptible trauma), *aff'd*, 697 F.2d 880 (9th Cir. 1983).

[27] 455 U.S. 385 (1982).

[28] 42 U.S.C. § 2000e-5(e) (1982) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .").

[29] *Zipes*, 455 U.S. at 398.

[30] *Id.* at 394-95 (citing the Final Conference Committee analysis of H.R. 1746, the Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972)).

[31] 104 S. Ct. 1723 (1984) (per curiam).

[32] *See infra* text accompanying notes 69-77.

of a particular time period is appropriate. In part I, this Comment identifies the filing periods that have been affected by the *Zipes* decision. Part II outlines the jurisdictional confusion resolved by the *Zipes* decision and the implications of the *Baldwin* limitation. Part III examines the conflict in the lower courts regarding the characterization of the Title VII time periods after the *Zipes* and *Baldwin* decisions. Although some lower courts have held these periods to be jurisdictional, this Comment argues that the *Zipes* rationale logically extends to these other time periods.[33] Finally, part IV discusses the consequences of a nonjurisdictional characterization of the time periods, and provides guidelines for future application of equitable principles. Title VII's remedial purpose can only be served by allowing plaintiffs to bring late claims when the tardiness was beyond the plaintiff's control and the employer would not be unduly prejudiced. This Comment concludes that all of Title VII's time limits are statutes of limitation. Consequently, instead of focusing on the character of the period, the courts' emphasis should be on the appropriateness of equitable modification in each case.

I. Procedural Requirements for Adjudicating Employment Discrimination Claims Under Title VII

Title VII contains a host of statutory requirements that a complainant must satisfy to bring an employment discrimination claim successfully. The following discussion identifies the Title VII's time periods that will be discussed later in terms of their characterization as jurisdictional or nonjurisdictional.

Title VII provides administrative and judicial avenues of relief[34] to an individual who has been denied equal employment opportunities. The procedural requirements for bringing a grievance vary depending on the type of employer and the existence of applicable state laws.

A private sector applicant or employee must file her charge[35] with

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[33] *See infra* text accompanying notes 78-110.

[34] Administrative relief is authorized in 42 U.S.C. § 2000e-4 (1982) (establishes the EEOC and its General Counsel and describes the EEOC's role in administrative enforcement). Judicial relief is provided in *id.* § 2000e-5 (sets forth civil actions that may be pursued by EEOC and complainant against the Title VII violator).

[35] In their treatise on employment discrimination law, Barbara Schlei and Paul Grossman describe the substantive elements of a Title VII charge as follows:

> To be valid, a charge under Title VII must meet the following requirements:
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> (1) It must be timely;
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> (2) It must be filed by a person claiming to be aggrieved, a person filing

appropriate state and federal agencies before seeking a judicial hearing. In states without fair employment agencies, the charge must be filed with the EEOC within 180 days of the discriminatory act to comply with the statutory time period.[36] In states with fair employment laws and corresponding agencies (deferral states), the complainant must first comply with local law by filing a charge with the local agency.[37] A deferral state complainant must also file a charge with the EEOC within 300 days of the alleged unlawful employment practice or within 30 days after receiving notice that the state proceedings have terminated.[38]

After the complainant files a charge with the EEOC, the agency has exclusive control over the case for a maximum of 180 days.[39] The EEOC investigates the charge to determine whether "reasonable cause" exists to believe the unlawful employment practice occurred.[40] Once the investigation is complete, the private complainant may initiate civil ac-

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on behalf of such an aggrieved person, or a member of the Commission;
(3) It must be filed against a covered respondent: an employer, a union, an apprenticeship training program, or an employment agency;
(4) It must allege discrimination on a basis covered by Title VII: race, color, religion, sex, national origin, or retaliation; and
(5) It must allege an issue in dispute: the adverse employment action.

B. SCHLEI & P. GROSSMAN, *supra* note 16, at 983-84. The statute itself provides that "[c]harges shall be in writing under oath . . . and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (1982). The Code of Federal Regulations sets out the Commission's requirements. Accordingly, a proper charge includes "a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." 29 C.F.R. §1601.11(b) (1975); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 16, at 984-86.

[36] *See supra* note 28. The 180-day limit was the filing period at issue in *Zipes*, 455 U.S. 385 (1982).

[37] 42 U.S.C. § 2000e-5(c) (1982):

> If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority.

[38] The state agency has exclusive jurisdiction for 60 days, or 120 days if the state agency is less than one year old. *Id.* § 2000e-5(c). After this period, the complainant may file a charge with the EEOC. However, the complainant may file a charge no later than 30 days following receipt of notice that the state agency has disposed of the matter or within 300 days following the discriminatory act. *Id.* § 2000e-5(e).

[39] *Id.* § 2000e-5(f)(1).

[40] *Id.* § 2000e-5(b) (EEOC's standard of review is "reasonable cause to believe that the charge is true").

tion in one of three situations. First, if the EEOC determines that the charge is probably false, it dismisses the charge and notifies the parties.[41] Second, the complainant may request a right-to-sue letter. This letter is automatically granted if requested after 180 days of exclusive EEOC jurisdiction.[42] The agency, under certain circumstances, may grant the letter earlier.[43] Finally, if the EEOC determines the charge is probably true and attempts to remedy the situation through conference, conciliation, and persuasion procedures are unsuccessful, the agency will either bring an action or issue a right-to-sue letter.[44] Once the complainant receives a right-to-sue letter, she has ninety days to bring action in civil court.[45]

Title VII also guarantees equal employment opportunities for appli-

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[41] *Id.* § 2000e-5(b). 29 C.F.R. § 1601.19(a) to (e) (1984) describe when it is appropriate for the EEOC to dismiss a complainant's charge. 29 C.F.R. § 1601.19(f) (1984) then adds: "Written notice [of dismissal shall be issued] to the person claiming to be aggrieved . . . and to the respondent. Appropriate notices of right to sue shall be issued pursuant to § 1601.28."

29 C.F.R. § 1601.28(e) describes the information that a right-to-sue notice must contain:

> The notice of right to sue shall include:
>
> (1) Authorization to the aggrieved person to bring a civil action pursuant to section 706(f)(1) of the Act within 90 days from receipt of such authorization;
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> (2) Advice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate;
>
> (3) A copy of the charge;
>
> (4) The Commission's decision, determination, or dismissal, as appropriate.

[42] 42 U.S.C. § 2000e-5(f)(i) (1982).

[43] 29 C.F.R. § 1601.20(a)(2) (1984) permits issuance of early notice provided that local EEOC personnel have "determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days . . . ." Some courts have held that since 42 U.S.C. § 2000e-5(f)(i) does not provide for a notice of right to sue within the 180-day period, there is no jurisdiction to consider a claim filed prior to the expiration of that period. *See, e.g.*, People v. Holiday Inns, 35 Fair Empl. Prac. Cas. (BNA) 1308, 1311-12 (W.D.N.Y. 1984); Mills v. Jefferson Bank E., 559 F. Supp. 34, 36 (D. Colo. 1983); Spencer v. Banco Real, 23 Fair Empl. Prac. Cas. (BNA) 1558 (S.D.N.Y. 1980); Loney v. Carr-Lowrey Glass Co., 458 F. Supp. 1080, 1081 (D. Md. 1978). Other courts have held that early issuance of the notice does not preclude filing of a suit. *See, e.g.*, Bryant v. California Brewers Ass'n, 585 F.2d 421, 425 (9th Cir. 1978), *vacated on other grounds*, 444 U.S. 598 (1980); Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975); Cattell v. Bob Frensley Ford, Inc., 505 F. Supp. 617, 622 (M.D. Tenn. 1980); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 682-86 (D. Md. 1979).

[44] 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1) (1982).

[45] *Id.* § 2000e-5(f)(1).

cants to and employees of the federal government.[46] Each federal agency is required to have its own EEO program.[47] Federal regulations require a federal complainant to take her complaint to an in-house EEO counselor within thirty days of the discriminatory act.[48] If the issue is not resolved at that level, the complainant may file a civil action within 30 days after she receives notice of final action by either the federal employer or the EEOC, or 180 days after filing the initial charge with those agencies.[49]

Thus, Title VII establishes two types of time limitations: one proscribes the amount of time a complainant has in which to file a charge with the EEOC, the other limits the time in which a complaint may be filed in court. The time period's length differs depending on whether the employer is private or public and whether the state has a coexisting fair employment agency. While the time limits vary for valid reasons, the different standards confuse the lay person seeking to have her grievance addressed and may become procedural roadblocks. Consequently, the purpose behind the rules must be examined to determine whether strict adherence to them is appropriate.

Although a vast amount of legislative history about the Civil Rights Act exists, almost none of this history addresses the Title VII time periods. In fact, the only time the limitations periods were discussed was when members of Congress read into the record the various provisions of Title VII. During this reading, Senator Case mentioned that the purpose of the time periods was to prevent "stale" claims.[50] Thus, the time periods apparently were intended to protect employers from claims so remote from the alleged discriminatory act as to make it unfair to litigate them. The prevention of stale claims is the commonly stated rationale for statutes of limitation.[51] This language suggests that Title VII limitations are analogous to statutes of limitation. If this analogy is followed, courts will allow the same equitable modification of Title VII time periods that they allow with statutes of limitation. Although the majority of courts eventually agreed that Title VII time periods should be equitably modified, this conclusion was reached only after much confusion over the characterization of the time periods.

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[46] *Id.* § 2000e-16(a) to (e).

[47] 29 C.F.R. §§ 1613.203-.204 (1984).

[48] *Id.* § 1613.214(a)(1)(i).

[49] 42 U.S.C. § 2000e-16(c) (1982).

[50] 110 Cong. Rec. 7243 (1964) (statement of Sen. Case).

[51] *See Zipes*, 455 U.S. at 394.

II. The Conflict Over the Character of Title VII Procedural Requirements

Congressional failure to explicitly define the Title VII time periods as either jurisdictional[52] or nonjurisdictional[53] resulted in conflicting interpretations by the lower courts. The courts' characterization of the time periods had a tremendous impact on a complainant's ability to have the merits of her case heard. In jurisdictions where the periods were considered jurisdictional, the EEOC or the court could not hear a claim brought after the statutory time period expired. However, in jurisdictions that found the periods to be nonjurisdictional and more like statutes of limitation, the courts could consider an identical claim brought after the statutory time period if equitable circumstances justified the delay.

The Seventh and Eighth Circuits adopted positions characterizing all Title VII time limits as jurisdictional in nature.[54] Thus, a plaintiff who worked in the states represented in these circuits could not bring a Title VII claim if she failed to comply with the statutory time limits, although a comparable worker in another jurisdiction could bring the same action if equitable modification of the time limits was warranted. Neither circuit articulated a rationale for finding the time periods to be jurisdictional.[55] Perhaps this inability to support a jurisdictional interpretation led the majority of the circuits to accept the time periods as

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[52] *See supra* text accompanying note 23.

[53] *See supra* text accompanying notes 24-26.

[54] *See, e.g.*, Larson v. American Wheel & Brake, Inc., 610 F.2d 506, 511 (8th Cir. 1979) (court has labeled the limitations period for filing the Notice of Intent to Sue with the EEOC as a jurisdictional prerequisite in Title VII cases); Shea v. City of St. Paul, 601 F.2d 345, 349-50 (8th Cir. 1979) (court lacked jurisdiction because plaintiff missed 90-day filing period with court after receiving right-to-sue letter); Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1233 (8th Cir. 1975) (court only has jurisdiction if the employment discrimination charge is filed within 180 days); Moore v. Sunbeam Corp., 459 F.2d 811, 821-22 n.26 (7th Cir. 1972) (210-day limit for filing with EEOC in deferral state is jurisdictional and not subject to equitable tolling); Harris v. National Tea Co., 454 F.2d 307, 309-10 (7th Cir. 1971) (failure to institute a civil action within statutory time limit following receipt of right-to-sue letter made suit subject to dismissal for lack of subject-matter jurisdiction); Comment, *Title VII - Time Limitation for Filing Charge with EEOC is Subject to Equitable Tolling*, 55 Notre Dame Law. 614, 618 (1979).

[55] "The difficulty with this extensive body of authority is that no court has even expounded any reason for considering the requirements to be jurisdictional." Comment, *Equitable Modification of Time Limitations Under Title VII*, 48 U. Chi. L. Rev. 1016, 1020 (1981) [hereafter Comment, *Equitable Modification*].

statutes of limitation subject to equitable modification.[56] This position ultimately was adopted by the Supreme Court in *Zipes v. Trans World Airlines*.[57]

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[56] The Second, Third, Fifth, Sixth, Tenth, and D.C. Circuits all allowed Title VII's time periods to be equitably modified before the *Zipes* decision. *See* Carlile v. South Routt School Dist., 652 F.2d 981, 985 (10th Cir. 1981) (court called 90-day filing period with court jurisdictional, but said the period could be subject to equitable tolling); Gerometti v. General Motors Corp., 609 F.2d 1200, 1203 (6th Cir. 1979) (court recognized availability of equitable tolling but found it inapplicable), *cert. denied*, 446 U.S. 985 (1980); Leake v. University of Cincinnati, 605 F.2d 255, 259 (6th Cir. 1979) ("Title VII time limitations are jurisdictional in the sense that that phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application."); Chappell v. Emco Machine Works Co., 601 F.2d 1295, 1301-02 (5th Cir. 1979) (equitable extension allowed even though the court classified the filing period as jurisdictional); Hart v. J.T. Baker Corp., 598 F.2d 829, 831 (3d Cir. 1979) (filing of a charge with EEOC within 180-day period is not jurisdictional, but is analogous to a statute of limitations and therefore subject to equitable modification); Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711, 718 n.23 (D.C. Cir. 1978) ("[T]he time restriction on filing charges with the Commission is not jurisdictional, but subject to extension in deserving cases."); Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 838 (10th Cir. 1979) (no grounds for equitably tolling filing period with court); Bethel v. Jefferson, 589 F.2d 631, 640-43 (D.C. Cir. 1978) (court allowed tolling when plaintiffs filed pursuant to the wrong section of Title VII, citing general complexity of the procedures required by statute); Smith v. American Pres. Lines, 571 F.2d 102, 105 (2d Cir. 1978) (plaintiff's failure to file a charge with EEOC within 180 days barred suit, though court recognized proposition that under different conditions a plaintiff could defeat a time bar); Laffey v. N.W. Airlines, 567 F.2d 429, 474-75 (D.C. Cir. 1976) (time limits not jurisdictional and can be extended in deserving cases), *cert. denied*, 434 U.S. 1086 (1978); Egelston v. State Univ. College at Geneseo, 535 F.2d 752, 754-55 (2d Cir. 1976) (plaintiff's late charge did not bar suit because of "a flexible stance in interpreting Title VII's procedural provisions."); Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975) ("[A]lthough compliance with these [time] requirements is a jurisdictional prerequisite to maintenance of a civil action, . . . the rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate."); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928 (5th Cir. 1975) ("[T]he ninety day requirement is not 'jurisdictional' in the sense that compliance with it *vel non* determines the jurisdiction of the district court . . . ."); Franks v. Bowman Trans. Co., 495 F.2d 398, 402-06 (5th Cir.) (suit filed over a year after right-to-sue letter issued was allowed because EEOC's letter had been received and misplaced by plaintiff's nephew and plaintiff had no effective notice of her right to sue), *cert. denied*, 419 U.S. 1050 (1974); Harris v. Walgreen's Distrib. Center, 456 F.2d 588, 592 (6th Cir. 1972) ("We believe on equitable grounds the motion for counsel should be regarded as tolling the statute until it was disposed of.").

[57] *See infra* notes 64-67 and accompanying text.

A. Resolution of the Conflict: The Zipes *Decision*

In 1982, the Supreme Court resolved the conflict between the circuits over the characterization of Title VII's time periods in *Zipes v. Trans World Airlines*.[58] In *Zipes*, the collective bargaining unit of Trans World Airline's (TWA) flight attendants brought a federal class action suit against TWA.[59] The complaint alleged that TWA's policy of grounding female flight attendants with children, but not male flight attendants with children, constituted unlawful sex discrimination in violation of Title VII.[60]

TWA moved to exclude class members who had failed to file timely charges with the EEOC and had been grounded more than ninety days before the class representative's charges were filed.[61] The issue raised

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[58] 455 U.S. 385 (1982).

[59] The parties originally attempted to settle the case. Although the district court approved a settlement, the Seventh Circuit found that the union could not adequately represent the class because of the inherent conflict between the interests of current and former employees. The circuit court remanded the case with instructions to change class representatives. *Zipes*, 455 U.S. at 388.

[60] *Id.*

[61] The district court denied TWA's motion to exclude untimely filed charges in 1976. *Zipes*, 455 U.S. at 389. Although the district court agreed with TWA that the filing requirements were jurisdictional, it denied the motion under a continuing violation theory. The court held that any violation by the airline airline against one class member continued against all class members until the airline changed the challenged policy. *Id.* Four days later, the district court granted the plaintiffs' motion for summary judgment on liability. *Id.*

The court of appeals affirmed the district court order granting summary judgment on liability. The court of appeals held that TWA's no motherhood policy "provides a clear example of the discrimination prohibited by § 2000e-2(a)." *In re* Consol. Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1145 (7th Cir. 1978), *rev'd*, 455 U.S. 385 (1982). However, it rejected the district court's use of a continuing violation theory. As a result, those employees discharged more than ninety days before the class filed the EEOC charge were excluded from the class. *Zipes*, 455 U.S. at 389. (In 1970, when the action was filed, the filing period with the EEOC was 90 days under 42 U.S.C. § 2000e-5(d). It was subsequently amended and renumbered. As § 2000e-5(e) the filing period is 180 days. *See supra* note 28.) The class, TWA, and the union filed petitions for certiorari with the Supreme Court, all of which were granted. TWA's petition for certiorari appealed on three issues:

> (1) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability;
> (2) that TWA should be required to grant only prospective relief to plaintiffs; and
> (3) that the Court of Appeals erred in defining the sub-class of plaintiffs who had filed timely charges with the EEOC.

The Supreme Court later dismissed TWA's petition as "improvidently granted." *Zipes*,

by the class' petition at the Supreme Court level was whether the timely filing of an EEOC charge constitutes a jurisdictional prerequisite to bringing a Title VII suit in federal court, or whether the time period is subject to waiver and estoppel.[62] The Seventh Circuit's finding that the ninety-day EEOC filing period was jurisdictional automatically barred ninety-two percent of the plaintiffs' claims.[63] The Supreme Court held that a timely filing of a charge with the EEOC is not a jurisdictional prerequisite to suit in federal court. Instead, the requirement is analogous to a statute of limitations and subject to waiver, estoppel, and equitable tolling.[64] In reaching its conclusion, the Court relied on Title VII's structure[65] and legislative history,[66] and the Court's

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455 U.S. at 392 n.5. The union's petition challenged the district court's authority to award retroactive seniority to one class of employees over the union's objection. The Supreme Court decided this issue in Part III of the *Zipes* opinion. *Id.* at 398-401.

[62] *Id.* at 392.

[63] *Id.* at 389-90.

[64] *Id.* at 393.

[65] The Court began its analysis by comparing the Title VII provisions that grant district courts jurisdiction with the provisions specifying the time for filing charges. *Id.* at 393-94. This comparison revealed that the two types of provisions are mutually exclusive. The section granting federal court jurisdiction does not limit jurisdiction to cases in which the complainant filed a timely charge with the EEOC. For example, 42 U.S.C. § 2000e-5(f)(3) (1982) reads: "Each 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." Section 5(f)(3) also defines the judicial districts in which an action may be brought. Likewise, the separate provision specifying the time for filing charges with the EEOC is not phrased in jurisdictional terms nor does it discuss federal jurisdiction. *Zipes*, 455 U.S. at 394; *see also supra* note 28 (regarding 42 U.S.C. § 2000e-5(e), the 180-day filing period involved in *Zipes*).

[66] The Court cited Senator Humphrey's characterization of the time period for filing a claim as a "period of limitations." *Zipes*, 455 U.S. at 394 (citing 110 Cong. Rec. 12723 (1964)). The Court also relied on Senator Case's description of the purpose of the time limits as preventing "stale" claims, the end served by statutes of limitation. *Id.* (citing 110 Cong. Rec. 7243 (1964)). The Court also held that the legislative history of the 1972 Amendments to the Civil Rights Act supported the conclusion that the filing period should operate as a statute of limitation. *Id.* Specifically, the Court cited the Final Conference Committee analysis of the amendments. The Committee references to the filing period indicated that it recognized the period to be a statute of limitations subject to equitable modification. The Committee noted that the court decisions acknowledged Title VII's remedial purpose. Thus, the courts tended to hear the merits of cases, giving the complainant the maximum benefit of the law. *Id.* at 394-95 (citing the Final Conference Committee analysis of H.R. 1746, the Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972)). In this spirit, the court held the filing periods to be statutes of limitation rather than jurisdictional bars. *Id.* (citing 110 Cong. Rec. 12723 (1964)).

reasoning in other Title VII cases.[67]

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[67] The Court noted that the term "jurisdictional" was used in some of the cases in which the legal character of the time requirements was *not* at issue. However, the same cases also referred to the filing provisions as limitation statutes. *Zipes*, 455 U.S. at 395 & n.12. In note 12 the *Zipes* Court explained:

> As the Court of Appeals for the Fifth Circuit points out in its opinion in [*Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 588-89 (5th Cir. 1981)], references to the filing requirement as a statute of limitations have come to dominate our opinions: "The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label 'jurisdictional prerequisite.' [*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)]. In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to 'tolling the limitations period,' 429 U.S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines v. Evans*, 431 U.S. 553 . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 371-72 . . . (1977); *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 391-92. . . (1977); *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-23. . . (1980), *Delaware State College v. Ricks*, [449] U.S. [250]. . . (1980)."

The Court also turned to Love v. Pullman Co., 404 U.S. 522 (1972). In *Love*, the Court declined to read literally another filing provison of Title VII. The *Love* plaintiff sent a letter to the EEOC claiming that he was denied equal employment opportunity on the basis of race. *Id.* at 523-24. The EEOC contacted the appropriate state agency, which declined to take further action. *Id.* at 524. The EEOC followed up on the case, eventually bringing the employer to court for violating Title VII. *Id.* The employer challenged the court's jurisdiction over the case, claiming that the charge of discrimination had not been properly "filed" with the EEOC. The district court accepted the employer's argument and dismissed the complaint. The court of appeals affirmed.

The Supreme Court reversed, holding that the filing procedure that the plaintiff followed was consistent with the intent underlying Title VII. The Court was concerned with two provisions of the act: 42 U.S.C. § 2000e-5(b) (subsequently amended and renumbered § 2000e-5(c)), which provides that when a state or local fair employment practices agency exists "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated," and 42 U.S.C. § 2000e-5(d) (subsequently amended and renumbered 2000e-5(e)), which requires that the complaint to the EEOC "shall be filed by [or on behalf of] the person aggrieved within two hundred and ten days [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 state or local law, whichever is earlier" [amended language added in brackets]. The Court held that requiring a complainant to file a second complaint after the state proceedings terminated contravenes the purposes of the Act by merely creating an additional procedural hurdle

The *Zipes* holding acknowledges the underlying remedial purpose of Title VII without negating the filing requirement's function of ensuring prompt notice to the employer.[68] The holding recognizes that the statute's complexity coupled with the legal inexperience of most complainants makes strict adherence to the statutory time periods unreasonable. It strikes an effective balance by preventing stale claims while allowing meritorious claims when equitable circumstances interfere

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for the complainant. *Love*, 404 U.S. at 525. The Court explained that procedural obstacles that serve solely as technicalities are particularly inappropriate in a statutory scheme in which laypeople initiate the process without benefit of legal counsel. *Id.* at 527. The *Zipes* Court relied on principles underlying *Love* when interpreting Title VII's filing provisions. 455 U.S. at 397.

The *Zipes* Court drew similar inferences from four Supreme Court cases in which the Court could not have reached the merits had the filing requirements been jurisdictional. Two of the cases, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), involved a request to dismiss the claims of those class members in Title VII suits who had failed to file administrative charges. In *Albemarle Paper*, the Supreme Court firmly rejected the company's contention that no back pay could be awarded to unnamed class members who had not individually filed charges with the EEOC. 422 U.S. at 414 n.8. In *Franks*, the Court relied on *Albemarle Paper* to allow seniority relief for unnamed class members, even though they had not filed individual administrative charges. 424 U.S. at 771. Consequently, if some class members have filed timely charges with the EEOC, other class members will not automatically be barred if they file late charges.

In *Zipes*, the Court relied on these cases to emphasize that the filing provisions were nonjurisdictional. The Court reasoned that had the provisions been jurisdictional, the district courts in *Albemarle Paper* and *Franks* would have lacked jurisdiction to adjudicate the claims of those who had not filed. *Zipes*, 455 U.S. at 397. Moreover, the Court noted in all three cases that in 1972 Congress rejected amendments that would have barred relief to class members who had not filed with the EEOC. Congress thus implicitly adopted the view that the provision for filing charges with the EEOC is not a jurisdictional prerequisite to suit in federal court. *Zipes*, 455 U.S. at 397; *Albemarle Paper*, 442 U.S. at 414 n.8, *Franks*, 424 U.S. at 771.

The *Zipes* Court cited two other cases, similar to *Albemarle Paper* and *Franks* in that they contain the assumption that the filing requirement involved was not jurisdictional. In Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), the Court considered the merits of an argument that the filing requirement be tolled. Such reasoning would have been gratuitous if the filing requirement was necessary for jurisdiction. Similarly, in Mohasco Corp. v. Silver, 447 U.S. 807 (1980), the Court did not dismiss the action sua sponte for lack of jurisdiction although plaintiff failed to comply with a filing provision.

[68] *Zipes*, 455 U.S. at 398:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

with a timely filing.

Although the Supreme Court outlined the policy underlying its holding, it did not define the scope of the *Zipes* rule. The Court emphasized the remedial nature of Title VII, but failed to specify when equitable factors should be considered. The Court left unclear whether all Title VII filing periods should be subject to equitable modification or only the time period involved in the *Zipes* case. Even less certain was whether courts should consider equitable factors for all Title VII requirements. Since *Zipes*, the Court has addressed only one of these questions: the scope of equitable modification for requirements not defined in Title VII.

B. The Outer Boundaries of Equitable Modification of Title VII Time Periods: The Baldwin *Case*

In 1984, the Supreme Court provided the only guidance available on the extension of *Zipes* to other Title VII time periods. In *Baldwin City Welcome Center v. Brown*,[69] the Court considered whether equitable principles could be used to determine the date a court action commences for purposes of the Title VII limitations periods.[70] Under Title VII, a plaintiff has ninety days to bring a civil action after the EEOC issues a right-to-sue letter.[71] The Federal Rules of Civil Procedure provide that a civil action commences when a complaint is filed with the court.[72] The *Baldwin* plaintiff argued that filing a right-to-sue letter with the court tolls the ninety-day limitations period for instituting a civil action, citing *Zipes* as authority for the equitable modification.[73]

Although the facts in *Baldwin* were compelling,[74] the Court refused

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[69] 104 S. Ct. 1723 (1984) (per curiam).

[70] *Id.* at 1725.

[71] *See supra* text accompanying notes 41-45.

[72] "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

[73] *Baldwin*, 104 S. Ct. at 1725.

[74] In *Baldwin*, plaintiff Brown received a right-to-sue letter from the EEOC that stated that she needed to file a complaint with the district court within 90 days of receiving the notice. Brown mailed the notice to the district court, accompanied by a request for appointment of counsel, within the 90 days. A month later, a magistrate sent Brown a letter that reminded her that she needed to file a complaint within 90 days of receiving the EEOC's right-to-sue letter. The magistrate also ordered Brown to apply for court-appointed counsel using the district court's motion form and questionnaire. Brown returned the questionnaire 96 days after receiving the right-to-sue letter. *Baldwin*, 104 S. Ct. at 1724. However, Brown failed to file the appropriate forms within the 90-day period and her motion for appointed counsel was denied as untimely. *Id.* The district court ruled that plaintiff Brown had failed to file a complaint comply-

to hold that the filing of the right-to-sue letter tolled the ninety-day period. Neither the statute nor the legislative history supported the claim that Title VII requires a different definition than the Federal Rules of Civil Procedure for when an action commences.[75] The Court also found no basis to hold that the ninety-day period was tolled by filing the right-to-sue letter. The Court distinguished *Zipes* by stating that the *Zipes* holding did not mean that the time limits need never be satisfied, merely that they are subject to waiver and tolling.[76]

The *Baldwin* decision does not undercut *Zipes'* recognition of the complexity of the statutory scheme and the legal inexperience of most complainants. Instead, the *Baldwin* decision more accurately represents an interpretation of Rule 3 of the Federal Rules of Civil Procedure in the Title VII context. *Baldwin* dealt with a procedural term not defined in Title VII that had an established interpretation under the Federal Rules. Indeed, the *Baldwin* Court noted that plaintiff's argument that Title VII required a different definition of when an action is commenced was not supported by statute or legislative history. In contrast, the equitable modification of Title VII's time periods finds support in the statute and the legislative history.[77] A consistent reading of *Zipes*

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ing with the requirements of Rule 8 of the Federal Rules of Civil Procedure, which reads:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.

Fed. R. Civ. P. 8. Thus, Brown forfeited her right to pursue her Title VII claim. *Baldwin*, 104 S. Ct. at 1724. The Eleventh Circuit reversed, holding that the filing of a right-to-sue letter "tolls" the time period provided by Title VII. *Id.*

[75] *Id.* at 1725.

[76] The three dissenting justices claimed the majority posed the wrong question. They posed the question as whether a timely complaint was filed, not whether the right-to-sue notice was a complaint. *Id.* at 1732 (Stevens, J., dissenting). A timely complaint was filed when the plaintiff typed a short and plain statement of her claim and request for damages on the in forma pauperis affidavit. *Id.* at 1727 (Stevens, J., dissenting).

[77] The narrow interpretation of *Baldwin* is consistent with the Ninth Circuit's holding in Casavantes v. California State Univ., Sacramento, 732 F.2d 1441 (9th Cir. 1984), decided a month after *Baldwin*. In *Casavantes*, the plaintiff, a university professor, filed an intake questionnaire with the EEOC 248 days after receiving his termination notice. *Id.* at 1441. He later filed a formal charge document 316 days after his termination. *Id.* at 1442. The court held that the filing of the intake questionnaire complied with the requirement of filing a charge in writing with the EEOC within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(b) (1982). The court stated two rationales for this decision. First, it noted that federal regulations gov-

and *Baldwin* leads to the conclusion that if a term or procedure is established or defined in Title VII, then its meaning or characterization should be guided by *Zipes*. Other terms are subject to a standard interpretation, regardless of whether that interpretation promotes the remedial purpose of Title VII. Consequently, because Title VII defines all of its time periods, a nonjurisdictional characterization of those periods is consistent with *Zipes* and *Baldwin*. Part III examines the lower courts' analyses of these time periods under *Zipes* and concludes that equitable modification should be available for all Title VII time limitations.

III. Application of *Zipes* Reasoning to Other Title VII Time Periods

While the Supreme Court resolved some of the intercircuit conflict in *Zipes*, the decision left several unanswered questions for the lower courts. The first question facing the courts was whether the *Zipes* reasoning could be extended to other time limits in Title VII. These other time limits include the time periods in deferral states, time periods for filing suit in court, and filing periods for federal employees.[78]

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erning EEOC procedures establish minimum requirements for administrative charges, which were met by the intake questionnaire. 732 F.2d at 1443 (citing 29 C.F.R. § 1601.12(b) (1984)). Second, the court used the *Zipes* reasoning to support its position. "This position is consistent with the recent trend in Title VII jurisprudence which recognizes the importance of non-technical interpretations of the procedural requirements inherent in the processing of discrimination claims." *Id.* at 1442. The Ninth Circuit's position is consistent with the interpretation of *Baldwin* that procedural terms created by Title VII, like an administrative "charge" should be governed by *Zipes*, although terms not defined in Title VII are subject to standard interpretation.

[78] *See supra* text accompanying notes 35-49.

Zipes has also been applied to other statutes with similar remedial purposes. The primary example is the Age Discrimination in Employment Act, discussed in detail at *infra* notes 118-20 and accompanying text.

Lower courts have used *Zipes* to apply waiver, estoppel, and tolling theories to the statutory requirements of other statutes with purposes similar to Title VII. In doing so, courts primarily rely on the *Zipes* Court's emphasis on the "remedial nature" of Title VII. The purpose of Title VII is to provide victims of employment discrimination with remedies. Therefore, to interpret the statutory requirements as jurisdictional contravenes the basic remedial purposes of the statute. This same policy argument can be used to invoke nonjurisdictional interpretations of provisions in statutes that provide remedies for those who are discriminated against in the employment context for other impermissible reasons.

The *Zipes* doctrine has been extended to cases involving the Employment Opportunitites for Handicapped Individuals Act (EOHIA), 29 U.S.C. §§ 701-796i (1982). The EOHIA requires affirmative action in federal employment, *id.* § 791, and provides the

The lower courts have split on the characterization of each of these

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remedies and procedures available under § 2000e to 16(a) through (f) of Title VII to federal applicants and employees claiming a violation of the affirmative action section, *id.* § 794(a)(1). Regulations also expressly prohibit employment discrimination against handicapped individuals by the federal government. 29 C.F.R. § 1613.703 (1984). Regulations further direct aggrieved individuals to pursue administrative remedies available to federal employees under Title VII. The EOHIA relies on Title VII's administrative procedures, consequently handicapped complainants are benefitted by the *Zipes* holding. Because the EOHIA filing provisions are those under Title VII, some courts are willing to apply waiver, tolling, and estoppel. *See, e.g.*, Smith v. United States Postal Serv., 570 F. Supp. 1415 (E.D. Mich. 1983).

The courts have also applied the *Zipes* analysis to a number of statutes that do not prohibit employment discrimination. One example is the Occupational Health and Safety Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). The Tenth Circuit analogized OSHA to Title VII in Donovan v. Hahner, Foreman, & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984). *Hahner* involved judicial review of Occupational Safety and Health Review Commission decisions. The case involved § 660(c)(2), which provides in relevant part: "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination." In interpreting § 660(c)(2), the Tenth Circuit cited *Zipes* at length. The court noted that: "The Occupational Safety and Health Act, like Title VII, is remedial in nature; the process for filing complaints under the Act is initiated by lay persons and thus it is subject to a liberal construction." *Hahner*, 736 F.2d at 1424; *accord* Donovan v. Peter Zimmer Am., Inc., 557 F. Supp. 642 (D.S.C. 1982).

The *Zipes* rationale has also been applied to the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5, 10, 15, 28, 38, 39, 42 U.S.C.). The *Zipes* analysis was adopted to justify modification of the time limits under the CSRA in Rustrata v. United States Merit Sys. Protection Bd., 549 F. Supp. 344 n.2 (D.D.C. 1982) (since defendant raised no initial statute of limitations defense, and a number of decisions on the merits of plaintiff's claim had been rendered, the doctrines of waiver, estoppel, and equitable tolling barred such a defense).

A further example of application of the *Zipes* rationale is the Social Security Act, 42 U.S.C. §§ 301 to 1397f (1982). The illustrative case is Chiaradonna v. Schweider, 569 F. Supp. 1471 (E.D. Penn. 1983). In *Chiaradonna*, the plaintiff sought judicial review of the Social Security Administration's (SSA) denial of her claim for disability benefits. However, the plaintiff did not appeal the SSA's decision within the 60-day period laid out by the Social Security Act § 205(g), as amended. 42 U.S.C. § 405(g) (1982). The district court cited a 1975 United States Supreme Court case, Weinberger v. Salfi, 422 U.S. 749, 764 (1975), which compared the 60-day time period to a statute of limitations, saying it could be waived by the government. *Accord* Mathews v. Eldridge, 424 U.S. 319, 328 n.9 (1975). The district court also cited *Zipes* for the proposition that "[b]ecause the Supreme Court has treated the 60-day period as a statute of limitations for purposes of waiver, the 60-day period would also be capable of being tolled under certain factual circumstances." *Chiaradonna*, 569 F. Supp. at 1473.

The final example of the use of *Zipes* to achieve equitable resutls involves the Truth in Lending Act (TILA), 51 U.S.C. §§ 1601 to 1677 (1982). In Jones v. The Trans-

time periods. The majority have no defined policy and instead address

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Ohio Sav. & Ass'n, 747 F.2d 1037 (6th Cir. 1984), the court used *Zipes* to find that the one year limitations period is subject to tolling. The court noted: "The scheme of TILA is to create a system of private attorney generals to aid its enforcement . . . and 'a technical reading would be particularly inappropriate [when] laymen, unassisted by trained lawyers, initiated the process.' " *Id.* at 1040 (quoting *Zipes*, 455 U.S. at 397).

Currently, the courts have declined to apply the *Zipes* rationale to four statutes. One of these statutes is the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, 94 Stat. 2325 (codified as amended in scattered sections of 5, 15, 28, and 42 U.S.C.). Monark Boat Co. v. NLRB, 708 F.2d 1322 (8th Cir. 1983), involved 5 U.S.C. § 504 (1982) of the EAJA. This section directs an agency to award fees and expenses to a prevailing party in an adversary adjudication. 5 U.S.C. § 504(a)(1). However, an application for fees under this section must be received within a 30-day period. 5 U.S.C. § 504(a)(2). The Eighth Circuit strictly interpreted § 504(a)(2) and the corresponding regulation 29 C.F.R. § 102.148(a) (1984). The latter provides:

> An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding . . . *but in no case later than 30 days* after the entry of the Board's final order in that proceeding [emphasis added].

The court relied on legislative history to conclude that the 30-day time limitation was a "mandatory, jurisdictional condition." *Monark Boat*, 708 F.2d at 1327. Although acknowledging the remedial nature of the EAJA, the court distinguished this case from *Zipes* because *Zipes* involved an action against a private employer, whereas the EAJA involves a suit against a federal agency and correspondingly raises the question of sovereign immunity. *Id.* Therefore, since the Board did not receive the application until 31 days after the final order's entry, the application was dismissed as untimely. *Id.* at 1324.

A similar result was reached in Action on Smoking & Health v. CAB, 724 F.2d 211 (D.C. Cir. 1984), regarding another EAJA provision, 28 U.S.C. § 2412 (1982). This section orders a court to award fees and expenses to a prevailing party in a civil action against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The plaintiff, a non-profit organization, successfully challenged CAB regulations as inadequately protective of the rights of non-smoking airline passengers. The plaintiff then had 30 days to submit to the court an application for fees and other expenses. 28 U.S.C. § 2412(d)(1)(B). The D.C. Circuit Court found that "[t]he thirty day time limitation contained in the EAJA is not simply a statute of limitations. It is a jurisdictional prerequisite to governmental liability." *Action on Smoking*, 724 F.2d at 225. The court based this finding on the fact that the EAJA "significantly abridged the government's immunity from suits for attorney's fees. As a waiver of sovereign immunity, the Act must be strictly construed." *Id.* The court cited the *Monark Boat* decision in distinguishing *Zipes* because it involved an action against a private party and therefore did not raise a question of sovereign immunity. *Id.* at 225 n.80. (Note: 28 U.S.C. § 2412(d) was repealed effective Oct. 1, 1984 by Pub. L. No. 96-481.)

The *Zipes* analysis was also rejected as applying to the Commodity Futures Trading Commission Act, Pub. L. No. 93-463, 88 Stat. 1389 (codified as amended in scattered sections of 5 and 7 U.S.C.). In Kessenich v. Commodity Futures Trading Comm'n, 684

each time period when the situation arises. However, the Fifth and Eleventh Circuits have stated that the *Zipes* reasoning should apply to all Title VII filing requirements.[79] The Eleventh Circuit adopted this interpretation without discussion:

> Although the courts have not had occasion to address the nature of each of Title VII's preconditions, we discern no rational basis for treating those

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F.2d 88 (D.C. Cir. 1982), the plaintiff petitioned for review of orders of the Commodity Futures Trading Commission (CFTC). The plaintiff relied on *Zipes* to argue that the time to file a bond after a reparation award of the CFTC should be subject to equitable modification. The court disagreed:

> Such an interpretation . . . ignores important differences between the two statutory schemes involved. First, the Commodities Exchange Act is not a remedial civil rights statute attempting to implement far-reaching social change. It does not envision significant reliance on the efforts of laymen unassisted by counsel. In addition, the language of the two statutes differs markedly. . . . Perhaps more important, the legislative history of the CFTC Act reflects a desire to . . . [make] filing of a timely bond a jurisdictional prerequisite . . . .

Id. at 93.

The final statutory scheme to which *Zipes* was found inapplicable is the Presidential Primary Matching Payment Account Act (PPMPAA), 26 U.S.C. §§ 9031 to 9042 (1982). Carter/Mondale Pres. Comm., Inc. v. Federal Election Comm'n, 711 F.2d 279 (D.C. Cir. 1983), involved the Federal Election Commission's determination that the plaintiff was required to pay $104,300.78 to the United States treasury to cover primary campaign expenses that did not qualify under the PPMPAA. The court held that it lacked jurisdiction over the action because the Committee failed to petition for review within 30 days after the FEC decision. *Id.* at 291. The court distinguished the time limit involved, which was conceded by both parties to be jurisdictional, from the one involved in *Zipes*. It noted that the statutory structure of the acts differed. Title VII contains separate provisions that grant jurisdiction in district courts and specify time limits for filing charges with the EEOC, whereas the PPMPAA integrates the two. The court found that the difference in statutory structure reflected different congressional policies. "Title VII integrates the efforts of laymen who may be victims of discrimination, the EEOC, and the courts. . . . In contrast, § 9042 . . . prescribes *judicial* review procedures that *follow* a detailed administrative review process between *two* legally sophisticated parties (a campaign committee and the FEC)." *Id.* at 284 n.7.

[79] "Based on *Zipes*, we hold that the timely filing requirements of Title VII are to be treated as limitations periods for all purposes. *Zipes* clearly holds that these requirements are not jurisdictional, so that in any event it is beyond our power to declare them so." Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 562 (5th Cir. 1983) (court held that dismissal of Title VII suit due to untimely filing was not res judicata to a § 1983 action); *accord* Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1010-11 (11th Cir. 1982) (defendant waived the right to raise time limit by waiting until after the trial to raise the defense); English v. Ware County Dep't of Family & Children Serv., 546 F. Supp. 689, 692 (S.D. Ga. 1982) (cites *Jackson* in determining that state employee's suit should not be dismissed because her right-to-sue notice was issued by EEOC and not by the Attorney General's office).

> that have not been considered differently from those that implicitly or explicitly have been held not to be jurisdictional.[80]

An examination of the procedural provisions at issue reveals the accuracy of the Eleventh Circuit's observation.

A. Filing Provisions in Deferral States

The most similar time limit to the 180-day provision in *Zipes* is the provision relating to filing a charge with the EEOC in the deferral states.[81] This filing period is identical in purpose to the period at issue in *Zipes*, but the length differs because of the need to accommodate the state agency. This provision requires the complainant to file a charge with the appropriate state agency prior to filing an action with the EEOC under Title VII.[82] In these situations, the complainant must file with the EEOC within 300 days of the alleged unlawful employment practice, or within 30 days of receiving notice that the state or local agency has terminated the proceedings under state or local law, whichever is earlier.[83]

The lower courts have yet to grapple fully with whether deferral state filing requirements are jurisdictional. The Fifth and Eleventh Circuits have indicated that they consider all Title VII time periods nonjurisdictional, language that clearly encompasses the deferral state filing requirements.[84] The few district courts that have addressed the issue also consider the filing period nonjurisdictional;[85] however, no court has found that the circumstances before it justified application of equitable principles.

Nothing in the statutory language or legislative history indicates that the 180-day discrepancy between the EEOC filing dates in deferral and nondeferral states is due to underlying policy considerations. The most likely explanation for the discrepancy is Congressional recognition of the additional bureaucratic complexities involved with the dual agency

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[80] Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1009-10 (11th Cir. 1982) (footnote omitted).

[81] *See supra* text accompanying notes 37-38.

[82] 42 U.S.C. § 2000e-5(c) (1982).

[83] *Id.* § 2000e-5(e).

[84] *See supra* text accompanying notes 79-80.

[85] Douglas v. Red Carpet Corp. of Am., 538 F. Supp. 1135, 1138 (E.D. Pa. 1982) (Failure to comply with deferral procedures is subject to waiver or tolling "under the proper equitable circumstances."); Meyer v. MacMillan Publishing Co., 536 F. Supp. 791, 792 n.2 (S.D.N.Y. 1982) ("Although it is unnecessary to decide the question, it appears that the court's broad language in *Zipes* . . . supports strongly the argument that a similar result would be reached with respect to [this] section.").

system. The additional time provides a procedural cushion for complainants who need more time to file their claims properly with both the state and federal agencies. Given this lack of substantive distinction, the *Zipes* rationale recognizing the inexperience of most complainants and the complexity of Title VII applies to these time limits as well. The complainants in deferral states are as inexperienced as those in nondeferral states. Moreover, the state agencies add another layer of complexity to the statutory scheme. The additional 180 days are no guarantee that these procedural hurdles will be overcome by the average complainant. Consequently, equitable modification of time periods is even more critical in deferral states to guarantee that Title VII remains a remedial statute.

B. Filing with the Court

Another important Title VII time period is the ninety-day time requirement for filing an action with the court. This period begins to run when the complainant receives a right-to-sue letter from the EEOC.[86] Two issues arise with respect to this ninety-day period. The first involves determining when the period begins to run. The second concerns whether the period's expiration bars the case from being heard. Prior to *Zipes*, the Supreme Court in *Mohasco Corp. v. Silver*[87] implicitly treated the ninety-day filing period as a statute of limitations subject to

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[86] 42 U.S.C. § 2000e-5(f)(1) (1982) states that if a charge filed with the EEOC is dismissed by the EEOC, or if within 180 days from filing the EEOC has not filed an action in a case involving the government, the Commission or Attorney General "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge."

In Craig v. Department of Health, Educ., & Welfare, 581 F.2d 189, 193 (8th Cir. 1978), the court defined what notice will begin the 90-day period in which the complainant may file suit in federal court. Notice is sufficient if:

> (1) A registered or certified letter, or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the employee and the employee personally acknowledges such receipt; or,
>
> (2) A registered or certified letter, or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the representative designated by the employee. Such notice must be addressed in accordance with the specific directions of the employee, and receipt must be acknowledged personally by the designated representative.

Craig dealt with 42 U.S.C. § 2000e-16(c), which applies to federal employees. This interpretation was later applied to 42 U.S.C. § 2000e-5(f)(1) in Harris v. Ford Motor Co., 487 F. Supp. 429, 431 n.2 (W.D. Mo. 1980) ("[Section 2000e-16(c)] differs in wording from § 2000e-5(f)(1) but courts interpret the two sections similarly.").

[87] 447 U.S. 807 (1980).

equitable modification. In *Mohasco Corp.*, the plaintiff failed to file a complaint with the court within the statutory time period. However, the Court did not dismiss the action sua sponte as it would have been forced to do if the requirement were a jurisdictional prerequisite. Instead, the Court heard the merits of the case because "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense."[88] By failing to object to the late filing, the employee waived[89] this statute of limitations defense.

Although most lower courts have yet to decide cases characterizing the ninety-day filing period with the court, the general trend is to follow *Zipes* and *Mohasco Corp.* The First, Fifth, Sixth, Tenth, and District of Columbia Circuits have used the Supreme Court's analysis to treat the ninety-day filing period as a statute of limitations.[90] Several district courts have followed the circuit courts' interpretation in this area.[91] One district court has expressly refused to follow the trend,

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[88] *Id.* at 811 n.9.

[89] *See supra* note 24.

[90] *See* Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983) (90-day period equitably tolled when employee received misleading information from district court clerk, diligently attempted to secure counsel and promptly filed *pro se* complaint when advised to do so by the clerk); Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982) (equitable tolling and waiver can be applied to the 90-day period, though not applicable in this case); Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982) (*Zipes* rationale "extends to the time limit for filing suit after receiving a right-to-sue letter from the EEOC"); Sessions v. Rusk State Hosp., 648 F.2d 1066, 1070 (5th Cir. 1981) ("After the right-to-sue letter is issued, the timeliness of the suit in federal court does not involve the court's jurisdiction but whether the litigant has fulfilled the statutory conditions."); Fox v. Eaton Corp., 615 F.2d 716, 720 (6th Cir. 1980) (court tolled 90-day period where plaintiff filed in the wrong court and court's lack of jurisdiction was not clear), *cert. denied*, 450 U.S. 935 (1981).

[91] Thornton v. Chrysler Corp., 581 F. Supp. 84, 85 (D. Md. 1983) (Fourth Circuit has not characterized 90-day limit since *Zipes*, but has applied the equitable principles in other Title VII situations); Banks v. Teletype Corp., 563 F. Supp. 1358, 1359 & n.1 (E.D. Ark. 1983) (cites *Zipes* as holding that the 90-day limitation period is subject to waiver, estoppel, and equitable tolling); Cox v. Consolidated Rail Corp., 557 F. Supp. 1261, 1263 (D.D.C. 1983) ("Although *Zipes* dealt with the time limitation for filing charges of discrimination with the EEOC, its logic and reasoning was extended by this Circuit to the time limits for filing suit after receiving a right-to-sue letter from the EEOC."); Ivanov-McPhee v. Washington Nat'l Ins. Co., Nos 78C 2948, 79C 3100, 79C 3503, 79C 4696, 79C 4933, 79C 4935, 79C 4936, 79C 4937, 79C 4939 (N.D. Ill. Oct. 5, 1982) (available Apr. 1, 1985, on LEXIS, Genfed library, Dist file) ("Although the court did not consider the precise question presented here, the rationale provided by the Court with regard to the 180-day filing period logically would apply with equal force to the 90-day requirement."); Nash v. City of Oakwood, 541 F. Supp. 220, 221

however, using the structure of the statute to support its position.[92]

The courts holding the ninety-day filing period to be nonjurisdictional view the time period's purpose to be the prevention of stale claims. This is the same purpose that the Supreme Court attributed to the time period in *Zipes*.[93] Thus, both the EEOC filing periods in *Zipes* and the court filing periods are analogous to statutes of limitation. Since both statutes of limitation and EEOC filing periods are subject to equitable modification, a logical extension of the analogy requires courts to consider the equities when a complainant files a Title VII suit in court. Again, the court must acknowledge the legal inexperience of the plaintiff and the complexities of the statute, the policies underlying *Zipes*.

A related issue concerns whether the *Zipes* rationale applies to determining when the ninety-day period begins to run. Even before *Zipes*, courts were sympathetic to plaintiffs who never received the right-to-sue letter from the EEOC. In *Bell v. Brown*,[94] the District of Columbia Court of Appeals emphasized that the statute's language stated that the thirty-day period commenced only upon "receipt of notice." The court adopted a literal interpretation of this language, finding that the period begins to run only from the time that the complainant has actual knowledge of her right to sue.[95] The Seventh Circuit adopted a similar interpretation.[96]

The *Zipes* Court's emphasis on Title VII's remedial nature supports the analysis the lower courts used in these decisions.[97] In a remedial statute, the purpose of time periods is not to restrict a complainant's access to courts. Rather, the purpose is to provide guidance as to when

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(S.D. Ohio 1982) (*Zipes* analysis requires that 90-day limit be subject to waiver, estoppel, and equitable tolling.).

[92] LeCompte v. University of Houston Sys., 535 F. Supp. 317, 319 (S.D. Tex. 1982) (*Zipes* not applicable to the 90-day limit because while the 180-day period is discussed in part of the statute separate from provisions granting jurisdiction to federal courts, the 90-day period appears in the provision granting jurisdiction over such action to federal courts). The Southern District Court of Texas seems to be alone in adopting this analysis.

[93] *See supra* note 66.

[94] 557 F.2d 849 (D.C. Cir. 1977).

[95] *Id.* at 852.

[96] Archie v. Chicago Truck Drivers, 585 F.2d 210, 214-16 (7th Cir. 1978) (receipt of notice by plaintiff's wife does not start the 90-day period; 90 days only begins to run when plaintiff "actually receives from the EEOC his notice of right-to-sue."); *see also* Scarlett v. Seaboard Coastline R.R., 27 Fair Empl. Prac. Cas. (BNA) 624 (S.D. Ga. 1977).

[97] *Zipes*, 455 U.S. at 394-95.

a court should begin to balance the reasons a complainant missed the filing period against any prejudice the employer will suffer from an old claim. If the courts held that the ninety-day period commenced when the complainant should have received the letter rather than when she actually received notice, the time period would merely restrict access to the courts without giving deference to Title VII's remedial purpose.[98]

Some courts have followed the *Zipes* doctrine to hold that a court will not automatically lose jurisdiction because the plaintiff failed to receive a right-to-sue letter from the EEOC before filing suit. The Fifth Circuit premised this holding on an analysis of Title VII's structure. The court noted that the jurisdictional section does not limit jurisdiction to those cases in which the plaintiff received the right-to-sue letter. Likewise, the section requiring a plaintiff to receive the right-to-

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[98] Croffut v. United Postal Serv., 575 F. Supp. 1264, 1265 (E.D. Mo. 1984) (plaintiff's wife signed for the letter but was hospitalized due to an accident later that day, thus plaintiff failed to receive letter for three days — filing not timely if time period ran from time wife received letter, but timely if based on actual notice.); Motley v. Bell Tel. Co., 562 F. Supp. 497, 498 (E.D. Penn. 1983) ("Although the court agrees with the defendant that interpreting the statute to mean that the 90-day period is triggered by the date on the notice would make matters simpler for the courts . . . , such a construction is contrary to the principle of liberally construing Title VII to achieve its remedial purpose."); Fletcher v. Royston, 30 Fair Empl. Prac. Cas. (BNA) 286, 290-91 (D.D.C. 1982) (period did not begin to run when notice was delivered to the plaintiff's father-in-law); Killingham v. Board of Governors of State Colleges & Univ., 549 F. Supp. 225, 226 (N.D. Ill. 1982) (period did not begin to run when the plaintiff's mother received notice); Douglas v. Heyward-Robinson Co., No. 81 Civ. 6564 (S.D.N.Y. Oct. 13, 1982) (available May 1, 1985, on LEXIS, Genfed library, Dist file) (time period begins to run when the plaintiff actually received the letter, not presumptively three days after the EEOC issued the notice).

The result has differed, however, when the person accepting the letter in lieu of the plaintiff was the plaintiff's attorney. *See* Thomas v. KATV Channel 7, 692 F.2d 548, 551 (8th Cir. 1982) (notice of right-to-sue letter by employee of plaintiff's attorney did not constitute receipt of notice so as to trigger running of 90-day filing period), *cert. denied*, 460 U.S. 1039 (1983); Decker v. Anheuser-Busch, 632 F.2d 1221, 1224 (5th Cir. 1980) (split Fifth Circuit panel held that delivery of a right-to-sue letter to complainant's attorney's office triggered the running of the 90-day period; however, subsequent to the district court's dismissal of plaintiff's complaint, the Fifth Circuit granted rehearing en banc in *Decker*, vacated the panel decision, and remanded the case for a further evidentiary hearing as to the scope and duration of the alleged attorney-client relationship, 670 F.2d 506 (5th Cir. 1982) (en banc)); Craig v. Department of Health, Educ. & Welfare, 581 F.2d 189, 191, 193 (8th Cir. 1978) (court rejected argument that receipt of a right-to-sue letter by an employee of the plaintiff's attorney constituted receipt of notice by aggrieved party); *cf.* Noe v. Ward, 754 F.2d 890 (10th Cir. 1985) (the plaintiff received notice seven days before her attorney was notified, 90-day period held to run from the day *plaintiff* received notice so suit was barred).

sue letter before bringing a Title VII action does not contain jurisdictional language.[99] Therefore, the statute's structure does not dictate that the plaintiff must have received the notice before the court can take jurisdiction over her case. The Fifth Circuit also noted that the legislative history of the right-to-sue provision, like the *Zipes* time period's legislative history, does not support the conclusion that Congress intended the receipt of the right-to-sue letter to be jurisdictional.[100] The Eleventh Circuit similarly decided that equitable modification of the statutory requirement was warranted when the plaintiff had diligently, but unsuccessfully, attempted to obtain a right-to-sue letter.[101] The district court of Rhode Island offered a final argument. The court observed that the right-to-sue letter requirement is in the same clause and sentence as the 90-day time period and the 180-day time period ad-

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[99] Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In *Pinkard*, the plaintiffs did not receive their right-to-sue letters before filing suit. They did, however, receive their letters almost four months before trial. The district court dismissed their claims, holding that it lacked jurisdiction because the plaintiffs filed suit before receiving their letters. The Fifth Circuit, citing *Zipes*, reversed. The court reasoned that Title VII's jurisdictional provision does not limit jurisdiction to those cases in which the plaintiff received the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(3) ("Each 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 sub-chapter."). Furthermore, the court noted that the section requiring the plaintiffs to receive a right-to-sue letter before bringing a Title VII action does not contain jurisdictional language. *Pinkard*, 678 F.2d. at 1216-17.

[100] *Pinkard*, 678 F.2d at 1217; *see also* Woods v. State of Mo. Dep't of Mental Health, 581 F. Supp. 437, 443 (W.D. Mo. 1984) (cites *Pinkard* with approval: "We are convinced that the statutory requirement of the receipt of a right-to-sue letter from the Attorney General is not jurisdictional.").

[101] Fouche v. Jeckell Island State Park Auth., 713 F.2d 1518 (11th Cir. 1983). In *Fouche*, the district court dismissed the plaintiff's claim because she had not received the appropriate right-to-sue letter. Because the plaintiff was a government employee, a right-to-sue letter needed to be issued by the United States Attorney General under 42 U.S.C. § 2000e-5(f)(1) (1982). The plaintiff initially requested a right-to-sue letter from the EEOC and filed suit. When the defendant moved to dismiss the claim, the plaintiff's attorney wrote to the Attorney General requesting a right-to-sue letter. The Justice Department then informed the plaintiff that it did not intend to issue a right-to-sue letter in her case. The Justice Department relied on a regulation requiring the plaintiff to obtain a right-to-sue letter from the EEOC. 29 C.F.R. § 1601.28(d) (1984). After reviewing applicable case law, primarily *Zipes* and *Pinkard*, the court concluded that the requirement that the Attorney General issue the right-to-sue letter is not jurisdictional. *Fouche*, 713 F.2d. at 1524-26. The court also decided that equitable modification of the statutory requirement was warranted since the plaintiff had made diligent, but unsuccessful efforts to obtain a right-to-sue letter. The requirement was waived because to dismiss her claim for failure to receive the letter when she was unable to obtain it would "obviously be unfair." *Id.* at 1526.

dressed in *Zipes*. The court noted that to hold that the "procurement of a right-to-sue letter is jurisdictional would, if sustained, require this court . . . to hold that one part of a phrase should for some mystical reason be treated differently than another part of the same phrase."[102]

The ninety-day time requirement for filing a Title VII complaint with the court is subject to equitable considerations. Prior to and since the *Zipes* decision, the ninety-day period for filing generally has been tolled and waived when the facts warrant equitable treatment. Similarly, some lower federal courts have relied on the *Zipes* decision to hold that the time period begins to run only when the right-to-sue letter actually reaches the plaintiff, rather than imposing a strict standard of constructive notice. In this vein, some courts have concluded that even the receipt of the right-to-sue letter prior to filing suit is not a jurisdictional prerequisite when equitable modification of the requirement is appropriate. The courts that have yet to address these issues or have rejected equitable modification should follow *Zipes* and the general trend to allow consideration of equitable factors.

C. Procedural Prerequisites for Claims Against the Federal Government

Title VII also guarantees equal employment opportunities for applicants seeking positions with and employees working for the federal government.[103] Federal regulations provide that a federal complainant must

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[102] Black v. Brown Univ., 555 F. Supp. 880, 883 (D.R.I. 1983).

[103] 42 U.S.C. §§ 2000e-16(a) to (e) (1982). When Congress enacted Title VII in 1964, it excluded the federal government from the definition of employer. However, it did authorize the President to issue appropriate executive orders to ban all discrimination in employment actions. Schlei and Grossman explain:

> Executive Order 11246 gave the United States Civil Service Commission (CSC) authority to issue regulations dealing with charges of discrimination. The CSC issued comprehensive regulations in 1966 which provided, for the first time, formal procedures by which federal employees could file charges of discrimination. The regulations also imposed obligations on agencies both to correct discriminatory practices and to develop affirmative action programs.

B. SCHLEI & P. GROSSMAN, *supra* note 16, at 1188.

Originally, enforcement of federal employment rights was vested with the Civil Service Commission. This was changed by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan Number 1 of 1978, 43 Fed. Reg. (1978), 92 Stat. 3781, which placed enforcement with the EEOC and the Merit Systems Protection Board (MSPB). Schlei and Grossman explain the jurisdictional understanding between the two bodies:

> The dispute between the relative jurisdictions of the EEOC and the

take her complaint to an in-house EEO counselor within thirty days of the discriminatory act.[104] Unlike the other Title VII time requirements, federal regulations explicitly create exceptions to the thirty-day limit under certain circumstances. A complainant is exempted if she demonstrates that:

> 1) she was not notified of the time limits and was not otherwise aware of them;
> 2) she was prevented by circumstances beyond her control from complying with the time limits; or
> 3) there were "other reasons considered sufficient by the agency."[105]

The complainant who is not exempted must file a complaint in court within 30 days of receiving notice of final action taken by the federal employer or the EEOC, or within 180 days of the filing of the initial charge with them.[106]

The courts differ as to whether the *Zipes* rationale should be applied to extend the time limits in circumstances other than those provided for in the codes. Two rationales have emerged for applying *Zipes* to these thirty-day filing periods. The first and more common rationale recognizes that the purpose of all Title VII filing requirements is to prevent stale claims. This rationale follows from the courts' recognition of Title VII's remedial purpose and a consistent application of this consideration to all of Title VII's time periods.[107]

> MSPB was resolved in the Reform Act by giving the EEOC sole jurisdiction over "pure" EEO cases, cases in which only discrimination issues were raised or cases where there were no appeal rights to the MSPB. The MSPB was given concurrent authority over all adverse action and appeals of "pure" EEO cases, and exclusive jurisdiction where a procedural violation or other issue under the civil service regulations was raised where the MSPB would have had jurisdiction in the absence of an EEO claim.

B. SCHLEI & P. GROSSMAN, *supra* note 16, at 1190.

[104] 29 C.F.R. § 1613.214(a)(1) (1984).

[105] *Id.* § 1613.214(a)(4).

[106] 42 U.S.C. § 2000e-16(c) (1982).

[107] Patton v. Brown, 95 F.R.D. 205 (E.D. Penn. 1982); *see also* Jarrell v. United States Postal Service, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (30-day period for contacting EEO counselor like a statute of limitations and subject to waiver, estoppel, and equitable tolling, citing *Zipes*); Kizas v. Webster, 707 F.2d 524, 545-46 (D.C. Cir. 1983) (court allows equitable modification for filing administrative charges in federal employment discrimination cases), *cert. denied*, 104 S. Ct. 709 (1984); Milam v. United States Postal Serv., 674 F.2d 860, 862 (11th Cir. 1982) ("Timely filing is not a prerequisite to federal jurisdiction." Therefore, plaintiff can file suit on the day following the weekend or holiday if a time period for filing ends on a weekend or holiday.); Saltz v. Lehman, 672 F.2d 207, 208-09 (D.C. Cir. 1982) (*Zipes* analysis applicable to

Another reason for applying the *Zipes* rationale to the thirty-day filing period is that federal employees and private sector employees should face an equal number of jurisdictional prerequisites.[108] When federal employees encounter employment discrimination, they should not face additional procedural barriers to relief. Treating the time periods as jurisdictional would pose a significant obstacle to federal complainants and would result in the dismissal of claims that would be heard in a nonfederal, *Zipes* situation. Thus, equitable considerations — tolling, waiver, estoppel — should apply to time limits facing federal employees, as they do to time limits involving private sector employees.[109]

The majority of the circuit courts correctly allow equitable modification of the time periods in situations other than those enumerated in the regulations. However, this position is not unanimous, and as recently as April, 1985, the Supreme Court denied certiorari to a Ninth Circuit case that would have resolved the conflict.[110] The nonjurisdictional in-

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provisions regarding federal employees, although plaintiff failed to show basis for equitable tolling); White v. Donovan, No. 81 C 2628 (N.D. Ill. April 21, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) (*Zipes* analysis equally applicable to the federal employee filing requirements); Johnson v. Bond, 94 F.R.D. 125, 129 (N.D. Ill. 1982) (same); Beckler v. Kreps, 541 F. Supp. 1311, 1315 (E.D. Penn. 1982) ("Though *Zipes* did not involve a discrimination claim against the federal government, the *Zipes* holding would likely be extended to encompass cases brought pursuant to 42 U.S.C. § 2000e-16(c). Thus, this Court does not view exercise of administrative remedies to be a jurisdictional prerequisite to suit under Title VII.").

[108] Ross v. United States Postal Serv., 696 F.2d 720, 722 (9th Cir. 1983); Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980).

[109] Boyd v. United States Postal Serv., 752 F.2d 410, 414 (9th Cir. 1985) (Ninth Circuit concluded that 30-day time limit in federal employee filing with EEOC is a statute of limitations and subject to waiver, estoppel, and equitable tolling); *cf.* Sims v. Heckler, 725 F.2d 1143, 1145 (7th Cir. 1984) (Seventh Circuit refuses to apply *Zipes* to federal employees' actions, invoking the sovereign immunity principle to limit *Zipes* to actions of private employers); Rice v. Hamilton Air Force Base, 720 F.2d 1082, 1083-84 (9th Cir. 1983) (Ninth Circuit concluded that the provision giving federal employees 30 days to file in federal court was jurisdictional, but found that plaintiff "filed" an action by filing with the court a request for counsel, a description of the claim, and the administrative dispositions of his complaint.).

[110] Cooper v. United States Postal Serv., 105 S. Ct. 2034 (1985). Justice White dissented, noting the conflict between the circuits on whether *Zipes* applies to federal filing periods. *Id.* at 2035-36. In October, 1984, the Supreme Court denied certiorari to a Seventh Circuit case on this point. Stuckett v. United States Postal Serv., 105 S. Ct. 274 (1984). In his dissent in *Stuckett*, Justice White noted that the position of the Seventh Circuit refusing to apply *Zipes* to actions brought by federal employers directly conflicts with three other Courts of Appeals. He concluded that certiorari should be granted. *Id.* (White, J. dissenting).

terpretation is faithful to the *Zipes* Court's concerns about Title VII's remedial nature and the inexperience of the average complainant. It also treats federal and private sector employees equally, allowing both the benefit of equitable modification of the time limits.

The *Zipes* reasoning should be extended to other time limits. The same policy considerations — sympathy for the inexperienced plaintiff and preventing employer prejudice — underlie all of Title VII's time periods. Therefore, whether the plaintiff is filing with the EEOC, filing with the court, filing in a deferral state, or filing as a federal or private sector employee, the time periods should be subject to equitable modification.

IV. Guidelines for Using Equitable Remedies to Modify Title VII's Limitations Period

For many Title VII complainants, the *Zipes* decision will prevent their grievances from being barred altogether. The *Zipes* case resolved the issue of the jurisdictional nature of Title VII's time periods by allowing equitable modification of the periods when the circumstances warrant. However, the Supreme Court in *Zipes* did not explain when equitable modification would be appropriate in the Title VII context. Furthermore, the Court failed to provide guidelines for appropriate application of these modifications, leaving the lower courts to fashion their own rules.

The use of equity to prevent unfair results is hardly confined to the Title VII context; instead, the recognition of equitable consideration is "deeply rooted in our federal jurisprudence."[111] The Sixth Circuit recently noted that "throughout our judicial history, the Supreme Court has approved the application of equitable tolling to statutes of limitation to prevent unjust results in cases arising at law as well as at equity."[112] In determining whether equitable tolling is appropriate in a given situation, "the basic inquiry is whether congressional purposes are effectuated by tolling the statute of limitations."[113]

In the Title VII context, the refusal to dismiss a delinquently filed Title VII charge or complaint may arise from a variety of circumstances that provide a basis for waiver, estoppel, or tolling. Waiver and estoppel are generally based on the employer's actions, whereas tolling may arise out of a broader range of events. For example, tolling is

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[111] Jones v. The TransOhio Sav. Ass'n, 747 F.2d 1037, 1039 (6th Cir. 1984).

[112] *Id.*

[113] *Id.* (citing Burnett v. New York Central R.R., 380 U.S. 424, 427 (1965)).

appropriate when a plaintiff is acting without advice of counsel,[114] when a plaintiff's untimely filing is due to attorney ineptitude,[115] or when the untimely filing results from actions of third parties.[116] In post-*Zipes* cases, courts have used equitable tolling more often than waiver and estoppel to modify Title VII's statutory limitations periods.[117]

Lower courts have also applied the *Zipes* rationale to cases involving the Age Discrimination in Employment Act (ADEA),[118] which prohibits discrimination based on age.[119] Much of the ADEA's language is virtually identical to Title VII's language. The enforcement procedures and time limitation scheme of the ADEA are also very similar to those under Title VII.[120] Consequently, ADEA and Title VII cases are used

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[114] *See infra* note 139 and accompanying text.

[115] *See infra* notes 144-47 and accompanying text.

[116] *See infra* text accompanying notes 152-69.

[117] *See infra* text accompanying notes 122-69.

[118] The purpose of the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621-34 (1982)) is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

[119] 29 U.S.C. § 623(a) is entitled "Prohibition of Age Discrimination" and states that it is unlawful for an employer to fail or refuse to hire or to discharge or otherwise discriminate against an individual because of age. Employers are also prohibited from limiting, segregating, or classifying employees to affect their status as employees adversely because of age. Finally, employers cannot reduce the wage rate of any employee in order to comply with the ADEA.

[120] *See* Comment, *Equitable Modification*, *supra* note 55, at 1024 ("[The ADEA], although not analogous to Title VII in every respect, shares with it a common time limitation scheme.").

A primary reason for applying the *Zipes* analysis to the time periods in the ADEA is the similar purpose behind Title VII and the ADEA. The Sixth Circuit noted that Title VII and the ADEA share the purpose of eliminating employment discrimination. Jones v. Airco Carbide Chem. Co., 691 F.2d 1200, 1202 n.2 (6th Cir. 1982). *See also* Soble v. University of Md., 572 F. Supp. 1509, 1513 (D. Md. 1983) (court notes that the language and purpose of Title VII and the ADEA sections are similar). Courts refer to this goal when they note the "remedial nature" of the legislation. Greene v. Whirlpool Corp., 538 F. Supp. 352, 355 (W.D.N.C. 1982) ("The ADEA is remedial and humanitarian legislation. Congress gave to the courts the power 'to grant such legal or equitable relief as may be appropriate to effectuate the purposes' of the Act. 29 U.S.C. § 626(b)."), *rev'd on other grounds*, 708 F.2d 128 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984)). Since the Supreme Court emphasized the remedial nature of Title VII in the *Zipes* opinion, the analogy is persuasive. *See supra* note 68. This analogy has led courts to apply the *Zipes* analysis to the 180-day provision in the ADEA.

The courts also refer to the legislative history of the 180-day filing requirement to

interchangeably by the courts as precedents in employment discrimination cases.

As noted above,[121] regulations exist that allow equitable modification of the time periods governing federal Title VII complainants under certain circumstances. Following *Zipes*, and using Title VII and ADEA precedent interchangeably, courts have modified and expanded upon the equitable modifications allowed in the regulations, and applied them to all of Title VII's time limitations in three general contexts: 1) when actions by the employer prejudice the plaintiff; 2) when characteristics or acts of the complainant warrant lenient treatment; and 3) when actions of third parties result in prejudice to the plaintiff.

A. Actions by the Employer

Courts equitably modify time periods when an employer's action or inaction prejudiced the employee's ability to file timely charges. Affirmative actions by the employer sufficient to cause the filing period to be suspended include cases in which the employer actively misled the employee,[122] concealed facts supporting plaintiff's cause of action,[123] un-

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find equitable modification appropriate to ADEA time periods. In one House Conference Report the conferees agreed that the 180-day period was not a jurisdictional prerequisite to an ADEA action, and that equitable modification would be available. Vance v. Whirlpool Corp., 716 F.2d 1010, 1012 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 1600 (1984) and 104 S. Ct. 2678 (1984) (citing H.R. Conf. Rept. No. 950, 95th Cong. 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 504, 534); *see also* Thomas v. Nathan Littauer Hosp. Ass'n, No. 81-CV-1347 (N.D.N.Y. Apr. 14, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) ("The legislative history of the 1978 amendments to the ADEA show that the intent of Congress was to encourage courts to reach the merits of age discrimination cases.").

[121] *See supra* note 105 and accompanying text.

[122] Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748 (3d Cir.) (complainant not entitled to equitable tolling of 180-day EEOC filing period because she had not been misled by employer), *cert. denied*, 104 S. Ct. 164 (1983); Earnhardt v. Puerto Rico, 691 F.2d 69, 71 (1st Cir. 1982) (since the employer did not actively mislead complainant, the mere refusal to explain grounds for discharge had no equitable consequences); Price v. Litton Business Sys., 694 F.2d 963, 966 (4th Cir. 1982) (same); Thomas v. Nathan Littauer Hosp. Ass'n, No. 81-CV-1347 (N.D.N.Y. Apr. 14, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) (equitable tolling applies in ADEA case if the employer "deliberately misled" employee); Graves v. University of Mich., 553 F. Supp. 532, 534-35 (E.D. Mich. 1982) (limitations period tolled where defendant misleads plaintiff, however, plaintiff did not allege that defendant actively sought to mislead her); Lanyon v. University of Del., 544 F. Supp. 1262, 1272 (D. Del. 1982) (equitable tolling appropriate where defendant misleads plaintiff, although such was not the situation in this case), *aff'd*, 709 F.2d 1493 (3d Cir. 1983).

[123] EEOC v. Chrysler Corp., 683 F.2d 146, 149 n.1 (6th Cir. 1982) (had plaintiffs

fairly prevented plaintiff from asserting her federal statutory rights,[124] or pursued a course of secrecy and concealment in dealing with the plaintiff.[125]

Employer inaction that may be grounds for equitable modification includes omissions before and after filing a discrimination complaint. For example, the employer may fail to post informational notices required by Title VII and the ADEA.[126] In a pre-*Zipes* case, *Bonham v. Dresser Industries*, the Third Circuit stated that the 180-day filing requirement of the ADEA was jurisdictional.[127] However, it treated the requirement as nonjurisdictional, concluding that failure to post the notice, as required by the ADEA, "will toll the running of the 180-day period, at least until such time as the aggrieved person seeks out an

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claimed that Chrysler concealed relevant facts, the time period might have been tolled); Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1302-03 (5th Cir. 1979) (pre-*Zipes* case in which the court would allow suspension of 180-day period if defendant concealed facts that support plaintiff's cause of action); English v. Ware County Dept. of Family & Children Serv., 546 F. Supp. 689, 693 (S.D. Ga. 1982) (cites *Chappell* in a post-*Zipes* case).

[124] Thomas v. Nathan Littauer Hosp. Ass'n, No. 81-CV-1347 (N.D.N.Y. Apr. 14, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) ("[I]f the defendant employer prevented the employee from learning of the reason for his termination, with the result that the employee could not assert his claim within the required time limits, the time requirement is tolled."). EEOC v. Chrysler Corp., 683 F.2d 146, 149 n.1 (6th Cir. 1982) (had plaintiffs had claimed that Chrysler's actions unfairly prevented them from asserting their federal statutory rights, the time period might have been tolled); Price v. Litton Business Sys., 694 F.2d 963, 965 (4th Cir. 1982) (ADEA statute of limitations not tolled due to steps taken by defendant to ameliorate effects of its decision to remove plaintiff as branch manager); Lawson v. Burlington Indus., 683 F.2d 862, 864 (4th Cir.) (employer's offer of six-month severance pay, right to full reinstatement within 270 days of layoff, and company's representation that plaintiff would be considered for future positions not enough to toll), *cert. denied*, 459 U.S. 944 (1982). ***But see*** Franci v. AVCO Corp., 538 F. Supp. 250, 254 (D. Conn. 1982) (ADEA complainant's good faith reliance on possibility of being recalled and lack of prejudice to employer justified tolling of 300-day filing period in deferral state).

[125] Jones v. Cassens Transp., 538 F. Supp. 929, 932 (E.D. Mich.) (equity required relief from the filing requirement), *appeal dismissed*, 705 F.2d 454 (6th Cir. 1982).

[126] Title VII, 42 U.S.C. § 2000e-10(a) (1982) reads: "Every employer . . . shall post and keep posted in conspicuous places upon its premises . . . a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of this subchapter and information pertinent to the filing of a complaint."

ADEA, 29 U.S.C. § 627 (1982), reads: "Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission . . . ."

[127] 569 F.2d 187, 192-93 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

attorney or acquires actual knowledge of his rights."[128] Courts generally have held that an employer's failure to post notice of ADEA rights warrants tolling[129] and that the burden of proving the posting is on the employer.[130]

Courts have been slow to adopt the ADEA failure-to-post reasoning in Title VII cases, however. In 1978, the Second Circuit in *Smith v. American Presidential Lines*,[131] apparently accepted the Third Circuit's failure-to-post theory, but found it factually inapplicable.[132] Shortly after *Zipes*, the First Circuit relied on *Smith* and the ADEA cases to conclude that a failure to post may toll Title VII time periods.[133] The Fifth Circuit, however, has been reluctant to accept the employer's failure to post as a basis for equitable tolling.[134] The Fifth Cir-

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[128] *Id.* at 193. This confusing use of terminology was recently commented upon by the Seventh Circuit: "As with Title VII, under which the *Zipes* Court recognized that many opinions branded the filing requirement as jurisdictional but then did not treat the failure to file in a timely fashion as unforgiveable, many ADEA cases used the terminology of jurisdiction but applied the law of conditions precedent." Stearns v. Consolidated Management, 747 F.2d 1105, 1111 (7th Cir. 1984).

[129] Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983) (the 180-day period should be tolled by reason of Whirlpool's failure to post the ADEA statutory notice), *cert. denied*, 104 S. Ct. 1600 and 104 S. Ct. 2678 (1984); Elliot v. Group Medical & Surgical Serv., 714 F.2d 556, 562-64, (case not dismissed because no notice posted and jury believed plaintiff's claim that he was unaware of his ADEA rights), *reh'g denied*, 721 F.2d 819 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984); Kephart v. Institute of Gas Technology, 581 F.2d 1287, 1289 (7th Cir. 1978) (tolling appropriate), *cert. denied*, 450 U.S. 959 (1981); Shields v. Grocer's Supply Co., 568 F. Supp. 61, 64 (S.D. Tex. 1983) (tolling possible when ADEA rights posted in buildings where plaintiff rarely, if ever, went); *cf.* Greene v. Whirlpool Corp., 708 F.2d 128, 131 (4th Cir. 1983) (not tolled because plaintiff had acquired actual knowledge of ADEA requirements from a visit to the Department of Labor, even though employer did not post), *cert. denied*, 104 S. Ct. 707 (1984); Wilkerson v. Siegfried Agency, 683 F.2d 344, 347 (10th Cir. 1982) (no tolling because employee had actual knowledge); Hrzenak v. White Westinghouse Appliance Co., 682 F.2d 714, 719 (8th Cir. 1982) (no tolling when notice was posted in employee's lunch room and plaintiff had reasonable access to lunch room, even if plaintiff claimed he did not see the posted notice).

[130] Jacobson v. Pitman-Moore, Inc., 573 F. Supp. 565, 569 (D. Minn. 1983) ("In this case, based upon PMI's admission that it is unable to prove that the required notices were posted at the Minneapolis branch [where plaintiff worked], the court must assume that no such notices were posted.").

[131] 571 F.2d 102 (2d Cir. 1978).

[132] *Id.* at 109 (since plaintiff retained counsel more than 180 days before to filing his charge, any causal relationship between the employer's failure to post and plaintiff's late filing was severed).

[133] Earnhardt v. Puerto Rico, 691 F.2d 69, 73 (1st Cir. 1982) (court acknowledged theory behind tolling for failure-to-post, but did not find equitable circumstances).

[134] Cruce v. Brazosport Indep. School Dist., 703 F.2d 862, 864 (5th Cir. 1983) (no

cuit's refusal to allow tolling in Title VII failure-to-post cases is inconsistent with its general willingness to allow equitable modification in favor of the complainant.[135] The *Zipes* Court emphasized that complainants, who are laypeople, initiate Title VII actions. The statutory duty to post notice of Title VII rights at the work site is directly related to the congressional policy of ensuring that laypeople who are victims of discrimination are adequately informed of their Title VII rights. Therefore, the courts should embrace the ADEA failure-to-post reasoning in Title VII cases by allowing tolling in failure-to-post cases and placing the burden of proving the posting on the employer.

Another example of employer inaction occurs when the employer has participated fully in the Title VII proceedings and failed to raise a procedural issue. This form of employer inaction occurs when an employer tries to have the case dismissed after the proceedings are underway, claiming that the court lacks jurisdiction because plaintiff failed to comply with the time period. Courts generally hold that the employer has waived the claim and is estopped from raising it later.[136] Therefore, an employer who fails to raise the untimely filing defense in her answer may not later assert it.[137] The application of waiver and estoppel

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tolling because although employer failed to post, the plaintiff could have learned of the EEOC and its procedures).

[135] *See supra* note 79 and accompanying text.

[136] Toombs v. Greer-Smyra, Inc., No. 82-5076 (6th Cir. Feb. 23, 1983) (available May 1, 1985, on LEXIS, Genfed library, Cir file) (defendant failed to raise procedural issue for three years, sufficient to waive or estop); Liberles v. County of Cook, 709 F.2d 1122, 1125-26 (7th Cir. 1983) (defendant failed to raise filing problem in summary judgment motion, therefore, it could not raise it on appeal).

The finding of waiver or estoppel has not been unanimous, with one court requiring a showing of substantial prejudice before allowing such a claim. Mamos v. School Comm'n, 553 F. Supp. 989 (D. Mass. 1983). In *Mamos*, the defendant waited eight months before moving to amend its answer to the Title VII complaint to assert the limitations defense. The court found "that neither the delay in asserting the defense, nor the prejudice to the plaintiff which may have been caused by the delay was substantial." *Id.* at 992.

[137] Henson v. City of Dundee, 682 F.2d 897, 899 n.1 (11th Cir. 1982); *see also* Rice v. New England College, 676 F.2d 9, 10 (1st Cir. 1982) (if the answer neglected to assert the untimely filing as a defense, then the defendant will be held to have waived the defense).

The basis for the waiver of the untimely filing defense is stated in Federal Rules of Civil Procedure 12(h)(1):

> A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be

to prevent dismissal of the plaintiff's claim is consistent with *Zipes*. In *Zipes*, the Court found that one of the purposes of the time limits is to protect the employer from stale claims. If the employer has been participating fully in the Title VII proceedings, she does not need this protection since she is obviously aware of the claim.

An employer's affirmative actions that prejudice an employee's ability to file timely discrimination charges will cause the time limit to be equitably modified. However, the courts disagree on whether an omission by the employer, such as a failure to post the required informational notice or a failure to raise a procedural issue in timely manner, provides grounds for equitable modification. A consistent application of the *Zipes* policies, however, requires equitable modification of the time limits in any of these circumstances. Title VII is a remedial statute. If the employer affirmatively obstructs the plaintiff's ability to file charges or omits to post the required informational notice, Title VII's purposes are thwarted because the employee will be unable to seek redress for the employer's discriminatory acts. Likewise, if the employer fails to raise a procedural issue in a timely manner, no Title VII policies are affected if her objection is waived. An employer who has been actively participating in the Title VII proceedings does not need protection from stale claims.

B. Characteristics or Acts of Claimant

Two critical considerations underlying *Zipes* were the complexity of the Title VII filing scheme and the legal inexperience of most potential complainants.[138] A directly related, and currently unresolved, issue is whether pro se plaintiffs should be treated differently from those plaintiffs represented by counsel.

Several courts have held that a plaintiff who acts utterly without the advice of an attorney may have the filing periods tolled until the facts to support her Title VII or ADEA claim would have been apparent to a reasonably prudent person.[139] The plaintiff may also receive equitable

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made as a matter of course.

[138] See *supra* note 67 for a discussion of Love v. Pullman Co., 404 U.S. 522 (1972).

[139] The Supreme Court invoked equitable considerations in cases involving lay persons acting without legal advice in several cases before *Zipes*. Delaware State College v. Ricks, 449 U.S. 250 (1980); Oscar Meyer & Co. v. Evans, 441 U.S. 750 (1979); Love v. Pullman Co., 404 U.S. 522 (1972). Lower courts then applied the "reasonable person" standard to determine the point at which Title VII limitation periods should begin to run. Hamilton v. General Motors Corp., 606 F.2d 576, 579 (5th Cir. 1979), *cert. denied*, 447 U.S. 907, *reh'g denied*, 449 U.S. 913 (1980); Chappell v. Emco Mach.

treatment if she erroneously filed a timely complaint in the wrong forum.[140] Some cases support the position that consultation with an attorney during the limitations period eliminates any basis for equitable tolling.[141] The rationale behind this position was expressed by the Fifth Circuit in *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*,[142] an ADEA case. In *Edwards*, the plaintiff consulted an attorney while there was still adequate time to file within the 180-day period. The plaintiff was found to have had the "means of knowledge" of his

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Works Co., 601 F.2d 1295, 1303 (5th Cir. 1978); Bickham v. Miller, 584 F.2d 736, 738 (5th Cir. 1979); Bonham v. Dresser Indus., 569 F.2d 187, 192 (3d Cir. 1977) (ADEA case), *cert. denied*, 439 U.S. 821 (1978); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975); Carpenter v. Board of Regents of the Univ. of Wisc., 529 F. Supp. 525, 531 (W.D. Wisc. 1982), *aff'd*, 728 F.2d 911 (1984).

After *Zipes* the trend continued: Coleman v. Clark Oil & Ref. Co., 568 F. Supp. 1035, 1038 (E.D. Wisc. 1983) (filing with EEOC under Title VII); Stoller v. Marsh, 682 F.2d 971, 974 (D.C. Cir. 1982) (filing with EEOC under Title VII), *cert. denied*, 460 U.S. 1037 (1983); Armstrong v. Veteran's Admin., 31 Fair Empl. Prac. Cas. (BNA) 1834, 1836 (D.D.C. 1982) (federal employee filing with EEOC under Title VII). *But see* Cruz v. Triangle Affiliates, Inc., 571 F. Supp. 1218, 1221-22 (E.D.N.Y. 1983) (period cannot be tolled although the plaintiff was a lay person for whom English was a second language).

[140] The Third Circuit thought tolling would be appropriate when the plaintiff filed in the wrong forum under the Toxic Substances Control Act before *Zipes*. School Dist. v. Marshall, 657 F.2d 16, 20 (3d Cir. 1981). In post-*Zipes* cases allowing equitable modification when plaintiff files a timely complaint in the wrong forum, the courts cite *Zipes* and *Marshall*. Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir.), *cert. denied*, 104 S. Ct. 164 (1983); Lanyon v. University of Del., 544 F. Supp. 1262 (D. Del. 1982), *aff'd*, 709 F.2d 1493 (1983).

[141] Bonham v. Dresser Indus., 569 F.2d 187, 193 (3d Cir. 1977) ("Failure to post the required notice will toll the running of the [ADEA's] 180-day period, at least until such time as the aggrieved person seeks out an attorney . . . ."), *cert. denied*, 439 U.S. 821 (1978); Edwards v. Kaiser Aluminum & Chem. Sales, Inc., 515 F.2d 1195, 1200 (5th Cir. 1975) (plaintiff's cause of action not entitled to equitable tolling because he hired an attorney and had actual knowledge of his ADEA rights); Bennett v. Russ Berrie & Co., 564 F. Supp. 1576, 1579-80 (N.D. Ind. 1983) (because plaintiff had been represented by counsel since shortly after her discharge, she was precluded from claiming that the filing period should be tolled).

The court in Perez v. Dana Corp., 545 F. Supp. 950 (E.D. Pa. 1982), *aff'd*, 718 F.2d 581 (1983), also held that plaintiffs represented by counsel could not rely on equitable modification of the time limits, relying on three pre-*Zipes* cases: Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv., 667 F.2d 1074, 1085 (3d Cir. 1981) ("[P]laintiffs [who] have been counseled . . . by able attorneys . . . cannot rely on . . . equity to toll Title VII's administrative requirements."), *cert. denied*, 458 U.S. 1122 (1982), Smith v. American Pres. Lines, 571 F.2d 102 (2d Cir. 1979) (same); Keyse v. Cal Tex Oil Corp., 590 F.2d 45 (2d Cir. 1978) (same).

[142] 515 F.2d 1195 (5th Cir. 1975).

ADEA rights. The court found that it would be unfair to estop the employer from raising the 180-day bar when the injured employee consulted an attorney. Estopping the employer would penalize her for the actions of an attorney who "either slept on his client's rights or did not believe he had any under the statute."[143] The Fifth Circuit found this result unacceptable.

Other cases, however, support the position that consulting an attorney does not necessarily eliminate the basis for equitable tolling.[144] These courts recognize that the plaintiff who actively sought out an attorney did not sleep on her rights.[145] One court justified this conclusion by refusing to penalize the plaintiff for the attorney's mistake.[146] Another court refused to penalize a plaintiff because of the "sloppy, inept practice of his attorney."[147]

The only Supreme Court decision to address Title VII pro se plaintiffs, *Baldwin City Welcome Center v. Brown*,[148] limited, but did not preclude, equitable modification in this area. The *Baldwin* plaintiff acted without the advice of an attorney. In fact, she was seeking to obtain counsel through the court when the time expired for filing her claim. Rather than excuse the six-day delay, the Court rigidly adhered to the statutory time limit.[149] The Court ignored the fact that the plaintiff was acting pro se, and instead noted that she had failed to file a timely complaint with the court.[150]

The *Baldwin* case is unique because the plaintiff had been notified by the EEOC, in her right-to-sue letter, and by the district court magistrate, in a separate letter, of the ninety-day limitations period.[151] Consequently, the plaintiff had actual knowledge of the applicable time periods. *Baldwin* differs from other pro se cases in which plaintiffs are

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[143] *Id.* at 1200 n.8.

[144] Dartt v. Shell Oil Co., 539 F.2d 1256, 1262 (10th Cir. 1976) (plaintiff's consultation with an attorney did not preclude equitable tolling because she twice promptly sought legal advice and twice promptly followed that advice), *aff'd by an equally divided court*, 434 U.S. 99 (1977), *reh'g denied*, 434 U.S. 1042 (1978); Volk v. Multi-Media Inc., 516 F. Supp. 157, 162 (S.D. Ohio 1981) (district court did not penalize plaintiff for attorney's failure to file properly); Wagner v. Sperry Univac, 458 F. Supp. 505, 514-15 (E.D. Pa. 1978) (dicta of court suggests that an attorney's blunders may not be chargeable to the plaintiff-client), *aff'd mem.*, 624 F.2d 1092 (3d Cir. 1980).

[145] Jacobson v. Pitman-Moore, Inc., 573 F. Supp. 565, 570 (D. Minn. 1983).

[146] *Id.*

[147] Volk v. Multi-Media Inc., 516 F. Supp. 157, 162 (S.D. Ohio 1981).

[148] 104 S. Ct. 1723 (1984) (per curiam). *See supra* text accompanying notes 69-77.

[149] *Id.* at 1724-25.

[150] *Id.*

[151] *Id.*

ignorant of the time periods. In the latter situations, equitable circumstances should be considered. Thus, *Baldwin* stands for the limited proposition that complainants with actual knowledge of the time periods cannot plead for equitable considerations due to their pro se status. In these limited circumstances, the plaintiffs understand Title VII's technical filing requirements because they have been actually notified of them; consequently, the *Zipes* concerns are not at issue. However, in the majority of the pro se and attorney ineptitude cases, the *Zipes* concerns — Title VII's complexity and the inexperience of the complainants — are furthered by allowing equitable modification of missed filing deadlines. *Zipes* should be applied to these cases.

C. Actions by Third Parties

The courts also allow tolling in situations in which a third party[152] causes the the filing to be untimely. Generally, this third party is the EEOC, although state agencies, the post office,[153] and even courts have been third parties whose actions have justified tolling in specific situations.

1. Action by the EEOC and State Fair Employment Practices Agencies

Negligent or affirmative action by the EEOC may justify the tolling of a Title VII or ADEA time period. For example, tolling was applied to two statutory conditions that a plaintiff failed to meet in *Waiters v. Robert Bosch Corp.*[154] Plaintiff Waiters' race-based Title VII action was dismissed for failure to comply with the 300-day time limit for filing charges with the EEOC in deferral states.[155] A series of miscommunications and mishaps (including the burglarization of the Greenville, South Carolina EEOC office) resulted in Waiters missing the 300-day deadline. The Fourth Circuit found that "equity clearly mandates the tolling of the 300-day period."[156] The court also found

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[152] That is, one other than the employer or the complainant.

[153] The First Circuit, in a brief opinion, discussed the impact of postal service delays on the filing periods in Rice v. New England College, 676 F.2d 9 (1st Cir. 1982). The court found that mail delivery delays can toll the periods, but only if the mail could reasonably be expected to arrive within the time period. *Id.* at 10, 11.

[154] 683 F.2d 89 (4th Cir. 1982).

[155] *Id.* at 92.

[156] *Id.* The court noted: "In this case, Waiters did everything required by him by the statute; had his charge been properly processed, the charge would have satisfied the filing period." *Id.*

that the plaintiff was not responsible for the EEOC's failure to notify the employer of the charges within ten days of receiving plaintiff's affidavit, as required by statute.[157] Therefore, the delay in notifying the employer did not bar the action.[158] Similarly, the Sixth Circuit held that a plaintiff was not responsible when the EEOC failed to refer charges to the appropriate state agency as required by statute.[159] The District Court of the District of Columbia followed these circuits to find that when the plaintiff made a good-faith effort to exhaust her administrative remedies, but was thwarted by EEOC personnel, the time limitation would not bar the action.[160]

Several other affirmative prejudicial actions by EEOC personnel will justify equitable modification. Even before *Zipes*, courts allowed equitable modification when the EEOC misled a claimant about the nature of her rights under Title VII.[161] Equitable modification is also appropriate when EEOC employees reject complainants' charges in direct violation of regulations. Since EEOC officials lack discretion to turn away complainants,[162] their doing so will not prejudice the complainant.[163]

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[157] 42 U.S.C. § 2000e-5(b) (1982) requires the EEOC to serve notice of a charge on the employer within 10 days.

[158] *Waiters*, 683 F.2d at 92.

[159] Toombs v. Greer-Smyra, No. 82-5076 (6th Cir. Feb. 23, 1983) (available May 1, 1985, on LEXIS, Genfed library, Cir file).

[160] Leigh v. Ruppe, 32 Fair Empl. Prac. Cas. (BNA) 356 (D.D.C. 1983).

[161] Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1303 (5th Cir. 1979) (plaintiff did not claim that the EEOC misled her about her rights under Title VII; had she done so, equitable modification would have been appropriate); Page v. United States Indus., 556 F.2d 346, 350-51 (5th Cir. 1977) (letter provided adequate notice but was patently misleading; plaintiff allowed to continue her action even though she technically filed late), *cert. denied*, 434 U.S. 1045 (1978); DeMatteis v. Eastman Kodak Co., 520 F.2d 409, 411 (2d Cir. 1975) (on rehearing plaintiff entitled to prove he was misled by the EEOC); English v. Ware County Dep't of Family & Children Serv., 546 F. Supp. 689, 693 (S.D. Ga. 1982) (court refused to dismiss case when EEOC told plaintiff she could file in court without the statutorily required right-to-sue notice from the Attorney General); Jones v. Cassens Transp., 538 F. Supp. 929, 932 (E.D. Mich.) (Plaintiffs "were misadvised . . . by every source of representation with which they consulted until they reached the judicial process, and will not be penalized here by a technical requirement."), *appeal dismissed*, 705 F.2d 454 (6th Cir. 1982).

[162] 29 C.F.R. § 1601.6 (1984) states:

> The Commission *shall* receive information concerning alleged violations of Title VII from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate officer *shall* render assistance in the filing of a charge [emphasis added].

[163] McKee v. McDonnell Douglas Technical Serv. Co., 700 F.2d 260, 263 (cites 29 C.F.R. § 1601.6 in finding "EEOC regulations do not vest Commission officials with discretion to turn away complainants."), *reh'g denied*, 705 F.2d 776 (5th Cir. 1983);

Courts also refuse to allow a plaintiff to be prejudiced by actions of state fair employment practices agencies. Thus, the District Court of Colorado found that the filing period was equitably tolled when the Colorado Civil Rights Commission (the EEOC state counterpart) "rebuffed and frustrated" plaintiff's efforts to file her claim.[164] Tolling has also been allowed when the complainant has been given incorrect information on where to serve summons by a state agency.[165] Finally, one court has allowed tolling when the plaintiff was incorrectly told the amount of proof necessary to file a complaint by a state fair employment practices agency employee.[166]

Courts agree that negligent or affirmative conduct on the part of the EEOC or its state counterparts that cause a plaintiff to miss a statutory deadline justifies tolling Title VII's time period. Although allowing tolling may seem inconsistent with the legislative intent to protect employers from stale claims, equitable modification promotes Title VII's remedial nature by not prejudicing a plaintiff for circumstances beyond her control. Since the overall purpose of Title VII is to provide plaintiffs with redress against discrimination, a policy not to penalize plaintiffs for agency mistakes appropriately outweighs the employers' protection against stale claims, and equitable modification should be available.

2. Action by the Courts

Finally, court procedure, or actions by court employees, can result in a tolling of the limitations periods. For instance, if a delay in filing a complaint with the court occurs even though the plaintiff brought the complaint to the court within the time period, the complaint usually

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Jennings v. American Postal Workers Union, 672 F.2d 712, 715 (8th Cir. 1982) ("If the EEOC actually declined to process Ms. Jenning's charge based on that reason, [that it lacked jurisdiction over a claim by a federal employee against her union], . . . it was proceeding under an erroneous interpretation of the law."); *see also* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 923 n.2 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982) ("Filing a complaint with the EEOC placed the Commission under a duty to refer the complaint to the California compliance agency. The complainant is not to be prejudiced by the EEOC's failure to fulfill its duty.").

[164] Graves v. Colorado, 30 Fair Empl. Prac. Cas. (BNA) 1344 (D. Colo. 1982).

[165] Hunt v. Bruce Constr., 674 F.2d 834, 837 (10th Cir. 1982) (Secretary of State told plaintiff to serve summons on the wrong service agent).

[166] Lanyon v. University of Del., 544 F. Supp. 1262, 1272 (D. Del. 1982) (state Department of Labor employee told plaintiff she needed more proof to file charge, including proof that a man had been hired in her place, which is not required by Title VII), *aff'd*, 709 F.2d 1493 (3d Cir. 1983).

will be considered timely.[167]

However, *Baldwin City Welcome Center v. Brown*[168] may limit the courts' tolerance of tardiness when a plaintiff knowingly misses a deadline, even if the court's own procedures contributed to the delay. In *Baldwin*, the plaintiff attempted to file a right-to-sue letter and petition for appointment of an attorney with the court. These documents were held to be insufficient to constitute a filing with the court. However, *Baldwin* presents a unique factual situation because the plaintiff had been warned several times by the court that a filing deadline was approaching and even with this knowledge failed to file the charge in a timely fashion.[169] The cases in which the courts have tolled the limitation period, however, involved plaintiffs who had brought the necessary papers to the court in a timely fashion, but the court failed to complete its internal procedures within the statutory deadline. *Baldwin* is distinguishable from these situations because unlike the *Baldwin* plaintiff, the actions of these plaintiffs have not prejudiced the employer.

The *Zipes* decision emphasized the remedial nature of Title VII. Specifically, the Court noted the complexity of the statutory time scheme and the corresponding difficulty facing an inexperienced plaintiff who was attempting to bring an employment discrimination charge. A competing concern was the protection of employers from stale claims. Consideration of these factors dictates that equitable modification is appropriate when an employer's actions or omissions prejudice an employee's ability to file timely discrimination charges. In such situations the employer is not unduly penalized by the untimely filing because her acts or omissions have prejudiced the plaintiff. Similarly, when a plaintiff misses a filing period due to her own ignorance of the applicable time period or her attorney's ineptitude, equitable modification is appropriate. Although this may subject the employer to late claims, this prejudice is outweighed by the competing remedial considerations. Finally, when the untimeliness of a filing is the result of the actions of third parties, equitable modification is also justified.

Although the *Zipes* doctrine prevents many plaintiffs' claims from being completely barred, equitable modification of statutory require-

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[167] Quiles v. O'Hare Hilton, 572 F. Supp. 866 (N.D. Ill. 1983) (Complainant brought in complaint along with his petition for leave to file in forma pauperis 89 days after receiving right-to-sue letter. Leave to proceed in forma pauperis was not granted until five days later, and complaint was not filed until then. Complaint was held timely filed.).

[168] 104 S. Ct. 1723 (1984) (per curiam). *See supra* note 74 and text accompanying notes 69-76, 148-51.

[169] *See supra* note 151 and accompanying text.

ments "is not an escape valve through which jurisdictional requirements will evaporate since '[t]he tolling of the statutory time periods on equitable grounds is usually very much restricted.' "[170] For example, the plaintiff must allege in her complaint that she satisfied the conditions precedent to bringing a Title VII suit.[171] Additionally, the plaintiff has the burden of proof to show why the challenged provision should be equitably modified in her favor.[172] Finally, under the *Baldwin* decision procedural terms not specifically defined in Title VII that are commonly used in other contexts, for instance the Federal Rules of Civil Procedure, will be given their common interpretation and will not be affected by the *Zipes* rationale.[173]

CONCLUSION

The Supreme Court decision in *Zipes* ended intercircuit conflict regarding the characterization of Title VII's time periods as jurisdictional or nonjurisdictional. A jurisdictional interpretation would have automatically precluded a complainant's ability to have the merits of her case heard by the EEOC or a court if the case was brought after one of the statutory time periods had elapsed. However, the *Zipes* Court concluded that the time periods were like statutes of limitation, which may be equitably modified if the circumstances so warrant. The primary

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[170] Holland v. Allied Maintenance Corp., No. 81-5295 (6th Cir. May 24, 1982) (available May 1, 1985, on LEXIS, Genfed library, Cir file); *see also* Brown v. Mead Corp., 646 F.2d 1163 (6th Cir. 1981); Nash v. City of Oakwood, 541 F. Supp. 220 (S.D. Ohio 1982).

[171] Martin v. Western Electric Co., No. 83C0256 (N.D. Ill. Aug. 31, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) (time limit cannot be tolled when plaintiff failed to submit evidence of circumstances justifying equitable modification); Watson v. Republic Airlines Inc., 553 F. Supp. 939, 943 (N.D. Ga. 1982) (case dismissed when plaintiff failed to allege that she satisfied conditions precedent to bringing a Title VII suit).

[172] Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982) (plaintiff has the burden of pleading and proving any equitable reasons for failure to comply with a time limitation); Sharif v. New York State Dept. of Corrections, No. 83 Civ. 1922 (CBM) (S.D.N.Y. Aug. 16, 1983) (available May 1, 1985, on LEXIS, Genfed library, Dist file) (cites *Saltz*), Leigh v. Ruppe, 32 Fair Empl. Prac. Cas. (BNA) 356 (D.D.C. 1983) (cites *Saltz*); Mitchell v. Jacobsen Mfg. Co., 32 Fair Empl. Prac. Cas. (BNA) 584 (E.D. Wisc. 1983) (plaintiff offered no evidence of waiver or estoppel and the equities weighed heavily in favor of the defendant); Garvin v. Postmaster, 553 F. Supp. 684, 686 (E.D. Mo. 1982) (plaintiff failed to argue that the time period for filing with the EEOC should be tolled, charge dismissed as untimely), *aff'd*, 718 F.2d 1108 (8th Cir. 1983).

[173] *See supra* text accompanying note 77.

rationale the Court offered for the nonjurisdictional interpretation is that technical reading of these complex statutes poses an unreasonably formidable barrier to the typical complainant.

Regardless of certain limitations,[174] the *Zipes* rationale encompasses many situations. Equitable modifications of Title VII time periods will be allowed when an employer affirmatively obstructs a plaintiff's ability to file charges or fails to post the required informational notice. The courts will not allow an employer to evade Title VII through her own acts or omissions. An employer who fails to raise an untimely filing in a timely fashion will also be barred from this defense. The purpose of the filing requirements is to provide prompt notice to the employer; this notice has already been accomplished if the employer is actively participating in the Title VII proceedings. Courts will also allow equitable modification of time periods if the plaintiff is acting pro se and does not have actual knowledge of the time constraints. Finally, courts allow equitable modification if the actions of third parties have prevented the plaintiff from filing in a timely manner.

Most lower courts are currently defining and redefining the requirements for equitable modification under *Zipes* as each situation arises. Courts can simplify this case by case analysis by focusing on the two policies underlying the *Zipes* decision: the remedial nature of Title VII and the use of the time limits to protect employers from stale claims. Remedial purposes are served by allowing plaintiffs to bring claims even though the deadline has passed when the reason for the untimely filing is beyond the plaintiff's control and the employer will not be unduly prejudiced. However, if no equitable circumstances caused the late filing, the interest in preventing stale claims should bar the untimely claim. All of Title VII's time periods are nonjurisdictional. Consequently, the only issue to be resolved in a case involving a missed deadline is whether the time period should be equitably modified.

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[174] *See supra* text accompanying notes 69-77, 170-73.