

MAKE-WHOLE OR MAKE-SHORT? HOW COURTS HAVE MISREAD TITLE VII'S LIMITATIONS PERIOD TO TRUNCATE RELIEF IN EEOC PATTERN-OR-PRACTICE CASES

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Section 707 of Title VII of the Civil Rights Act of 1964 authorizes the federal government to sue employers engaged in a pattern or practice of discrimination. Congress designed these so-called “pattern-or-practice” suits to be a formidable weapon against the most entrenched and reprehensible Title VII violations and to provide the public with swift and effective relief. Unlike section 706 of the statute, which furnishes a right of action for individual complainants, section 707 empowers the government to redress systemic discrimination. The only procedural requirement that Congress originally prescribed for section 707 cases was that the government have reasonable cause to believe that an employer was engaged in a pattern or practice of discrimination.

In 1972, Congress transferred the government’s pattern-or-practice power from the U.S. Attorney General to the Equal Employment Opportunity Commission in an attempt to strengthen Title VII’s enforcement. In doing so, it added a provision to section 707, stating that the Commission shall

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investigate and act upon allegations of a pattern or practice of discrimination “in accordance with the procedures set forth in [section 706].” Like many private rights of action, section 706 includes a limitations period. Although the Supreme Court has recognized that Congress intended the EEOC to have the same authority under section 707 as the Attorney General, numerous district courts have begun using this provision to apply section 706’s statutory limitations period to restrict relief in EEOC pattern-or-practice cases. This Comment argues that such an application conflicts with Congress’s intent, both in enacting section 707 and in granting the EEOC authority to litigate section 707 cases. But, even if Congress had intended section 706’s limitations period to apply to section 707 cases, a pattern or practice of discrimination is a single, continuing violation for purposes of timely filing.

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INTRODUCTION

“[O]nly by an effective attack on entire systems that discriminate can we have any significant impact on discrimination”

—Eleanor Holmes Norton¹

From 2003 to 2007, a farm labor contracting firm, Global Horizons, recruited hundreds of impoverished, uneducated Thai guest workers to work on six farms in Hawaii.² Global Horizons charged these Thai workers exorbitant recruitment fees to come to the United States, placing them “hopelessly in debt” and subjected the workers to slavery-like working conditions to pay off what they owed.³ Supervisors at the farms physically and verbally abused the Thai workers, forced them to live in uninhabitable sleeping quarters, and failed to provide adequate food and water.⁴ Meanwhile, the farms allowed other, non-Thai workers significantly greater freedoms and

1. *Overhauling the EEOC*, 28 LAB. L.J. 683, 690 (1977) (emphasis added). Eleanor Holmes Norton served as the first female Chair of the EEOC from June 1977 to February 1981. Deborah Churchman, *Eleanor Norton Reflects on Equal-Employment Successes*, CHRISTIAN SCI. MONITOR, Mar. 3, 1981, at 19; Lawrence Speiser, *A Look at Eleanor Norton Holmes*, DISTRICT LAW., Aug.–Sept. 1979, at 19.

2. *EEOC v. Glob. Horizons, Inc.*, 904 F. Supp. 2d 1074, 1081 (D. Haw. 2012); Third Amended Complaint ¶¶ 268, 323, 373, 432, 511, 560, 624, *Glob. Horizons*, 904 F. Supp. 2d 1074 (No. 11-00257), 2012 WL 10007945. The farms that contracted Global Horizons to supply foreign workers were owned by Captain Cook Coffee Co., Del Monte Fresh Produce (Hawaii), Kauai Coffee Co., Kelena Farms, Mac Farms of Hawaii, Maui Pineapple Co., and Alexander & Baldwin. *Glob. Horizons*, 904 F. Supp. 2d at 1074–75, 1081.

3. *EEOC v. Glob. Horizons, Inc.*, No. 11-00257, 2014 WL 7338725, at *3–4 (D. Haw. Dec. 19, 2014).

4. *Id.* at *3–6.

amenities.⁵ While non-Thai workers could own a car, drink alcohol, listen to music, cook their own food, and take work breaks, Thai workers could not.⁶ The farms also paid Thai workers less—and, sometimes, not at all.⁷ Global Horizons’s CEO later admitted that he “specifically sought Thai nationals to fulfill the farm labor contracts believing that Thai workers would be easier to exploit than workers from other national origins and/or races.”⁸ When the Thai workers complained to Global Horizons, its management threatened to deport them.⁹

In April 2011, the Equal Employment Opportunity Commission (EEOC) sued Global Horizons and these farms under section 707 of Title VII, alleging that the companies had engaged in a pattern or practice of discrimination against the Thai workers based on their national origin.¹⁰ Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or job applicants based on one or more protected grounds—race, color, religion, sex, or national origin.¹¹ Section 707 authorizes the EEOC to prosecute employers that exhibit “a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII].”¹² Congress designed these so-called “pattern-or-practice” cases to provide “a swift and effective weapon” for the government to “vindicate the broad public interest” in eradicating systemic employment discrimination.¹³

Since Congress enacted Title VII, however, the procedural requirements for pattern-or-practice cases have been widely contested.¹⁴

5. *Id.* at *5.

6. *Id.*

7. *Id.*

8. *Id.* at *3.

9. *Id.* at *5–6.

10. Third Amended Complaint at 2, *EEOC v. Glob. Horizons, Inc.*, 904 F. Supp. 2d 1074 (D. Haw. 2012) (No. 11-00257), 2012 WL 10007945.

11. 42 U.S.C. § 2000e-2(a) (2012).

12. § 2000e-6(a), (c); *see also infra* text accompanying notes 54–64 (explaining that the U.S. Attorney General has the authority to bring pattern-or-practice suits against public employers, and the EEOC has the authority to bring pattern-or-practice suits against private employers).

13. *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 843 (5th Cir. 1975). Although some scholars have used the phrase “pattern-or-practice case” to describe certain private class-action lawsuits litigated under section 706 of Title VII, this Comment uses “pattern-or-practice case” to refer solely to a lawsuit that the government brings under section 707 of Title VII.

14. *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 10 (1996) (“The amount of litigation over [the Title VII] procedures is likely unparalleled in federal administrative law.”).

One question that has generated considerable litigation is whether the EEOC can obtain relief for all individuals harmed by a pattern or practice of discrimination or for only those harmed within a given statutory time period.¹⁵ While section 707 of Title VII does not include such a limitations period,¹⁶ it provides that the EEOC shall investigate and act upon allegations of a pattern or practice of discrimination “in accordance with the procedures set forth in” section 706.¹⁷

Section 706, in contrast to section 707, affords recourse for individuals seeking relief from *specific instances* of employment discrimination.¹⁸ Not surprisingly, section 706 does include a limitations period, which provides that individuals must file a charge, or a formal allegation of discrimination, with the government within 180 or 300 days of the discriminatory act.¹⁹ Given this requirement, a private plaintiff, or the government acting on behalf of a private party, can sue an employer under section 706 only for discriminatory acts that occurred within 180 or 300 days prior to the charge.²⁰

15. See *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *2 (D. Md. Apr. 27, 2010) (discussing a split among district courts and citing eight decisions: four in favor of applying a statutory limitations period to pattern-or-practice cases and four opposed); see also BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1351 (Paul W. Cane, Jr. et al. eds., 3d ed. 1996) (commenting that Title VII’s limitations period is “arguably the most muddled area in all of employment discrimination law”).

16. This Comment uses the terms “limitations period” and “filing period” interchangeably. Both refer to Title VII section 706(e)(1), which provides that victims of employment discrimination must file a “charge” with the EEOC no more than 180 or 300 days after the discrimination occurred to be eligible for relief. See *infra* text accompanying notes 154–58 (explaining the limitations period and how courts assess the timeliness of a charge).

17. 42 U.S.C. §§ 2000e-5–6.

18. See *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1084 (C.D. Ill. 1998) (distinguishing section 707 cases, which challenge systemic discrimination, from section 706 cases, which vindicate the rights of individuals challenging discrete discriminatory acts).

19. 42 U.S.C. § 2000e-5(e)(1). The specific language of the statute reads,

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case . . . [where] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice[,] . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred . . .

Id.

20. 42 U.S.C. § 2000e-5(e)(1); see also *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109–10 (2002) (interpreting the statute’s language to mean that claimants have “up to 180 or 300 days *after* the unlawful practice happened to file a charge” and

In the *Global Horizons* case, the defendant employers argued that the court should apply section 706's limitations period to the EEOC's section 707 claims so that only Thai workers who experienced discrimination within 180 or 300 days of the triggering charge could obtain relief.²¹ The U.S. District Court for the District of Hawaii agreed.²² Of the hundreds of Thai workers that *Global Horizons* and the defendant farms exploited, only eighty-two ultimately were awarded compensation.²³

Many other district courts have similarly applied section 706's limitations period to EEOC pattern-or-practice cases and denied relief to countless victims of employment discrimination.²⁴ Some courts, on the other hand, have examined sections 706 and 707 and concluded that the section 706 limitations period *does not* apply to pattern-or-practice actions.²⁵ These courts have reasoned that application of section 706's filing requirements simply does not fit with the history and nature of section 707 cases.²⁶ No court of appeals has ruled on the issue.²⁷

that claims are "time barred" if not filed within these time limits), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

21. *EEOC v. Glob. Horizons, Inc.*, 904 F. Supp. 2d 1074, 1090 (D. Haw. 2012).

22. *Id.* at 1092.

23. *See EEOC v. Glob. Horizons, Inc.*, No. 11-00257, 2014 WL 7338725, at *15-16, *31 (D. Haw. Dec. 19, 2014) (listing the names of the claimants to whom the court awarded damages).

24. *See, e.g., EEOC v. FAPS, Inc.*, No. 10-3095, 2014 WL 4798802, at *24 (D.N.J. Sept. 26, 2014) (finding that the section 706 limitations period governed the EEOC's section 707 claims and dismissing all claims for discrimination that occurred outside that period); *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *1 (D. Md. Apr. 27, 2010) (same); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659 (E.D. Va. 2008) (same); *EEOC v. KCD Constr., Inc.*, No. 05-2122, 2007 WL 1129220, at *4 (D. Minn. Apr. 16, 2007) (same); *EEOC v. Custom Cos., Nos. 02 C 3768, 03 C 2293*, 2004 WL 765891, at *8 (N.D. Ill. Apr. 7, 2004) (same).

25. *See, e.g., EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2010 WL 86376, at *2 (W.D.N.Y. Jan. 6, 2010) (holding that the section 706 limitations period does not limit the relief that the EEOC may obtain in section 707 cases); *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535-36 (D. Md. 2007) (same); *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1137 (D. Nev. 2007) (same); *EEOC v. Dial Corp.*, No. 99-3356, 2002 WL 1974072, at *6-7 (N.D. Ill. July 23, 2002) (same); *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1084 (C.D. Ill. 1998) (same).

26. *See, e.g., Mitsubishi*, 990 F. Supp. at 1083-84 (finding that imposing a limitations period in section 707 cases is contrary to the "very nature" of a pattern-or-practice action, and that "no statutory language, no regulation, no case, and no commentator" definitively establishes that section 707 incorporates section 706's timely filing requirement).

27. *FAPS*, 2014 WL 4798802, at *23.

This Comment argues that upon establishing that an employer engaged in a pattern or practice of discrimination under section 707 of Title VII, the EEOC may secure relief for any individual injured by that pattern or practice. Specifically, this Comment reasons that the section 706 limitations period does not apply to section 707 cases, and even if it did, a pattern or practice of discrimination is a single, continuing violation of Title VII such that the section 706 limitations period would only bar victims from recovery if the pattern or practice ended before the EEOC received the initiating charge. Part I begins by discussing pattern-or-practice cases in the context of Title VII's history and the statute's other enforcement provisions. It then compares the different purposes, litigation frameworks, and statutory provisions of section 706 and section 707. Part II examines section 706's limitations period and how courts have, and have not, applied it to continuing violations and section 707 cases. Part III draws on the case law, the language of Title VII, and the general purpose of section 707 to explain why section 706's limitations period does not restrict individual relief in pattern-or-practice cases.

I. PATTERN-OR-PRACTICE CASES IN CONTEXT

A. *The Evolution of Title VII of the Civil Rights Act of 1964 and the EEOC*

Congress passed Title VII of the Civil Rights Act of 1964 (“the 1964 Act”) to achieve two objectives—“eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”²⁸ The representatives who supported the 1964 Act recognized that “discrimination is harmful not only to [those] who directly bear it, but to the entire country.”²⁹ Title VII thus prohibits employers³⁰ from discriminating against employees and applicants based on individuals’ race, color, religion, sex, or national origin.³¹ The statute contemplates two forms of

28. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (holding that courts must adhere to these “twin statutory objectives” when awarding back pay to victims of unlawful employment discrimination), *superseded by statute*, 42 U.S.C. § 2000e-2(a).

29. 110 CONG. REC. 2731 (1964) (statement of Rep. Dawson); see also *id.* at 2802 (statement of Rep. Vanik) (remarking that “the section on equal employment opportunities[] should bring our country to higher levels of dignity and national achievement”).

30. Title VII's prohibition applies to direct employers, employment agencies, and labor organizations. 42 U.S.C. § 2000e-2(a)–(c) (2012). This Comment uses the term “employer” to refer to all three types of entities.

31. § 2000e-2(a). The statute reads,

unlawful discrimination: *disparate treatment*, which involves treating individuals differently based on these protected characteristics, and *disparate impact*, which involves using employment practices that have an unjustifiable disparate impact on these protected groups.³² Title VII also prohibits employers from retaliating against individuals who pursue relief under the statute or otherwise participate in a proceeding to enforce compliance with its terms.³³

Title VII's provisions for achieving its goals and protecting these rights have changed over time. The 1964 Act covered only private employers and placed enforcement of Title VII primarily in the hands of private litigants.³⁴ Although Title VII created the EEOC to administer the statute's mandates, the agency initially had no independent enforcement power.³⁵ Rather, Congress designed the EEOC to serve primarily as a "screening agent" for potential lawsuits.³⁶ Individual victims of discrimination who sought relief

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; or (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.

Id.

32. See Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 221-24 (1995) (comparing the two theories of employment discrimination—disparate treatment and disparate impact—and explaining that disparate treatment focuses on "the way employers make decisions" while disparate impact focuses on "the results of such decisions").

33. 42 U.S.C. § 2000e-3(a).

34. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (excluding "the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a state or political subdivision thereof" from the Act's definition of "employer"); *id.* §§ 706(e), 707(a) (providing that the only parties who could file a lawsuit under Title VII were individual victims of discrimination and the Attorney General, who could only sue in cases where an employer had allegedly engaged in a pattern or practice of discrimination).

35. Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 7-8 (1977) (noting that under the original Title VII, the EEOC could only recommend that the Attorney General pursue a pattern-or-practice suit, file amicus briefs in private suits, and bring actions against defendant employers who failed to comply with court orders previously issued in private suits).

36. *Id.* at 28. Given the EEOC's limited powers, the agency became known as a "toothless tiger." Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement*

under the statute had to file a “charge” with the agency, alleging an employer had violated Title VII.³⁷ If the EEOC had reason to believe that an employer had violated Title VII, but the agency had not received a charge from the victim(s) of that violation, an EEOC Commissioner could file a so-called “Commissioner’s charge.”³⁸ The EEOC would then investigate the charge and, if the allegations had merit, attempt to resolve the matter through conciliation with the accused employer.³⁹ But, if the EEOC failed to reach an acceptable settlement, an individual victim’s only recourse was to file a private employment discrimination lawsuit against the employer in court.⁴⁰

The 1964 Act’s reliance on victims to serve as “private attorneys general”⁴¹ quickly proved ineffective.⁴² Not only did individual victims of discrimination carry the burden of enforcing Title VII’s provisions through private lawsuits, but the statute’s administrative procedures often discouraged victims from doing so. For example, the conciliation process and other statutory requirements substantially delayed any potential relief.⁴³ The financial rewards—back pay minus interim earnings—were not worth pursuing for plaintiffs who worked while waiting for their day in court.⁴⁴ And, although the statute allowed courts to award “reasonable” attorney’s fees at the conclusion of successful lawsuits, the costs of preparing and litigating these cases deterred many lawyers from undertaking

After 35 Years: Outsourcing Charge Processing by Mandatory Mediation, 105 DICK. L. REV. 305, 323 & n.51 (2001) (noting that the EEOC’s first Chief of Conciliations, Alfred Blumrosen, first coined the term “toothless tiger” to describe how the agency’s lack of enforcement power hobbled its ability to effect change).

37. Civil Rights Act § 706(a), 78 Stat. at 259.

38. *Id.*; EEOC v. Shell Oil Co., 466 U.S. 54, 84 (1984) (O’Connor, J., concurring in part and dissenting in part).

39. Civil Rights Act § 706(a), 78 Stat. at 259; *see infra* Section I.B.2(a) (explaining section 706’s conciliation requirement).

40. Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 83, 86 (1964); *see* Civil Rights Act § 706(e), 78 Stat. at 260 (providing that if “the [EEOC] has been unable to obtain voluntary compliance with this title, the [agency] shall so notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge” by the aggrieved person).

41. *See* *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 848 (5th Cir. 1975) (explaining that Title VII depended on private lawsuits to “elicit enunciation of the great bulk of policies and principles which serve to flesh out the [statute’s] mandate”).

42. In 1967, the EEOC’s second chairman, Stephen N. Shulman, remarked, “We’re out to kill an elephant with a fly gun.” Hill, *supra* note 35, at 32 (citing James P. Gannon, *Uphill Bias Fight*, WALL ST. J., Apr. 12, 1967, at 1).

43. *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1252–53 (1971) [hereinafter *Developments in the Law*].

44. *Id.* at 1253.

them.⁴⁵ Consequently, fewer than ten percent of the meritorious claims that did not settle ever reached a court.⁴⁶

Recognizing that “the individual right to sue, standing alone, is a poor method of enforcing social legislation designed to alter institutional patterns of behavior,”⁴⁷ Congress also included in the original Title VII a mechanism for the government to challenge systemic employment discrimination. The statute required employers within its purview to keep records and make reports as the EEOC prescribed.⁴⁸ Based on these records, the EEOC could analyze companies’ employment statistics to identify employers engaged in a pattern or practice of discrimination and make recommendations to the Attorney General accordingly.⁴⁹ The Attorney General could then sue these employers in court.⁵⁰ The pattern-or-practice provision of Title VII thus aimed to enable the government to hold employers accountable for discriminatory conduct that the individual complaint system did not or could not reach.⁵¹ The Department of Justice, however, did not have the resources to litigate more than a handful of these pattern-or-practice cases in Title VII’s early years.⁵²

Shortly after Title VII came into effect, members of Congress began working to remedy its shortcomings.⁵³ These efforts

45. *Id.* at 1253, 1255.

46. *Id.* at 1252.

47. Hill, *supra* note 35, at 31.

48. Civil Rights Act of 1964, Pub. L. No. 88-352, § 709(c), 78 Stat. 241, 263 (codified as amended at 42 U.S.C. § 2000e-8(c)).

49. Hill, *supra* note 35, at 7–8.

50. Civil Rights Act, § 707(a). The majority whip and co-sponsor of the bill that became Title VII, Senator Humphrey, characterized patterns or practices of discrimination as the most reprehensible violations. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (citing 110 CONG. REC. 14,270 (1964)); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444–46 (1966). In response to concern that section 707 would impose excessive liability on employers, he explained that the provision targeted employers that persistently violated Title VII. 110 CONG. REC. 14,239.

51. *Developments in the Law*, *supra* note 43, at 1229.

52. David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1137 (1989) (explaining that the Attorney General and Department of Justice prioritized their other responsibilities under the Civil Rights Act, first desegregating public accommodations and schools and enforcing voting rights laws); *Developments in the Law*, *supra* note 43, at 1230–32 (same).

53. Hill, *supra* note 35, at 33; *see also* *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 325 (1980) (“Congress became convinced . . . that the ‘failure to grant the EEOC meaningful enforcement powers ha[d] proven to be a major flaw in the operation of Title VII.’” (quoting S. REP. NO. 92-415, at 4 (1971))); George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40

culminated in the Equal Employment Opportunity Act of 1972 (“the 1972 Act”), which amended Title VII in several significant respects.⁵⁴ First, the 1972 Act granted the EEOC authority to initiate lawsuits against private employers based on the charges it received.⁵⁵ Individual victims still had to follow the same administrative procedures laid out in the original statute, but when the EEOC’s conciliation efforts failed, the EEOC could sue.⁵⁶ Second, the 1972 Act expanded Title VII’s coverage to include public employers and granted the Attorney General powers to bring charge-based lawsuits against public employers alleged to have violated Title VII.⁵⁷ Third, Congress transferred the government’s pattern-or-practice authority from the Attorney General to the EEOC.⁵⁸ After a two-year transition period, the EEOC took over all pending pattern-or-practice cases and the right to initiate pattern-or-practice claims.⁵⁹

The provision of the 1972 Act that transferred these pattern-or-practice cases to the EEOC, however, also gave the President the option to redistribute the government’s pattern-or-practice functions.⁶⁰ In 1978, President Jimmy Carter exercised his authority

GEO. WASH. L. REV. 824, 846 (1972) (observing that the legislative history of the 1972 Act is “replete” with statements regarding the need to enhance enforcement of Title VII’s provisions).

54. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

55. *Id.* § 4, 86 Stat. at 104.

56. *See* *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977) (“Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC’s administrative functions in § 706 of the amended Act.”). *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259–61 (providing that if conciliation failed, only the individual claimant had power to sue the employer), *with* Equal Employment Opportunity Act § 4, 86 Stat. at 104 (providing that if conciliation failed, either the individual claimant or the EEOC had authority to sue).

57. Equal Employment Opportunity Act § 2(1)–(2), 4(a), 86 Stat. at 103–06.

58. *Id.* § 5, 86 Stat. at 107.

59. *Id.*

60. *Id.* (“[T]he functions of the Attorney General under this section [707] shall be transferred to the [EEOC] . . . unless the President submits, and neither House of Congress vetoes, a reorganization plan . . .”). The Supreme Court later held in *INS v. Chadha*, 462 U.S. 919 (1983), that these types of legislative vetoes were unconstitutional. *See id.* at 954, 957–58 (explaining that statutory amendments must comply with Article I’s bicameral requirement and Presentment Clauses). The reorganization plan that the President indeed issued under this provision, *see infra* text accompanying notes 61–64, is nonetheless valid because Congress subsequently “ratifie[d] and affirm[ed] as law” all reorganization plans implemented prior to the Court’s decision in *Chadha*. Pub. L. No. 98-532, § 1, 98 Stat. 2705 (1984).

under this provision by issuing Reorganization Plan No. 1.⁶¹ The Plan transferred the government's power to sue public employers for pattern-or-practice discrimination, back to the Attorney General and left the power to sue private employers for pattern-or-practice discrimination with the EEOC.⁶² Other sections of the Reorganization Plan consolidated federal enforcement of employment discrimination laws in the EEOC.⁶³ President Carter explained in his accompanying statement to Congress that the Plan "place[d] the Commission at the center of equal employment opportunity enforcement" so that the agency could "give coherence and direction to the government's efforts" to combat employment discrimination.⁶⁴

Two years later, the Supreme Court echoed President Carter's view that the EEOC is "the principal [f]ederal agency in fair employment enforcement."⁶⁵ In *General Telephone Co. of the Northwest, Inc. v. EEOC*,⁶⁶ the Court held that the EEOC did not need to obtain class certification under Federal Rule of Civil Procedure 23 when seeking relief for a group of individuals.⁶⁷ The Court reasoned that in granting the EEOC authority to sue employers in federal court, Congress intended the agency to represent not only persons aggrieved but also the United States and the broader public interest in ensuring fair employment practices.⁶⁸ The Court further noted that prior to 1972, the Attorney General brought pattern-or-practice

61. Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 719 (2012), *and in* 92 Stat. 3781 (1978).

62. *See id.* § 5. Specifically, the Reorganization Plan states, Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions under Section 707 of Title VII . . . and all necessary functions related thereto, including investigation, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said Title VII.

Id.

63. *Id.* §§ 1–4 (transferring to the EEOC enforcement of the equal pay provisions of the Fair Labor Standards Act, all functions related to the Age Discrimination in Employment Act, and enforcement of federal employment laws).

64. 5 U.S.C. app. at 721 (Message of the President).

65. *Id.* at 720.

66. 446 U.S. 318 (1980).

67. *Id.* at 333–34. Federal Rule of Civil Procedure 23 provides numerous requirements for litigating class-action lawsuits, including a court order certifying that the class meets the Rule's requirements and defining its members and claims. FED. R. CIV. P. 23.

68. *Gen. Tel. Co.*, 446 U.S. at 325–29.

suits in the name of the United States without obtaining certification under Rule 23, and “[i]t is clear that with the 1972 amendments Congress intended the EEOC to proceed in the same manner.”⁶⁹

In the following decades, Congress made additional amendments to Title VII’s procedures and definitions of unlawful employment practices, but the statute’s overall enforcement structure has remained consistent.⁷⁰ For example, the Civil Rights Act of 1991 (“the 1991 Act”) provided for jury trials and compensatory and punitive damages in certain Title VII cases.⁷¹ The 1991 Act also codified the disparate impact theory of discrimination,⁷² thereby overturning the Supreme Court’s controversial decision in *Wards Cove Packing Co. v. Atonio*.⁷³ More recently, Congress passed the Lilly Ledbetter Fair Pay Act of 2009 (“the Fair Pay Act”)⁷⁴ in response to the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*⁷⁵ The *Ledbetter* Court had held that issuing a paycheck effecting a prior discriminatory salary decision did not restart Title VII’s filing period.⁷⁶ The Fair Pay Act explicitly abrogated *Ledbetter*, declaring the decision “at odds with the robust application of the civil rights laws that Congress intended,” clarifying that each payment of wages based on a previous unlawful employment decision constitutes a new, actionable discriminatory act.⁷⁷

69. *Id.* at 329.

70. Compare 42 U.S.C. §§ 2000e–2000e-17 (1976) (showing Title VII as amended by the 1972 Act), with 42 U.S.C. §§ 2000e–2000e-17 (2012) (showing the current version of Title VII).

71. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74.

72. *Id.* §§ 2–3, 105 Stat. at 1071.

73. 490 U.S. 642 (1989). The *Wards Cove* Court had substantially constrained plaintiffs’ ability to successfully allege disparate impact discrimination. *Id.* at 659–60. Because members of Congress could not agree on the precise holding in *Wards Cove*, the 1991 Act simply provided that the law around disparate impact discrimination was as it had been the day before the Court issued its opinion. See Civil Rights Act §§ 2–3, 105 Stat. at 1071; Linda Lye, Comment, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 334 (1998) (explaining that the 1991 Act was a result of two years of “contentious” debates about how Congress should respond to the *Wards Cove* decision).

74. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

75. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

76. *Id.* at 628, 632.

77. Lilly Ledbetter Fair Pay Act §§ 2–3, 123 Stat. at 5–6.

B. Comparing Section 706 and Section 707 of Title VII

Title VII contains two primary vehicles for enforcement: section 706 and section 707.⁷⁸ These sections embody the two general types of lawsuits created in the original statute.⁷⁹ Section 706 provides for charge-based lawsuits, which arise from charges filed with the EEOC and focus on specific instances of discrimination.⁸⁰ These cases seek to vindicate the rights of individuals harmed by employers' unlawful conduct, either on an individual or class-wide basis.⁸¹ Accordingly, both individual victims and the government—the EEOC or the Attorney General—acting on behalf of these victims, may bring a lawsuit under section 706.⁸²

Section 707 provides for pattern-or-practice lawsuits, which arise from evidence that an employer regularly discriminates against employees or job applicants.⁸³ These pattern-or-practice cases seek to redress discriminatory policies and vindicate the public's interest in eradicating artificial barriers to equal employment opportunities.⁸⁴ In contrast to section 706 suits, only the EEOC or the Attorney General may litigate section 707 suits.⁸⁵

78. 42 U.S.C. §§ 2000e-5-6 (2012).

79. *See supra* text accompanying notes 34-40, 50-51 (explaining that the original Title VII statute authorized individual victims of employment discrimination to sue their employers for specific discriminatory acts, and it authorized the Attorney General to sue employers engaged in a pattern or practice of discrimination).

80. 42 U.S.C. § 2000e-5; *see also* *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977) (noting that section 706 cases “begin[] when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice”).

81. *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1084 (C.D. Ill. 1998).

82. 42 U.S.C. § 2000e-5(f)(1); *see also* *EEOC v. Cont'l Oil Co.*, 548 F.2d 884, 887-89 (10th Cir. 1977) (holding that the EEOC may not sue an employer under section 706 after the individual complainant has filed a private suit against the same employer based on the same underlying charge).

83. 42 U.S.C. § 2000e-6; *see also* *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (explaining that to establish a pattern or practice of discrimination under section 707, the government must show that the alleged discrimination was the employer's “standard operating procedure—the regular rather than the unusual practice”).

84. *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 326-29 (1980); *Mitsubishi*, 990 F. Supp. at 1076-77.

85. 42 U.S.C. § 2000e-6(a); *see also* *EEOC v. Nev. Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986) (holding that district courts lack jurisdiction to grant a private party's Rule 24(b) petition to intervene in a section 707 suit); *EEOC v. Page Eng'g Co.*, No. 76-1439, 1978 WL 114, at *2 (N.D. Ill. Aug. 14, 1978) (“[P]rivate parties do not have any role to play when the EEOC brings a Section 707 ‘practice and pattern’ suit.”).

1. *The purposes of section 707 in relation to section 706*

Congress designed section 707 to address discriminatory conduct that charge-based lawsuits do not reach.⁸⁶ A victim of employment discrimination may choose not to file a timely charge with the EEOC or a state or local fair employment agency for numerous reasons. Workers may not know their rights or how to invoke them.⁸⁷ They may fear retaliation from the employer.⁸⁸ They may view the prospect of success at the end of the EEOC's administrative process as too slim and too distant to be worth pursuing.⁸⁹ Or, they may find the enforcement procedures too complex and intimidating.⁹⁰

Individual charges, moreover, cannot reliably identify all discrimination. Because workers are less likely to pursue employment in companies or industries that they perceive would be hostile toward them, charges tend to report on companies and sectors where minorities and women have already gained entry—not those from which they have been systematically shut out.⁹¹ As a result, a complaint-driven system of enforcement alone will not reach some of the most entrenched and invidious discrimination.

Not only do pattern-or-practice cases help to fill these gaps, but they have the potential to reach much larger numbers of workers than charge-based cases. Section 707 indeed authorizes the government to remedy *entire systems* that discriminate.⁹² Gathering the evidence to prove that an employer has engaged in a pattern or practice of discrimination is thus extremely resource-intensive. Pattern-or-practice cases generally involve extensive data collection

86. See *supra* text accompanying notes 47–51, 67–69 (explaining that Congress created section 707 to supplement the private lawsuits authorized by section 706); see also *EEOC v. Akal Sec., Inc.*, No. 08-1274-JTM, 2010 WL 3791705, at *3–4 (D. Kan. Aug. 31, 2010) (permitting discovery of information regarding an employer's operations in locations beyond those identified in related charges because the EEOC brought the lawsuit under section 707, and “a Section 707 pattern and practice action is not confined to individual grievances”).

87. Munroe, *supra* note 32, at 253.

88. *Developments in the Law*, *supra* note 43, at 1228.

89. Munroe, *supra* note 32, at 253–54; see also *Developments in the Law*, *supra* note 43, at 1228–29 (suggesting that black workers may doubt that their rights will be enforced against a white employer in a predominantly white legal system).

90. Munroe, *supra* note 32, at 253.

91. *Id.* at 255 (contending that “the figures for discriminatory claims and charges may [in fact] invert reality”); see also Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219, 236–37 (1994) (explaining that charge-based litigation protects incumbent employees but does little to address discrimination in the hiring process).

92. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 356–57 (1977).

and analysis and, therefore, require greater technical expertise.⁹³ Given their magnitude, pattern-or-practice claims also demand more time and intra-agency coordination than individual charge-based claims.⁹⁴ Litigating one pattern-or-practice case, in fact, may preclude the government from litigating multiple charge-based lawsuits.⁹⁵

2. *The frameworks for litigating section 706 and section 707 claims*

The Supreme Court's interpretation of Title VII has helped clarify the differences between section 706 and section 707 actions. In *McDonnell Douglas Corp. v. Green*,⁹⁶ the Court explained the framework for litigating a section 706 case.⁹⁷ The case arose when an African-American man sued his former employer, alleging that the company refused to re-hire him because of his race.⁹⁸ The Court's decision laid out a three-step, burden-shifting framework for individuals seeking relief under section 706.⁹⁹ First, the plaintiff must establish a prima facie case of discrimination by showing (1) the victim belonged to a protected class, (2) the victim was subjected to an adverse employment action, (3) the victim was qualified for the job, and (4)

93. Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1145 (2015).

94. *Id.*

95. *Id.* The statutory requirement that the EEOC receive and process all allegations of employment discrimination before either the government or a private party can take further action has constrained the agency's ability to bring pattern-or-practice lawsuits. *Id.* From its inception, the EEOC has experienced a backlog of charges and insufficient resources to process them. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672–90 (2005) (chronicling the various challenges that the EEOC has faced since opening its doors in 1965). More than 76,000 charges are currently pending resolution, and the EEOC is facing pressure from Congress to reduce the backlog. Vin Gurrieri, *Provisions to Cut EEOC Bias Case Backlog Advance in Senate*, LAW360 (Apr. 25, 2016, 3:47 PM), <http://www.law360.com/articles/788478/provisions-to-cut-eoc-bias-case-backlog-advance-in-senate>. Given the resource-intensive nature of pattern-or-practice lawsuits, EEOC officials have often declined to pursue them and instead focused on resolving individual charges. EEOC, SYSTEMIC TASK FORCE REPORT 18–19 (2006), https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf. In the last decade, however, the EEOC has prioritized pattern-or-practice cases in a renewed effort to attack systemic employment discrimination. Press Release, EEOC, EEOC Makes Fight Against Systemic Discrimination a Top Priority (Apr. 4, 2006), <https://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm>.

96. 411 U.S. 792 (1973).

97. *See id.* at 798 (stating that the Court granted certiorari “to clarify the standards governing the disposition of an action challenging employment discrimination”).

98. *Id.* at 794–97.

99. *Id.* at 802–06.

the employer treated similarly qualified employees or applicants outside the protected class more favorably.¹⁰⁰ The burden of production then shifts to the employer “to articulate some legitimate, nondiscriminatory reason” for the adverse employment action.¹⁰¹ Finally, assuming the employer produces such a reason, the plaintiff must demonstrate that the proffered justification is merely a pretext for discrimination and that discrimination was the employer’s actual motive for the employment action.¹⁰² Courts may award successful plaintiffs compensatory damages, punitive damages, and equitable relief, such as back pay and reinstatement.¹⁰³

The Court subsequently articulated a different burden-shifting framework for litigating section 707 pattern-or-practice actions. In *International Brotherhood of Teamsters v. United States*,¹⁰⁴ the Court explained that to prevail in a section 707 suit, the government had to prove “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts,” such as the refusal to hire at issue in *McDonnell Douglas*.¹⁰⁵ Rather, the government had to show “by a preponderance of the evidence” that unlawful discrimination was “the company’s standard operating procedure—the regular rather than the unusual practice.”¹⁰⁶ In *Teamsters*, the government sued a

100. *Id.* at 802 (describing a prima facie case of failure to hire based on race); 2 BLOOMBERG BNA, EMPLOYMENT DISCRIMINATION LAW § II.A.2 (5th ed. 2015) (broadening the Court’s language in *McDonnell Douglas* to articulate a prima facie case of discrimination generally).

101. *McDonnell Douglas*, 441 U.S. at 802.

102. *Id.* at 804–05; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 153–54 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993).

103. 42 U.S.C. § 1981a(a)(1) (2012) (providing for compensatory and punitive damages); *id.* § 2000e-5(g)(1) (providing for equitable remedies). Prior to 1991, Title VII provided only for equitable relief. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287 (2002) (noting that the 1991 Act expanded the remedies available under Title VII). Finding that equitable remedies alone did not adequately deter intentional discrimination in the workplace, Congress amended Title VII to allow plaintiffs in section 706 cases to seek compensatory and punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2, 102, 105 Stat. 1071, 1071–72 (codified as amended at 42 U.S.C. § 1981a(a)(1)).

104. 431 U.S. 324 (1977).

105. *Id.* at 336.

106. *Id.* Some private class-action lawsuits have used the *Teamsters* framework to litigate claims that an employer “regularly and purposefully” discriminated against a class of employees protected by Title VII. Angela D. Morrison, *Duke-ing out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87, 93 (2013). Some authors refer to these cases as “pattern or practice” suits. See, e.g., *id.* at 89 n.3 (using “the term ‘private pattern or practice’ to refer to pattern or practice claims brought by private individuals rather than a government agency such as the EEOC or U.S.

trucking company and affiliated unions under section 707 for systematically excluding minorities from the company's higher-paying and more desirable jobs.¹⁰⁷ In determining whether the government had presented sufficient evidence to prevail, the Court outlined the requisite framework for bringing section 707 claims.¹⁰⁸

Pattern-or-practice cases, the Court explained, involve two phases of litigation—a “liability” phase and a “remedial” phase.¹⁰⁹ In the liability phase, the government must first present a prima facie case that the employer engaged in a pattern or practice of discrimination.¹¹⁰ The words “pattern or practice” here reflect their usual meaning: “a pattern or practice would be present only where the denial of rights . . . is repeated, routine, or of a generalized nature.”¹¹¹ The government can generally establish such repeated discrimination with a combination of statistics and incident-specific evidence.¹¹² The burden then shifts to the employer to show that the

Department of Justice (DOJ)”; Vincent Cheng, Note, *National Railroad Passenger Corporation v. Morgan: A Problematic Formulation of the Continuing Violation Theory*, 91 CALIF. L. REV. 1417, 1432–33 (2003) (describing “pattern-or-practice class action suits” brought by named plaintiffs). Unlike the pattern-or-practice cases discussed in this Comment, though, these “pattern-or-practice” class actions are brought by private parties under section 706 and therefore involve different administrative procedures and requirements. See *infra* Part I.B.2 (explaining the different requirements for section 706 and section 707 cases).

107. *Teamsters*, 431 U.S. at 329–30; see also *United States v. T.I.M.E.-DC, Inc.*, Nos. 5-868, 5-897, 1972 U.S. Dist. LEXIS 11509, at *2–3 (N.D. Tex. Oct. 19, 1972, Dec. 6, 1973) (explaining that the company and unions routinely denied African Americans and Spanish-surnamed Americans long-distance driving jobs, which were the most desirable because they received higher pay and involved less physical loading and unloading duties), *vacated sub nom. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The Attorney General initiated this suit prior to the enactment of the Equal Employment Opportunity Act of 1972, which transferred the government's pattern-or-practice authority from the Attorney General to the EEOC. *Teamsters*, 431 U.S. at 328 n.1. After the 1972 Act took effect, a lower court entered an order substituting the EEOC for the United States as plaintiff but retaining the United States as a party “for purposes of jurisdiction, appealability, and related matters.” *Id.*

108. *Teamsters*, 431 U.S. at 356–62.

109. *Id.* at 360–61.

110. *Id.* at 360.

111. *Id.* at 336 n.16 (quoting 110 CONG. REC. 14,270 (1964) (statement of Sen. Humphrey)).

112. *Id.* at 339 (explaining that the Court's “cases make it unmistakably clear that ‘[s]tatistical analyses have served and will continue to serve an important role’ in cases in which the existence of discrimination is a disputed issue,” and that victims' testimony about their experiences bring “the cold numbers convincingly to life” (alteration in original) (citation omitted)). Subsequent decisions have required a “gross statistical disparit[y],” or statistically significant difference between an

government's evidence is "either inaccurate or insignificant."¹¹³ If the employer fails to rebut the government's evidence, the court may find that the employer violated Title VII.¹¹⁴ At this point, the government may enjoin the employer from continuing to discriminate, order the employer to file periodic reports documenting employment decisions going forward, and take any other action "necessary to ensure the full enjoyment of the rights protected by Title VII."¹¹⁵

Should the government seek relief for individual victims of the discriminatory pattern or practice, the case proceeds to the remedial phase.¹¹⁶ In this second phase, the unrebutted (or unsuccessfully rebutted) prima facie case of discrimination "supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."¹¹⁷ The government need only show that an individual in the relevant protected class was subject to an adverse employment action to establish that he or she is entitled to relief.¹¹⁸ To avoid liability, the employer must then demonstrate that it took the adverse employment action against that person for lawful reasons.¹¹⁹ When the employer fails to provide evidence of a lawful justification, the court may award the individual any of the equitable remedies available under section 706.¹²⁰

Several lower courts have held that the government may use the *Teamsters* framework to litigate pattern-or-practice claims under section 706.¹²¹ These courts have relied in part on the Supreme Court's

employer's decisions regarding the dominant class of employees and its decisions regarding the protected class of employees. See Allan G. King, "Gross Statistical Disparities" as Evidence of a Pattern and Practice of Discrimination: Statistical Versus Legal Significance, 22 LAB. LAW. 271, 273-78 (2007).

113. *Teamsters*, 431 U.S. at 360; see also *id.* at 342 n.24 ("[A]ffirmations of good faith . . . are insufficient to dispel a prima facie case of systematic exclusion.").

114. *Id.* at 361.

115. *Id.*

116. *Id.*

117. *Id.* at 362.

118. *Id.*

119. *Id.*

120. *EEOC v. FAPS, Inc.*, No. 10-3095, 2014 WL 4798802, at *24 (D.N.J. Sept. 26, 2014). Although the 1991 Act added compensatory and punitive damages to the remedies available in section 706 cases, *supra* note 103, it did not expand the relief available in section 707 cases. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981a(a)(1) (2012)).

121. *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 800 (5th Cir. 2016); *Serrano v. Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012); *EEOC v. Mavis Discount*

recognition in *General Telephone* that Congress gave the EEOC broad enforcement powers to remedy employment discrimination and to advance the public interest in equal employment opportunities.¹²² Indeed, by filing a pattern-or-practice case under section 706, the government can seek compensatory and punitive damages against employers that repeatedly discriminate against workers.¹²³

3. *The contents of section 706 and section 707*

The starkest differences between section 706 and section 707 are in the statutory provisions themselves. Section 706 contains detailed instructions for when and how individual claimants must file a charge, when and how the EEOC must notify an employer of a charge, when and how the EEOC must act on the charge, and so on.¹²⁴ Section 707, on the other hand, does not.¹²⁵

a. Section 706's statutory requirements

Section 706 provides “an integrated, multistep enforcement procedure” for resolving charges of discrimination.¹²⁶ When an employer unlawfully discriminates against an employee or job applicant, either the aggrieved worker, someone acting on behalf of the aggrieved worker, or an EEOC Commissioner must file a charge with the EEOC or a state or local equivalent within 180 or 300 days.¹²⁷ Within ten days of receiving the charge, the EEOC must serve the employer with notice of the charge’s allegations.¹²⁸ The EEOC then must investigate the allegations to determine whether there is reasonable cause to believe that the employer violated Title VII.¹²⁹

Tire, Inc., 129 F. Supp. 3d 90, 109 (S.D.N.Y. 2015); EEOC v. PMT Corp., 124 F. Supp. 3d 904, 909 (D. Minn. 2015); EEOC v. Pitre, Inc., 908 F. Supp. 2d 1165, 1174 (D.N.M. 2012).

122. *Bass Pro*, 826 F.3d at 799–800; *Serrano*, 699 F.3d at 895.

123. *See supra* note 103 (noting that Congress provided for compensatory and punitive damages only in section 706 cases).

124. 42 U.S.C. § 2000e-5.

125. *Id.* § 2000e-6.

126. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977).

127. 42 U.S.C. § 2000e-5(b), (e)(1); *see also supra* notes 153–58 and accompanying text (explaining section 706’s charge-filing requirements in greater detail).

128. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14 (2016).

129. 42 U.S.C. § 2000e-5(b); *see also* 29 C.F.R. §§ 1601.15–1601.17 (detailing the EEOC’s powers in investigating charges). Courts have construed Title VII generously to permit the EEOC access to a broad range of employer records. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984). In its investigation, the EEOC may request “virtually any material that might cast light on the allegations against the employer.” *Id.* The statute provides that the EEOC shall make its reasonable cause determination “as

If the EEOC finds reasonable cause, the agency must send the employer a letter announcing its determination and inviting the employer to participate in conciliation.¹³⁰ The purpose of section 706's conciliation requirement is to give employers the opportunity to voluntarily comply with Title VII and to resolve employment discrimination disputes out of court.¹³¹ At a minimum, the EEOC must engage with the employer in some form of discussion designed to afford such an opportunity.¹³² Yet, the EEOC has wide latitude in determining the extent of the information it shares, the content of the offers it extends, the pace and duration of its discussions with employers, and the flexibility of its negotiating positions.¹³³

If the parties cannot reach a conciliation agreement acceptable to the EEOC, either the EEOC or the Attorney General may file a civil complaint against the employer in federal district court.¹³⁴ If the relevant agency does not file a lawsuit, it must provide the victim(s) of the alleged discrimination with a right-to-sue letter.¹³⁵ A victim has ninety days after receiving a right-to-sue letter to bring a private Title VII lawsuit against the employer.¹³⁶

b. How section 706's requirements relate to section 707 cases

Section 707—unlike section 706—contains no administrative requirements.¹³⁷ Under the original Title VII, the only prerequisite to a section 707 lawsuit was that the Attorney General have “reasonable cause to believe” that an employer was “engaged in a pattern or practice” of discrimination.¹³⁸ The detailed procedures outlined in section 706 simply did not apply to section 707 cases.¹³⁹

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.” 42 U.S.C. § 2000e-5(b).

130. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.21(a)–(b); *see also* Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1650, 1653 (2015) (observing that it is the EEOC's standard practice to issue these letters).

131. *Mach Mining*, 135 S. Ct. at 1651, 1655.

132. *Id.* at 1655–56.

133. *Id.* at 1654.

134. 42 U.S.C. § 2000e-5(f)(1). The EEOC may sue only private employers, and the Attorney General may sue only public employers. *Id.*

135. *Id.* *See generally* 29 C.F.R. § 1601.28 (2016) (prescribing when and how the EEOC must issue right-to-sue letters).

136. 42 U.S.C. § 2000e-5(f)(1).

137. *Id.* § 2000e-6.

138. Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 241, 261.

139. *See* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 327 (1980) (noting that before 1972, the Attorney General's authority to bring pattern-or-practice cases “did not depend upon the filing of a charge with the EEOC”); *United States v. Masonry*

In 1972, Congress transferred the Attorney General's pattern-or-practice authority to the EEOC by adding subsection 707(e): "[T]he [EEOC] shall have authority to investigate and act on a charge of a pattern or practice of discrimination All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act."¹⁴⁰ Six years later, when President Carter returned some of the government's pattern-or-practice authority to the Attorney General, he provided that "all necessary functions" related to the Attorney General's new pattern-or-practice authority must be exercised "in accordance with procedures consistent with said Title VII."¹⁴¹ These "functions" included "investigation, findings, notice and an opportunity to resolve the matter without contested litigation."¹⁴² As the U.S. Court of Appeals for the Ninth Circuit observed in *United States v. Fresno Unified School District*,¹⁴³ the Reorganization Plan "reiterates many of the § 706 procedural prerequisites to litigation and follows from the requirement of § 707(e) that the EEOC was to conduct pattern or practice actions 'in accordance with the procedures set forth' in § 706."¹⁴⁴

Courts have generally found that neither section 707(e) nor President Carter's Reorganization Plan added any procedural requirements to the Attorney General's section 707 lawsuits.¹⁴⁵ These courts have reasoned that because the Attorney General was not

Contractors Ass'n of Memphis, 497 F.2d 871, 875–76 (6th Cir. 1974) (finding that because the Attorney General filed the section 707 lawsuit prior to 1972, the United States did not need "to comply with the provisions of [section 706] as to notice, informal methods of correction of the discriminatory acts, and the time limits for filing a complaint").

140. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107. Because the 1972 Act transferred the entirety of the government's pattern-or-practice authority to the EEOC, this provision did not mention the Attorney General. *Id.*

141. Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 719, 720 (2012), *and in* 92 Stat. 3781 (1978).

142. *Id.*

143. 592 F.2d 1088 (9th Cir. 1979).

144. *Id.* at 1095.

145. *See, e.g.,* Lanning v. Se. Pa. Transp. Auth., 176 F.R.D. 132, 140 (E.D. Pa. 1997) ("It is well-established that the administrative requirements of Section 706 . . . do not apply to cases brought by the Attorney General under Section 707."); *United States v. City of Yonkers*, 592 F. Supp. 570, 584 (S.D.N.Y. 1984) ("Section 707 itself prescribes the only prerequisite to the Attorney General's authority to bring a pattern-or-practice suit—reasonable cause."); *see also Fresno Unified Sch. Dist.*, 592 F.2d at 1095–96 ("The apparent intent of the Reorganization Plan is to incorporate all § 706 requirements applicable to pattern or practice suits. Not all procedures listed in § 706, however, are necessarily relevant in pattern or practice litigation.").

subject to section 706's procedural requirements before 1972, the Attorney General should not be subject to such requirements after 1972 absent a clear indication to the contrary.¹⁴⁶ Moreover, these courts have declined to read the Reorganization Plan's instruction that the Attorney General pursue pattern-or-practice cases "in accordance with procedures consistent with said Title VII" as an indication that the President intended to impose additional requirements.¹⁴⁷

The effect of section 707(e) and the Reorganization Plan on the EEOC's section 707 lawsuits, however, has divided the lower federal courts. Although courts agree that section 707(e) does require the EEOC to follow section 706's general administrative procedures when pursuing section 707 cases,¹⁴⁸ they have reached different conclusions regarding which section 706 provisions apply to the EEOC's section 707 cases.¹⁴⁹

One contested provision is section 706's charge requirement. Some courts have read section 707(e) to mean that the EEOC can only proceed under section 707 upon receiving a charge because the procedures in section 706 require one.¹⁵⁰ Other courts, however, have focused on the absence of an explicit charge requirement in

146. See, e.g., *United States v. R.I. Dep't of Corr.*, 81 F. Supp. 3d 182, 189 (D.R.I. 2015) (holding that section 706's administrative requirements do not apply to section 707 cases filed by the Attorney General because "[n]owhere in the history surrounding the 1972 amendments [or] Reorganization Plan No. 1 . . . does Congress or the President make plain their intention to impose new requirements on the Attorney General in bringing an action under Section 707(a)").

147. See, e.g., *City of Yonkers*, 592 F. Supp. at 582 (rejecting an employer's argument that the Reorganization Plan subjected the Attorney General to the same requirements that section 707 imposes on the EEOC); *United States v. New Jersey*, 473 F. Supp. 1199, 1201-02 (D.N.J. 1979) (same).

148. See, e.g., *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1201 (9th Cir. 2016) (noting that the EEOC's conciliation requirements are the same for claims arising under sections 706 and 707); *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 343 (7th Cir. 2015) (stating that "Congress intended for the [EEOC] to be bound by the procedural requirements set forth in Section 706" when litigating pattern-or-practice suits).

149. Compare *Fresno Unified Sch. Dist.*, 592 F.2d at 1095-96 (noting that not all section 706 procedures are relevant to section 707 cases), and *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 844 (5th Cir. 1975) (finding that "the duplication" of section 706's procedures in section 707 cases does not "extend beyond the administrative level"), with *CVS Pharmacy*, 809 F.3d at 343 (suggesting that all section 706 procedures apply to section 707 cases).

150. See, e.g., *CVS Pharmacy*, 809 F.3d at 343 ("The 1972 amendments gave the EEOC the power to file 'pattern or practice' suits on its own, but Congress intended for the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge."); *EEOC v. Glob. Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093 (D. Haw. 2012) ("[T]he EEOC's ability to act under § 707 is necessarily dependent upon the existence of a properly filed charge of discrimination . . .").

section 707 and read section 707(e) to mean that the EEOC must comply with section 706's administrative requirements *only if* the EEOC receives a charge.¹⁵¹

II. TITLE VII'S LIMITATIONS PERIOD

Arguably, the most litigated questions regarding the relationship between section 706's statutory requirements and the EEOC's section 707 pattern-or-practice cases is whether section 706's filing period applies and, if so, which victims of a pattern or practice of discrimination may obtain relief. Courts disagree over whether Congress intended for the limitations period that determines the timeliness of the underlying charge in section 706 cases to restrict relief in section 707 cases.¹⁵² Section 706(e) of Title VII provides,

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice[,] . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred¹⁵³

In most cases litigated under section 706, this limitations period is relatively straightforward. The clock starts running the day that the employer discriminates against an employee or job applicant.¹⁵⁴ The employee or job applicant then has either 180 or 300 days to file a charge of discrimination with the EEOC or a state or local equivalent.¹⁵⁵ In states that have their own equal employment laws and

151. EEOC v. Doherty Enters., 126 F. Supp. 3d 1305, 1310 (S.D. Fla. 2015); *accord* EEOC v. Bass Pro Outdoor World, LLC, 35 F. Supp. 3d 836, 852 n.9 (S.D. Tex. 2014) ("The Court does not agree with [defendant employer] that the text of the statute requires that any suit filed pursuant to [section] 707 be preceded by a charge. . . . [Section] 707(e) dictates what must happen when a pattern-or-practice charge is filed, but does not mandate that such a charge be filed in the first instance."), *aff'd*, 826 F.3d 791 (5th Cir. 2016).

152. See EEOC v. FAPS, Inc., No. 10-3095, 2014 WL 4798802, at *23-24 (D.N.J. Sept. 26, 2014) (listing twenty district court cases filed by the EEOC under section 707 that have addressed this question—thirteen applied the section 706 limitations period and seven did not).

153. 42 U.S.C. § 2000e-5(e)(1) (2012).

154. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

155. 29 C.F.R. § 1601.13(a)(1)-(2), (4)(ii)(A) (2016). The EEOC refers to these state and local agencies as Fair Employment Practice Agencies (FEPAs). *Fair Employment Practice Agencies (FEPAs) and Dual Filing*, EEOC, <http://www.eeoc.gov/em>

an agency to enforce them, the limitations period is 300 days.¹⁵⁶ In all other states, the limitations period is 180 days.¹⁵⁷ Only charges filed within the relevant limitations period give rise to a cause of action.¹⁵⁸

The effect of the limitations period has been unclear in two circumstances: (1) section 706 cases in which a person suffered repeated discriminatory acts over a period of time that began more than 180 or 300 days before he or she filed a charge and (2) section 707 cases. In the first category of cases, known as continuing violations, courts must determine whether the limitations period precludes the plaintiff from recovering for discrimination that occurred more than 180 or 300 days before she filed her charge.¹⁵⁹ In pattern-or-practice cases, which are based on evidence that many individuals suffered discrimination over an extended period of time, courts must determine whether the limitations period precludes the

ployees/fepa.cfm (last visited Oct. 19, 2016) [hereinafter *FEPAs and Dual Filing*]; see also 29 C.F.R. § 1601.70(a) (explaining that for an agency to qualify as a FEPA, the state or local subdivision must have a law prohibiting employment discrimination and the authority to pursue relief for violations of those laws). Under Title VII, before the EEOC steps in, it must allow states with their own equal employment opportunity programs an opportunity to resolve charges of discrimination. 42 U.S.C. § 2000e-5(c) (prohibiting the filing of charges with the EEOC sooner than sixty days after the commencement of state or local proceedings, unless those proceedings end earlier); see also Berg, *supra* note 40, at 67–68 (explaining that Congress had to find a way to supplement existing state enforcement efforts without infringing on state sovereignty or creating opportunities for forum shopping because twenty-five states already had equal employment opportunity laws when Title VII was proposed). Today, many FEPAs have entered into work-sharing agreements with the EEOC whereby the state agencies waive Title VII's requirement that the EEOC wait sixty days before acting on a charge filed in their jurisdiction. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115–16 (1988) (upholding one of these agreements on the ground that a state agency's waiver "terminates" the agency's proceedings per section 706(c), 42 U.S.C. § 2000e-5(c)).

156. 29 C.F.R. § 1601.13(a)(4).

157. § 1601.13(a)(1)–(2). The only states that do not have a FEPA are Alabama, Arkansas, and Mississippi. See § 1601.74(a) (listing agencies in the forty-seven other states, the District of Columbia, Puerto Rico, and the Virgin Islands). Some states with an equal employment opportunity statute and FEPA, however, may provide less protection than Title VII. For example, a state's laws may prohibit racial discrimination but not sex discrimination, or they may apply to for-profit employers but not non-profit employers. § 1601.13(2). In these states, charges relating to discriminatory conduct not covered by state law must be filed within 180 days of the alleged Title VII violation. *Id.*

158. *Cf. Commercial Office Prods.*, 486 U.S. at 124–25 (holding that the EEOC could proceed on a charge filed within the 300-day limitations period, even though the filing date exceeded the limitations period provided under applicable state law).

159. Cheng, *supra* note 106, at 1419–20.

government from obtaining relief for individuals harmed by the pattern or practice more than 180 or 300 days before the initiating charge.¹⁶⁰ In other words, courts must decide whether an employer must provide relief for the entire pattern or practice of discrimination, or for only the portion of the pattern or practice that fell within the limitations period.

Both of these circumstances lack a single, easily identifiable act that would trigger the limitations period. Most continuing violations involve a series of discriminatory acts that individually would not violate Title VII but that collectively give rise to a cause of action.¹⁶¹ Similarly, a pattern or practice of discrimination involves repeated discrimination against numerous people over an extended period of time.¹⁶² To apply section 706's limitations period in these cases, a court must take the date of the charge—whether filed by an individual claimant or by an EEOC Commissioner—and count back 180 or 300 days to determine which discriminatory acts or which victims of discrimination are eligible for relief.¹⁶³ Thus, the limitations period functions less as a statute of limitations and more as a “reach-back” period.¹⁶⁴

A. *Application of the Limitations Period to Continuing Violations in Section 706 Cases*

The continuing violation theory is a procedural theory that courts have adopted to modify or toll the limitations period in cases in

160. See, e.g., *EEOC v. FAPS, Inc.*, No. 10-3095, 2014 WL 4798802, at *22 (D.N.J. Sept. 26, 2014) (stating that the question presented in this section 707 case was whether “the EEOC may seek relief for individuals who were denied employment more than 300 days before the filing of the Commissioner’s Charge”).

161. See, e.g., *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 117 (2002) (discussing hostile-work-environment claims), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

162. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (explaining that to establish a pattern or practice of discrimination under section 707, the government must show more than isolated or sporadic discriminatory conduct).

163. The U.S. District Court for the Northern District of Iowa noted,

[T]here is a dual aspect to the Title VII limitations periods; they have a retrospective, as well as a prospective, aspect. In other words, not only must charges be filed within 180 (or 300) days after a discriminatory event, but also, as a general rule, the aggrieved party can only achieve redress for discriminatory acts which occurred 180 (or 300) days prior to the filing of charges.

EEOC v. CRST Van Expedited, Inc., 615 F. Supp. 2d 867, 871 (N.D. Iowa 2009) (quoting 4 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 72.02 (2d ed. July 2008)).

164. *Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 400 (1st Cir. 1990).

which the plaintiff experienced persistent discrimination over an extended period of time.¹⁶⁵ By applying this theory, courts can award relief for discriminatory acts that occurred both within and prior to the reach-back period. In the first several decades after the enactment of Title VII, the federal courts of appeals developed different standards for identifying which cases of discrimination qualified as continuing violations.¹⁶⁶ For example, the U.S. Court of Appeals for the Fifth Circuit developed a three-factor test that looked at whether the alleged discriminatory acts involved the same type of Title VII violation, when and how often the acts occurred, and whether the discrimination had reached a “degree of permanence” that “should trigger an employee’s awareness of and duty to assert his or her rights.”¹⁶⁷ The Ninth Circuit, however, adopted a “sufficient-relation” test that looked at whether the alleged discriminatory acts were sufficiently related to one another to constitute a single violation.¹⁶⁸ Other circuits adopted versions of these tests.¹⁶⁹

In 2002, the Supreme Court clarified some of the ambiguity regarding the continuing violation doctrine in *National Railroad Passenger Corp. v. Morgan*.¹⁷⁰ The case involved an African-American man, Morgan, who sued his former employer under section 706, alleging that the company had discriminated against him by committing a series of discriminatory acts and by maintaining a racially hostile work environment.¹⁷¹ Morgan had filed a charge of discrimination with his state’s equal employment agency, the California Department of Fair Employment and Housing, on February 27, 1995.¹⁷² The EEOC subsequently issued him a right-to-sue letter, and he filed a timely complaint in district court under section 706.¹⁷³ Because Morgan filed the initial charge with a state agency, the

165. Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1172 (1988).

166. Cheng, *supra* note 106, at 1422–23.

167. *Id.* at 1422 (quoting *Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983)).

168. *Id.* at 1422–23 (citing *Anderson v. Reno*, 190 F.3d 930, 936–37 (9th Cir. 1999), *abrogated by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009)).

169. *Id.* at 1423.

170. 536 U.S. 101 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

171. *Id.* at 104–05.

172. *Id.* at 105.

173. *Id.* at 106.

applicable limitations period was 300 days.¹⁷⁴ Many of the discriminatory acts alleged in the complaint, however, occurred more than 300 days before Morgan filed his charge.¹⁷⁵ The issue before the Court was “whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside this statutory time period.”¹⁷⁶

Writing for the majority, former chairman of the EEOC Justice Clarence Thomas¹⁷⁷ looked to the language of Title VII: “A charge under [section 706] *shall be filed* within [three hundred] days *after the alleged unlawful employment practice occurred.*”¹⁷⁸ Morgan argued that the term “unlawful employment practice” included an ongoing violation that endured over a period of time and that the entirety of such a practice was actionable as long as one or more of the acts that comprised it “occurred” during the 300-day limitations period.¹⁷⁹ With respect to the discrete discriminatory acts alleged in the complaint, the Court rejected this argument.¹⁸⁰ The Court held that the term “practice” did not “convert[] related discrete acts into a single unlawful practice for the purposes of timely filing.”¹⁸¹ Rather, Justice Thomas explained, “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act” such that a time-barred act is not actionable, even if it “relate[s] to acts alleged in timely filed charges.”¹⁸²

With respect to the hostile-work-environment claim, on the other hand, the Court adopted Morgan’s argument.¹⁸³ The Court recognized that a hostile work environment inherently involves repeated conduct and “cannot be said to occur on any particular day.”¹⁸⁴ The degree of harassment necessary to create a hostile work environment develops over time, and unlike a discrete act, “a single act

174. *See supra* notes 153–58 and accompanying text.

175. *Morgan*, 536 U.S. at 106.

176. *Id.* at 105.

177. Prior to his appointment to the federal bench, Clarence Thomas was the eighth and longest-serving Chairman of the EEOC, leading the agency’s enforcement efforts from 1982 to 1990. *Clarence Thomas*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/bios/clarencethomas.html> (last visited Oct. 19, 2016). For a detailed account of Clarence Thomas’s background and his legacy at the EEOC, see Juan Williams, *A Question of Fairness*, ATLANTIC (Feb. 1987), <http://www.theatlantic.com/magazine/archive/1987/02/a-question-of-fairness/306370>.

178. *Morgan*, 536 U.S. at 109 (quoting 42 U.S.C. § 2000e-5(e)(1) (2000)).

179. *Id.* at 110.

180. *Id.* at 110–11.

181. *Id.*

182. *Id.* at 113.

183. *Id.* at 117–18.

184. *Id.* at 115.

of harassment may not be actionable on its own.”¹⁸⁵ A hostile-work-environment claim is therefore “based on the cumulative effect of individual acts”¹⁸⁶ that “collectively constitute one ‘unlawful employment practice.’”¹⁸⁷ The Court, therefore, concluded that where at least one act contributing to a hostile-work-environment claim occurred within the limitations period, courts may consider “the entire time period of the hostile environment” in determining relief.¹⁸⁸

The decision in *Morgan* thus provided legal standards for two issues. First, it helped distinguish between discrete discriminatory acts, such as firing or not hiring someone, and continuing violations, such as harassment or maintaining a hostile work environment. Second, it explained how courts should apply the statutory limitations period to discrete-act claims versus continuing-violation claims. Yet, the decision did not address how courts should deal with the limitations period in pattern-or-practice cases. Justice Thomas wrote in a footnote, “We have no occasion here to consider the timely filing question with respect to ‘pattern-or-practice’ claims . . . as none are at issue here.”¹⁸⁹

*B. Application of the Limitations Period to Pattern-or-Practice
Discrimination in Section 707 Cases*

So how *should* courts address the timely filing question in pattern-or-practice suits? When does the limitations period start? Which discriminatory act starts the statutory clock running if no single act can constitute a “pattern or practice”? Who can recover in a pattern-or-practice case—all victims of the ongoing practice or only individuals who were injured by the practice during the limitations period? Where the government shows that an employer engaged in an ongoing practice of discrete violations, which acts give rise to damages—all acts that occurred while the practice was in place or only acts that occurred during the limitations period?

185. *Id.* (explaining that use of an epithet, for example, does not, on its own, “sufficiently affect the conditions of employment to implicate Title VII” (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993))).

186. *Id.*

187. *Id.* at 117.

188. *Id.*

189. *Id.* at 115 n.9. Although footnote 9 referred specifically to private class-action suits filed under section 706 that allege an employer systematically discriminated against employees or job applicants, these class-action cases raise many of the same concerns as pattern-or-practice cases litigated by the EEOC.

District courts have answered these questions in different ways.¹⁹⁰ Several years before the Supreme Court's decision in *Morgan*, the U.S. District Court for the Central District of Illinois held in *EEOC v. Mitsubishi Motor Manufacturing of America*¹⁹¹ that the limitations period provided in section 706 does not apply to section 707 actions.¹⁹² The EEOC had sued Mitsubishi under section 707 pursuant to a Commissioner's charge, alleging that the car company routinely discriminated against women through sexual harassment, retaliation, and constructive discharge at one of its auto assembly plants.¹⁹³ Mitsubishi argued that women who either left the company more than 300 days before the Commissioner's charge or did not complain within the 300-day window should be barred from the suit, but the court disagreed.¹⁹⁴ The court reasoned that "the very nature of a pattern or practice case attacking systemic discrimination by a company seems to preclude the application of a limitations period."¹⁹⁵

Five years after *Morgan*, the U.S. District Court for the District of Maryland came to a similar conclusion in *EEOC v. LA Weight Loss*.¹⁹⁶ The EEOC had investigated a female employee's charge alleging that LA Weight Loss repeatedly failed to hire qualified male applicants and found reasonable cause to believe that the company had engaged in a pattern or practice of discrimination.¹⁹⁷ The agency issued a letter to LA Weight Loss, giving notice of its determination.¹⁹⁸ In the ensuing lawsuit, LA Weight Loss sought to exclude all claims for male applicants who were denied a job more than 180 days before the EEOC issued its determination letter.¹⁹⁹ The court, agreeing with the reasoning in *Mitsubishi*, held that no statutory limitations period applies in pattern-or-practice cases.²⁰⁰

Other district courts have drawn a line between cases brought pursuant to a Commissioner's charge and those initiated by an

190. See, e.g., *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *2 (D. Md. Apr. 27, 2010) (discussing the split among district courts and citing eight district court decisions—four in favor of, and four opposed to, applying the 180-day or 300-day limitations period to pattern-or-practice cases).

191. 990 F. Supp. 1059 (C.D. Ill. 1998).

192. *Id.* at 1084.

193. *Id.* at 1068.

194. *Id.* at 1083–84.

195. *Id.* at 1084.

196. 509 F. Supp. 2d 527 (D. Md. 2007).

197. *Id.* at 531.

198. *Id.*

199. *Id.* at 534.

200. *Id.* at 535–36.

individual claimant's charge. In *EEOC v. Custom Cos.*,²⁰¹ the EEOC sued an employer, Custom Companies, under section 707, alleging that the company had engaged in a pattern or practice of sexually harassing female employees.²⁰² The EEOC had investigated the case after one female employee filed a charge with the agency, and it quickly discovered that many other female employees had also been victims of sexual harassment.²⁰³ Yet, the U.S. District Court for the Northern District of Illinois held that section 706's filing period applied to section 707 cases and that only women who had been employed during the limitations period—300 days before the female employee's charge—could recover.²⁰⁴ The court distinguished *Mitsubishi* by noting that the EEOC's claim there was based on a Commissioner's charge whereas the case against Custom arose from a private claimant's charge.²⁰⁵

The U.S. District Court for the District of New Jersey, however, has concluded more recently that the section 706 limitations period *does* restrict relief in pattern-or-practice cases that are based on a Commissioner's charge.²⁰⁶ In *EEOC v. FAPS, Inc.*,²⁰⁷ the EEOC had filed a Commissioner's charge against FAPS and found that the company had been engaged in a company-wide pattern or practice of discrimination against African Americans in recruiting and hiring for the previous three years.²⁰⁸ When the EEOC sued, the district court held that only African-American applicants denied a job at FAPS within the 300 days before the date of the Commissioner's charge could recover.²⁰⁹ All individuals who were unlawfully denied employment before the 300-day limitations period as a result of the *same* pattern or practice were out of luck.²¹⁰

These cases, and numerous others, illustrate the differing opinions among district courts regarding how the section 706 limitations period applies to section 707 cases. Prior to the Supreme Court's decision in *Morgan*, at least three courts had held that section 706

201. No. 02 C 3768, 03 C 2293, 2004 WL 765891 (N.D. Ill. Apr. 7, 2004).

202. *Id.* at *1.

203. *Id.*

204. *Id.* at *8.

205. *Id.* at *7–8.

206. *EEOC v. FAPS, Inc.*, No. 10-3095, 2014 WL 4798802, at *24 (D.N.J. Sept. 26, 2014).

207. No. 10-3095, 2014 WL 4798802 (D.N.J. Sept. 26, 2014).

208. *Id.* at *3.

209. *Id.* at *26.

210. *Id.*

does not limit recovery in section 707 cases.²¹¹ Conversely, two other courts had held that section 706 does limit recovery in section 707 cases.²¹² After *Morgan*, courts are still split. At least five have agreed with the EEOC and found the limitations period inapplicable.²¹³ Meanwhile, another twelve have sided with employers and applied the limitations period to narrow the scope of relief.²¹⁴ Following a string of these district court decisions in 2012, two attorneys at Seyfarth Shaw LLP published an article declaring that “the tides are turning,” and that courts are increasingly recognizing that EEOC pattern-or-practice suits must indeed adhere to section 706’s limitations period.²¹⁵ The following analysis, however, explains that the Supreme Court’s decisions, Title VII’s language, and the purpose of section 707 require a different conclusion.

211. EEOC v. Mitsubishi Motor Mfg. of Am., 990 F. Supp. 1059, 1093 (C.D. Ill. 1998); EEOC v. Rymer Foods, Inc., No. 88 C 10680, 1989 WL 88243, at *2 (N.D. Ill. July 31, 1989); EEOC v. Cont’l Oil Co., 393 F. Supp. 167, 169 (D. Colo. 1975).

212. EEOC v. Optical Cable Corp., 169 F. Supp. 2d 539, 547 (W.D. Va. 2001); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1260 (M.D. Ala. 1980).

213. EEOC v. New Prime, Inc., 42 F. Supp. 3d 1201, 1217 (W.D. Mo. 2014); EEOC v. Sterling Jewelers, Inc., No. 08-CV-706, 2010 WL 86376, at *4–5 (W.D.N.Y. Jan. 6, 2010); EEOC v. LA Weight Loss, 509 F. Supp. 2d 527, 535 (D. Md. 2007); EEOC v. Scolari Warehouse Mkts., Inc., 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007); EEOC v. Dial Corp., No. 99 C 3356, 2002 WL 1974072, at *9 (N.D. Ill. July 23, 2002).

214. *FAPS, Inc.*, 2014 WL 4798802, at *26; EEOC v. Princeton Healthcare Sys., No. 10-4126, 2012 WL 5185030, at *5 (D.N.J. Oct. 18, 2012); EEOC v. Presrite Corp., No. 11 CV 260, 2012 WL 3780351, at *4 (N.D. Ohio Aug. 30, 2012); EEOC v. Glob. Horizons, Inc., No. CV-11-3045-EFS, 2012 WL 3095577, at *7 (E.D. Wash. July 27, 2012); EEOC v. U.S. Steel Corp., No. 10-1284, 2012 WL 3017869, at *8 (W.D. Pa. July 23, 2012); EEOC v. PBM Graphics Inc., 877 F. Supp. 2d 334, 368 (M.D.N.C. 2012); EEOC v. Bass Pro Outdoor World, LLC, 884 F. Supp. 2d 499, 523 (S.D. Tex. 2012), *on recons.*, 35 F. Supp. 3d 836 (S.D. Tex. 2014), *aff’d*, 826 F.3d 791 (5th Cir. 2016); EEOC v. Kaplan Higher Educ. Corp., 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011); EEOC v. Bloomberg LP, 751 F. Supp. 2d 628, 650 (S.D.N.Y. 2010); EEOC v. Freeman, No. RWT 09CV2573, 2010 WL 1728847, at *7 (D. Md. Apr. 27, 2010); EEOC v. Burlington Med. Supplies, Inc., 536 F. Supp. 2d 647, 659 (E.D. Va. 2008); EEOC v. Custom Cos., Nos. 02 C 3768, 03 C 2293, 2004 WL 765891, at *13 (N.D. Ill. Apr. 7, 2004).

215. See Gerald L. Maatman, Jr. & Lily M. Strumwasser, *The Tides Are Turning: EEOC Pattern or Practice Lawsuits Must Adhere to Title VII’s 300-Day Limitation Period*, 29 ABA J. LAB. & EMP. L. 71, 71–72 (2013) (advocating for a strict application of the section 706 limitations period to section 707 claims as a means of “wip[ing] out large numbers of the EEOC’s claims”). One of the authors of this article, Gerald L. Maatman, Jr., in fact represented several of the defendants in *Global Horizons*. EEOC v. Glob. Horizons, Inc., 7 F. Supp. 3d 1053, 1056 (D. Haw. 2014); EEOC v. Glob. Horizons, Inc., 904 F. Supp. 2d 1074, 1080 (D. Haw. 2012).

III. TITLE VII'S LIMITATIONS PERIOD DOES NOT RESTRICT THE CLASS
OF VICTIMS ELIGIBLE FOR RELIEF IN EEOC PATTERN-OR-PRACTICE
CASES

Applying section 706's limitations period to restrict relief in EEOC pattern-or-practice cases thoroughly undermines the legislative purpose of section 707 and of Title VII as a whole. Courts must read the individual provisions of Title VII in context.²¹⁶ Indeed, nearly every Supreme Court decision interpreting Title VII has looked to its legislative history and overarching policy goals.²¹⁷ Reading section 707 against this backdrop reveals that Congress intended section 707 to empower the government to attack entire patterns or practices of discrimination—not 180-day or 300-day fragments of them.

A. *Section 706's Limitations Period Does Not Apply to the EEOC's Section
707 Cases*

1. *Congress designed pattern-or-practice cases to provide broad relief for
discriminatory employment practices that individual charges cannot
adequately address*

Pattern-or-practice lawsuits are an integral part of Title VII's enforcement scheme. The Supreme Court has recognized that Congress intended Title VII to eradicate discrimination throughout the economy and provide victims of employment discrimination with “make[-]whole” relief.²¹⁸ Because an individual complaint system alone could not achieve

216. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416–19 (1975) (instructing that in Title VII cases, courts must exercise their authority to award back pay “in light of the large objectives of the Act” (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944))), *superseded by statute*, 42 U.S.C. § 2000e-2(a).

217. See, e.g., *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115–20 (1988) (drawing on Title VII's legislative history to hold that a state's waiver of its 60-day exclusive jurisdiction over a charge “terminates” the state agency's proceedings and allows the EEOC to process the charge); *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 325–29 (1980) (using legislative history to conclude that the EEOC may sue on behalf of a class of workers without obtaining Rule 23 class certification); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 361–66 (1977) (employing legislative history in deciding that section 706's post-charge statute of limitations does not apply to the EEOC); *Albemarle*, 422 U.S. at 419–21 (relying on the legislative history to determine that Title VII requires district courts to award back pay for losses suffered); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434–36 (1971) (looking to the legislative history in holding that Title VII requires that employment tests be job related).

218. See, e.g., *Albemarle*, 422 U.S. at 418 (“[T]he purpose of Title VII[,] to make persons whole for injuries suffered on account of unlawful employment discrimination[,] . . . is shown by the very fact that Congress took care to arm the

these goals, Congress empowered the federal government to attack systemic discrimination.²¹⁹ Section 707 of Title VII gave the Attorney General, and subsequently the EEOC, the authority to sue employers that routinely discriminated against employees and job applicants.²²⁰ As Justice Marshall explained, “employment discrimination was a ‘complex and pervasive’ problem that could be extirpated only with thoroughgoing remedies.”²²¹ Indeed, “[u]nrelenting broad-scale action against patterns or practices of discrimination’ was *essential*” to achieve the purposes of Title VII.²²² Using the section 706 limitations period to drastically restrict the scale of the EEOC’s pattern-or-practice cases contravenes Congress’s intent.

Congress also designed pattern-or-practice cases to provide “swift and effective” relief.²²³ Title VII even provides that when the government files a section 707 suit in federal court, the chief judge of the district and the judge assigned to the case “shall . . . cause the case to be in every way expedited.”²²⁴ During the debates preceding the 1972 Act, Senator Gurney explained that because a pattern or practice of discrimination affects large numbers of workers, the statute must afford “the most expeditious and readily enforceable relief available.”²²⁵ Section 707’s provisions for expedited relief thus indicate that Congress intended to prioritize section 707 cases above suits based on discrete acts. To conclude that Congress also intended to truncate relief in these 707 cases based on a limitations period designed to encourage individual complainants to file timely charges would be nonsensical.

Although some courts have reasoned that Congress’s primary intent in creating section 707 was not to remedy past discrimination but to stop future discrimination, the Supreme Court has rejected such a distinction. In *Albemarle Paper Co. v. Moody*,²²⁶ the Court explained that “nothing on the face of [Title VII] or in its legislative history . . . justifies the creation of drastic and categorical distinctions between

courts with full equitable powers. For it is the historic purpose of equity to ‘secur[e] complete justice.’” (citation omitted)).

219. See *supra* text accompanying notes 34–51 (recounting the historical development of the EEOC’s enforcement power under Title VII).

220. See *supra* text accompanying notes 34–51.

221. EEOC v. Shell Oil Co., 466 U.S. 54, 69 (1984) (quoting H.R. REP. NO. 92-238, at 8 (1971)).

222. *Id.* (emphasis added) (quoting H.R. REP. NO. 92-238, at 14 (1971)).

223. United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 843 (5th Cir. 1975).

224. 42 U.S.C. § 2000e-6(b) (2012).

225. 118 CONG. REC. 4077–78 (1972).

226. 422 U.S. 405 (1975), *superseded by statute*, 42 U.S.C. § 2000e-2(a).

[prospective and retrospective] remedies.”²²⁷ Examining Title VII’s legislative history, the Court found that in cases of employment discrimination, courts have “not merely the power but the *duty*” to “eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”²²⁸ Yet, the district court in *Custom Cos.* asserted that denying relief to employees who were employed outside the filing period “would do little to frustrate the primary public purpose of the EEOC’s enforcement action” because the EEOC could still halt the employer’s pattern or practice of discrimination through injunctive remedies.²²⁹ To the extent that the *Custom* court and other district courts have applied the section 706 limitations period to section 707 claims based on this reasoning, their decisions are simply wrong. Section 707 empowers the government to seek, and federal courts to grant,²³⁰ make-whole relief to victims of systemic discrimination.

Moreover, Congress vested courts with the power to award swift relief not only to help victims but to hold offending employers fully accountable for their unlawful conduct. The Court explained in *Albemarle* that “[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality.”²³¹ Affirmative relief, such as back pay, “provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”²³²

2. *Congress intended the EEOC to have the same authority as the Attorney General when litigating section 707 lawsuits*

When Congress transferred the government’s pattern-or-practice authority from the Attorney General to the EEOC in the 1972 Act, it sought to *increase* the effectiveness of pattern-or-practice suits, not hamper them. The House Committee on Education and Labor

227. *Id.* at 423.

228. *Id.* at 418 (emphasis added).

229. EEOC v. Custom Cos., Nos. 02 C 3768, 03 C 2293, 2004 WL 765891, at *11 (N.D. Ill. Apr. 7, 2004).

230. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44–45 (1974) (concluding that Congress assigned federal courts “plenary powers to secure compliance with Title VII”).

231. *Albemarle*, 422 U.S. at 417.

232. *Id.* at 417–18 (alteration in original) (quoting *United States v. N.L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973)).

explained that the prevalence of institutionalized discrimination required stronger Title VII enforcement:

Unfortunately, the size of the [Civil Rights] Division has not kept pace with its vastly increased responsibilities. As a consequence[,] the Division has been highly selective and very limited in the number and the nature of [section 707] suits which it has filed. It has been unable to pursue [T]itle VII suits with the vigor and intensity needed to reduce the wide-spread prevalence of systemic discrimination. . . . The Committee believes these [pattern-or-practice] powers should be exercised by the [EEOC] as an integral and coordinated part of the overall enforcement effort.²³³

The Committee further recognized that the EEOC is in the best position to pursue pattern-or-practice claims because it can easily access up-to-date statistical information and analyses of employment trends.²³⁴

There is no evidence that Congress intended to limit the scope of relief that the government could secure in section 707 cases. Prior to 1972, the Department of Justice filed around seventy Title VII pattern-or-practice suits.²³⁵ None of the courts adjudicating these cases applied the section 706 limitations period to the government's claims.²³⁶ When the Senate debated transferring the Attorney General's pattern-or-practice authority to the EEOC, representatives consistently stated that the EEOC would have the same power under section 707 that the Attorney General originally possessed. One of the key proponents of the 1972 Act, Senator Williams, asserted, "[t]here will be *no difference* between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring."²³⁷ Senator Javits,

233. H.R. REP. NO. 92-238, at 2149 (1971).

234. EEOC v. Shell Oil Co., 466 U.S. 54, 69 (1984) (quoting H.R. REP. NO. 92-238, at 14).

235. 118 CONG. REC. 4079 (1972).

236. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971) (modifying an order in a pattern-or-practice case to grant relief to *all* employees against whom the employer had discriminated); United States v. Ironworkers Local 86, 443 F.2d 544, 546-48 (9th Cir. 1971) (affirming an order awarding specific relief in a pattern-or-practice case to *all* African Americans to whom various local trade unions had unlawfully denied job opportunities); United States v. Wood, Wire & Metal Lathers Int'l Union, Local 46, 328 F. Supp. 429, 441-42 (S.D.N.Y. 1971) (holding in a pattern-or-practice case that *all* African-American workers against whom a union had discriminated were entitled to back pay); United States v. Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC, 301 F. Supp. 906, 919-20 (E.D. La. 1969) (awarding relief in a pattern-or-practice case to *all* African-American workers against whom a union and employer had discriminated).

237. Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 328 (1980) (alterations in original) (emphasis added) (quoting 118 CONG. REC. 4081).

another sponsor of the bill, insisted the EEOC would have “the authority to institute *exactly the same actions* that the Department of Justice does under pattern or practice.”²³⁸

The only aspect of section 707 that either house debated was whether pattern-or-practice enforcement should be left to the Attorney General or vested in the EEOC.²³⁹ The 1972 Act’s legislative history contains virtually no discussion of section 707(e)’s requirement that the EEOC “investigate and act on a charge of a pattern or practice of discrimination . . . in accordance with the procedures set forth in [section 706].”²⁴⁰ A section-by-section analysis of the bill proposed by the House Committee on Education and Labor merely states that the provision “[a]ssimilates procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the [EEOC] may provide an administrative procedure to be the counterpart of the present Section 707 action.”²⁴¹ This explanation further suggests that Congress viewed section 707(e) simply to say that the EEOC should follow the same procedures that the Attorney General previously followed in litigating pattern-or-practice cases. The section-by-section analysis of the final bill, prepared by two senators who participated in the conference committee, does not even mention section 707(e).²⁴²

Congress’s ultimate decision to grant the EEOC pattern-or-practice authority turned on its recognition that the EEOC should be the principal representative of the federal government in combating employment discrimination. The EEOC was more insulated from politics than the Attorney General because Commissioners were appointed for staggered five-year terms and could not be removed at the will of the President.²⁴³ Senator Williams explained to his fellow Congressmen that “[t]he transfer to the [EEOC] will enable it to operate in a fresh atmosphere within an agency that has equal employment opportunity as its sole priority.”²⁴⁴ President Carter

238. *Id.* (alteration in original) (emphasis added) (quoting 118 CONG. REC. 4081).

239. 118 CONG. REC. 4076–81.

240. 42 U.S.C. § 2000e-6(e) (2012).

241. H.R. REP. NO. 92-238, at 29 (1971).

242. *See* 118 CONG. REC. 7166–68 (noting that the amendments to section 707 transferred pattern-or-practice jurisdiction to the EEOC, provided for concurrent jurisdiction for two years from the date of enactment, and authorized the President to alter this arrangement by submitting a reorganization plan).

243. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(a), 78 Stat. 241, 258. Title VII contains the same provisions for the appointment and removal of EEOC Commissioners today. 42 U.S.C. § 2000e-4(a).

244. 118 CONG. REC. 294–96.

echoed this belief when he brought the enforcement of other equal employment opportunity statutes under the umbrella of the EEOC in Reorganization Plan No. 1.²⁴⁵

Early pattern-or-practice cases also support this interpretation of the 1972 amendments to Title VII. For example, the trial court in *Teamsters*—the seminal Supreme Court pattern-or-practice case—awarded relief to numerous minority workers who had applied for and been denied jobs as long-distance drivers *more than ten years before* the government began pursuing the case.²⁴⁶ The Supreme Court found that the defendant employer and unions had perpetrated a pattern or practice of discrimination against racial minorities in hiring from 1958 to 1969.²⁴⁷ Accordingly, any minority worker who applied to be a long-distance driver during that time was eligible for relief in the remedial stage.²⁴⁸ Neither the district court, the court of appeals, nor the Supreme Court mentioned the section 706 limitations period. *Teamsters* thus demonstrates that the very point of section 707 pattern-or-practice cases was to permit the government to remedy and make whole victims of longstanding, systemic discrimination—an objective plainly defeated had the very short limitations period in section 706 been applied.

3. *Section 707(e) is silent regarding section 706's limitations period*

The district courts that have applied the section 706 limitations period in EEOC pattern-or-practice cases have reasoned that section 707(e)'s plain language incorporates section 706's timely filing requirement.²⁴⁹ A textual analysis of section 707(e), however, reveals

245. See *supra* text accompanying notes 61–64 (explaining the Reorganization Plan and why it was necessary).

246. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 330–32 (1977); cf. *id.* at 356–57 (holding that those individuals who were denied jobs could receive a retroactive seniority date no earlier than the effective date of Title VII).

247. *Id.* at 337; see *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690, 692 (5th Cir. 1981) (per curiam) (stating on remand that “[i]t is undisputed that it was the company’s policy, from 1958 until 1969, not to allow transfer from city to line jobs”).

248. See *United States v. T.I.M.E.-DC, Inc.*, Nos. 5-868, 5-897, 1972 U.S. Dist. LEXIS 11509, at app. B (N.D. Tex. Oct. 19, 1972, Dec. 6, 1973) (listing the names and races of thirty workers who “the evidence clearly show[ed] were the objects of [the pattern or practice of] discrimination” perpetrated by T.I.M.E.-D.C., the date and nature of the adverse employment action that each worker experienced, and the relief the court awarded), *vacated sub nom.*, *Teamsters*, 431 U.S. 324.

249. See, e.g., *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011) (“The plain language of § 707(e) . . . mandates that . . . the EEOC may only act where a charge of discrimination has been filed, and such charges must be filed within 300 days of the unlawful employment practice.”); *EEOC v. Burlington*

that its meaning is not so clear and that Title VII as written simply does not prescribe a limitations period for section 707 cases. Section 707(e) reads, in its entirety,

Subsequent to March 24, 1972, the [EEOC] shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the [EEOC]. All such actions shall be conducted in accordance with the procedures set forth in [section 706].²⁵⁰

Here, “[a]ll such actions” refers to the EEOC’s “authority to investigate and act on a charge of a pattern or practice of discrimination.”²⁵¹ In other words, “[a]ll such actions” refers to the administrative processes that the EEOC follows *after* a charge has been filed. Some courts have indeed concluded that the EEOC does not even need a charge to pursue a pattern-or-practice claim under section 707.²⁵² Thus, the administrative processes that the EEOC must conduct “in accordance with the procedures set forth in” section 706 do not include a limitations period governing how a complainant files the charge itself.

Several federal courts of appeals have agreed. In *United States v. Masonry Contractors Ass’n of Memphis*,²⁵³ a pattern-or-practice case, the U.S. Court of Appeals for the Sixth Circuit simply stated, “There is no statute of limitations delineated in [section 707], and the time limitations for making a claim under [section 706] are not applicable to actions under [section 707].”²⁵⁴ In *United States v. Fresno Unified School District*,²⁵⁵ the Ninth Circuit remarked that “[s]ome of the § 706 procedural requirements seem to apply only to individual unlawful employment practices and not to pattern or practice suits,” and the

Med. Supplies, Inc., 536 F. Supp. 2d 647, 659 (E.D. Va. 2008) (“Accepting the EEOC’s argument would contravene the text of the statute”); *EEOC v. Custom Cos.*, Nos. 02 C 3768, 03 C 2293, 2004 WL 765891, at *8 (N.D. Ill. Apr. 7, 2004) (“The plain language of the Title VII statute dictates that Section 706’s 300-day filing period applies to Section 707 actions”); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 546 (W.D. Va. 2001) (“[A] literal reading of the text would indicate that pattern or practice suits brought under [section 707(e)] ‘shall be conducted in accordance with the’ 180-day limitations period set out in [section 706(e)].”).

250. 42 U.S.C. § 2000e-6(e) (2012).

251. *Id.*

252. *See supra* note 151 and accompanying text.

253. 497 F.2d 871 (6th Cir. 1974).

254. *Id.* at 877.

255. 592 F.2d 1088 (9th Cir. 1979).

court pointed to the limitations period as an example.²⁵⁶ Because section 707 “contains no requirement that anyone file a charge,” and “it takes more than one unlawful practice to constitute a ‘pattern or practice’ of employment discrimination,” the court explained, “there could be no certain date from which the 180-day [limitations] period would run.”²⁵⁷ Similarly, in *United States v. Allegheny-Ludlum Industries, Inc.*,²⁵⁸ the Fifth Circuit recognized that section 707(e) incorporates only section 706’s administrative procedures.²⁵⁹ Reading section 707(e) in light of the 1972 Act’s legislative history, the court acknowledged that “Congress apparently intended that the EEOC have investigative and conciliatory authority in ‘pattern or practice’ situations comparable to its existing powers in § 706 cases.”²⁶⁰ But, the court found “no indication that Congress intended the duplication of procedures to extend beyond the administrative level.”²⁶¹ In short, although no circuit court has directly ruled on whether the section 706 limitations period applies in section 707 cases, at least three circuit courts have recognized that the language of section 707(e) does not expressly incorporate it.

4. *Congress provided limitations on damages elsewhere in Title VII*

Title VII’s back-pay provision provides another clue that Congress did not contemplate applying the section 706 limitations period to section 707 cases. Leading up to the 1972 Act, the House of Representatives debated two equal employment opportunity bills: one, sponsored by Representative Erlenborn, proposed a time limit on employers’ liability for back pay in section 707 cases while the other, sponsored by Representative Hawkins, did not.²⁶² In describing his bill, Erlenborn stated,

[T]o preclude the threat of enormous back[-]pay liability . . . my bill offers a new subsection (h) of section 706 . . . which limits liability in pattern and practice suits to a period of 2 years prior to the filing of a complaint with said court. With respect to individual complainants therefore, back pay and other liability is limited to the statutory period for filing The final sentence in subsection (h) which limits back[-]pay orders to 2 years is directed to the

256. *Id.* at 1096 n.5.

257. *Id.*

258. 517 F.2d 826 (5th Cir. 1975).

259. *Id.* at 844.

260. *Id.*

261. *Id.*

262. 117 CONG. REC. 31,962 (1971); Sape & Hart, *supra* note 53, at 836, 838.

pattern and practice suits authorized under section 707. It is only fair to say that liability should not go back ad infinitum but that there should be some reasonable statute of limitations.²⁶³

The House passed Erlenborn's bill the following day.²⁶⁴ Although Erlenborn did not explicitly state why a provision limiting back pay in section 707 cases—but not section 706 cases—was necessary, his comments suggest that the answer lies in “the statutory period for filing.”²⁶⁵ Erlenborn's bill presumed that section 706's filing period limited all forms of liability in section 706 cases. Indeed, Erlenborn stated that in cases based on individual charges, the filing period functions as a limit on liability.²⁶⁶ If section 706's limitations period applied to section 707 cases, it should have limited liability in section 707 cases as well. Yet, Erlenborn, and apparently the other 199 representatives who voted to adopt the Erlenborn bill over the Hawkins bill, was concerned about “the threat of enormous back[-]pay liability” absent “some reasonable statute of limitations.”²⁶⁷ Had the House viewed section 706's limitations period as a limit on liability in section 707 cases, Erlenborn's comments would have been unnecessary. Accordingly, the House's decision to include a provision limiting back pay specifically in section 707 cases indicates that the House did not think section 706's limitations period would apply to them.

The Senate later passed its own equal employment opportunity bill, which limited back pay to two years before the filing of the relevant charge in both section 706 and section 707 cases, and Congress enacted the Senate's version.²⁶⁸ But, this too indicates that section 706's limitations period does not apply to section 707 cases. Although members of the House initially viewed the filing period as a

263. 117 CONG. REC. 31,981.

264. *See id.* (noting that Rep. Erlenborn made these remarks on September 15, 1971); *id.* at 32,111–13 (recording that the House adopted Erlenborn's bill on September 16, 1971).

265. *Id.* at 31,981.

266. *Id.*

267. *See id.* (arguing that plaintiffs could use such extensive liability to coerce employers into giving up their due-process rights); *id.* at 32,111 (showing the House agreed to adopt the Erlenborn bill in place of the Hawkins bill by a vote of 200 to 195, with thirty-nine representatives not voting).

268. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420 n.13 (1975) (explaining that the Senate rejected the Erlenborn bill and adopted a more liberal limit on back pay), *superseded by statute*, 42 U.S.C. § 2000e-2(a); *United States v. Ga. Power Co.*, 474 F.2d 906, 919–20 (5th Cir. 1973) (concluding that the back-pay provision in section 706(g) applies to pattern-or-practice cases brought by the EEOC or the Attorney General under section 707).

limitation on liability in section 706 cases, both chambers ultimately agreed that Title VII needed a separate cap on back pay, distinct from the filing period.²⁶⁹ Subsequent Congresses have also adopted this view. For example, the Lilly Ledbetter Fair Pay Act added a provision to Title VII that expressly stated victims of pay discrimination are entitled to the full two years of back pay available under the 1972 Act.²⁷⁰ In a section-by-section analysis of the proposed bill, the House Committee on Education and Labor explained that this provision was intended to ensure that courts did not limit back pay “to 180 [or 300] days.”²⁷¹ The Committee further emphasized that “[t]he statute of limitations period and the back[-]pay recovery period are two separate periods.”²⁷²

Had Congress intended section 706’s limitations period to apply to section 707 cases and thereby cut off relief for acts that occurred prior to that limitations period, Title VII’s back-pay provision would be meaningless.²⁷³ Application of the limitations period to section 707 cases involving discrete discriminatory acts invariably limits employers’ liability to acts that occurred within 180 or 300 days prior to the relevant charge.²⁷⁴ In *Global Horizons*, for example, the court held that the farm labor contracting firm was liable only for discriminating against those workers employed during the 300-day filing period.²⁷⁵ But, Title VII’s back-pay provision caps liability at two years—not 300 days.

In *Morgan*, the Supreme Court distinguished between the function of the filing period and the function of other Title VII provisions relating to liability and damages.²⁷⁶ Justice Thomas explained that section 706(e) is a “timeliness requirement” that specifies when a

269. See *Gilmore v. Macy’s Retail Holdings*, No. 06-3020, 2009 WL 305045, at *3 (D.N.J. Feb. 4, 2009) (citing H.R. REP. NO. 110-237, at 19 (2007)) (indicating that the House intended the back-pay recovery period to be distinct from the filing period).

270. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6.

271. *Gilmore*, 2009 WL 305045, at *3 (alteration in original) (quoting H.R. REP. NO. 110-237, at 19 (2007)).

272. *Id.* (quoting H.R. REP. NO. 110-237, at 19).

273. See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119 (2002) (noting that limiting liability to conduct that occurred during the filing period would contradict Congress’s intent to cap back-pay recovery at two years), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5.

274. See *supra* text accompanying notes 152–63 (analyzing section 706’s limitation period and its effects).

275. See *supra* text accompanying notes 2–10, 21–23 (noting that because the court applied the section 706 limitations period, only eighty-two Thai workers were awarded compensation).

276. 536 U.S. at 119.

charge is timely filed—“[i]t is but one in a series of provisions requiring that the parties take action within specified time periods, . . . none of which function as specific limitations on damages.”²⁷⁷ Indeed, the Court pointed out that Title VII explicitly limits damages in other provisions, such as the back-pay provision in section 706(g)(1).²⁷⁸ “If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay.”²⁷⁹ Rather, the explicit limitations on the amount of recoverable damages elsewhere in Title VII show that the filing period was *not* intended to limit damages.²⁸⁰ The Court thus concluded that the *only reason* section 706(e) limits liability under section 707(e) is because a claim must be timely to be actionable.²⁸¹

5. *Reading section 707(e) to incorporate section 706’s limitations period would arbitrarily preclude victims from obtaining relief in pattern-or-practice cases*

Not only does the application of Title VII’s limitations period to pattern-or-practice cases lack support in the statute’s history, policy goals, and text, but it also produces arbitrary and unjustifiable outcomes. Section 706’s limitations period specifies a prerequisite for litigating a section 706 claim²⁸²: once a person experiences unlawful discrimination, he or she has 180 or 300 days to file a charge; otherwise, that person loses the right to sue the employer for that particular discriminatory act.²⁸³ This type of provision is appropriate for charge-based lawsuits, in which a single discriminatory act gives rise to a cause of action.

Pattern-or-practice suits, however, are not based on a particular discriminatory act, or even discrimination experienced by a particular person.²⁸⁴ To prevail on a pattern-or-practice claim, the government must establish that discrimination was the employer’s “*standard operating procedure*.”²⁸⁵ The nature of a pattern or practice of

277. *Id.* at 119–20 (emphasis added).

278. *Id.* at 119.

279. *Id.*

280. *Id.*

281. *Id.* at 120.

282. *Id.* at 109 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

283. *See supra* text accompanying notes 153–58.

284. *See supra* text accompanying notes 78–91 (describing the nature and purpose of pattern-or-practice claims).

285. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (emphasis added).

discrimination thus involves repeated discriminatory conduct that develops over time and likely persists over more than 180 or 300 days. Whereas a discrete act occurs on a particular date, a pattern or practice takes time to unfold. There is simply no identifiable point at which a series of discriminatory employment actions becomes an employer's standard operating procedure. Thus, whatever date a court uses to calculate a limitations period in a section 707 case will necessarily be arbitrary.

Because section 707 cases lack a date on which the pattern or practice began, the courts that have applied the section 706 limitations period have had to calculate the limitations period based on some other date. Most often this date was the date on which either an EEOC Commissioner or an aggrieved worker filed a charge.²⁸⁶ The courts then reached back 180 or 300 days from that charge to determine which segment of the pattern or practice of discrimination the EEOC could seek to remedy.²⁸⁷

This 180-day or 300-day segment, however, does not correlate with when the pattern or practice of discrimination "occurred." In other words, if section 707(e) incorporated the section 706 limitations period into section 707 cases, the determination of which victims could recover and which victims could not would depend upon factors irrelevant to an employer's conduct, such as when the EEOC chose to file a Commissioner's charge, the state in which the victim worked, and whether the employer was a public or private entity.

First, applying the limitations period to section 707 cases that arise from a Commissioner's charge would arbitrarily restrict relief based on when the EEOC gathered the information necessary to file that charge. Many pattern-or-practice cases arise from charges filed by members of the EEOC²⁸⁸ because, unlike private parties, the EEOC

286. See, e.g., *EEOC v. FAPS, Inc.*, No. 10-3095, 2014 WL 4798802, at *22, *24 (D.N.J. Sept. 26, 2014) (using the date on which an EEOC Commissioner filed a charge to calculate the limitations period); *EEOC v. Glob. Horizons, Inc.*, 904 F. Supp. 2d 1074, 1094 (D. Haw. 2012) (using the date on which an aggrieved worker filed a charge to calculate the limitations period); *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *3 (D. Md. Apr. 27, 2010) (same); *EEOC v. Custom Cos.*, Nos. 02 C 3768, 03 C 2293, 2004 WL 765891, at *8 (N.D. Ill. Apr. 7, 2004) (same).

287. *FAPS*, 2014 WL 4798802, at *24; *Glob. Horizons*, 904 F. Supp. 2d at 1094; *Freeman*, 2010 WL 1728847, at *3; *Custom Cos.*, 2004 WL 765891, at *8.

288. See, e.g., *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 798 (5th Cir. 2016) (discussing a pattern-or-practice case that arose from a Commissioner's charge); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1269 (11th Cir. 2002) (same); *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1335 (9th Cir. 1980) (same); *FAPS*, 2014 WL 4798802, at *1 (same); *EEOC v. Presrite Corp.*, No. 11 CV 260, 2012 WL

has access to detailed reports of companies' employment practices and the demographics of relevant labor markets.²⁸⁹ This information allows the EEOC to discern systemic discrimination that individual employees and job applicants simply cannot see.²⁹⁰ But, the EEOC can hardly detect a pattern of discrimination in 180 or 300 days. Accordingly, applying the limitations period to the EEOC's section 707 suits will unfairly cut off relief for victims who experienced discrimination more than 180 or 300 days before the EEOC identified the pattern or practice.

Moreover, given the resource-intensive nature of pattern-or-practice suits,²⁹¹ the EEOC's capacity to research a pattern or practice of discrimination and gather sufficient information to file a charge likely varies over time.²⁹² The agency may be precluded from looking into a particular pattern or practice violation because the staff that specializes in such cases is already busy pursuing other section 707 suits. Accordingly, different victims would be eligible to recover depending on the EEOC's available resources at the time they experienced the discrimination.

Second, applying the limitations period in section 707 cases would also narrow or expand the class of victims eligible for relief depending on the state in which the employer implemented the pattern or practice of discrimination. Section 706 provides that Title VII claimants in a state with its own fair employment agency have 300 days after an incident of discrimination to file their charges, and claimants in a state without an agency have 180 days to file their charges.²⁹³ As the Court in *Morgan* explained, the purpose of providing additional time to complainants in states with their own fair employment agencies is to give states the opportunity to redress the alleged discrimination without federal intervention—the purpose is not to restrict plaintiffs' recovery.²⁹⁴

3780351, at *1 (N.D. Ohio Aug. 30, 2012) (same); *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1082 (C.D. Ill. 1998) (same); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 84 (1984) (O'Connor, J., concurring in part and dissenting in part) (noting that Commissioners usually file charges on the basis of a pattern or practice of discrimination).

289. Occhialino & Vail, *supra* note 95, at 707 & n.284.

290. *Id.*

291. *See supra* notes 93–95 and accompanying text.

292. *See supra* notes 155–58 and accompanying text.

293. *Supra* notes 155–58 and accompanying text.

294. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119–20 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

The *Morgan* Court observed that if the reach-back period served to limit liability in a hostile-work-environment claim, the relief available to a victim would vary depending on where he or she filed the discrimination charge.²⁹⁵ The same analysis applies to pattern-or-practice cases. For example, a person in California who suffered from a pattern or practice of discrimination for one year prior to the filing date could recover damages for 300 days of that year, while a person in Mississippi with the same circumstances could recover damages for only 180 days of that year.²⁹⁶ Because applying the limitations period would tie the window of liability to the existence of a state or local fair employment agency, such an interpretation of the statute would be “arbitrary and inconsistent with Congressional intent.”²⁹⁷

Third, applying the limitations period to section 707 cases would arbitrarily restrict the damages available to an individual harmed by his or her employer’s pattern or practice of discrimination depending on whether the employer was a public or private entity. Pattern-or-practice lawsuits brought by the Attorney General against public employers are not subject to the section 706 limitations period.²⁹⁸ Thus, the government can sue public employers for the entire duration of the discriminatory pattern or practice. If Title VII limited the EEOC’s ability to secure relief for victims in its pattern-or-practice lawsuits, the government could only sue private employers for discriminatory acts during a 180-day or 300-day window. Nothing in the legislative history of the 1972 Act, however, indicates that Congress intended this inconsistent outcome.²⁹⁹

Section 707’s history in fact conflicts with such an interpretation. From 1964 to 1972, the Attorney General had sole authority to sue private employers engaged in patterns or practices of discrimination.³⁰⁰ Between 1972 and 1974, the Attorney General and the EEOC had

295. *Id.*

296. See 42 U.S.C. § 2000e-5(e)(1) (2012) (setting the period as 180 days for states without equal employment agencies and 300 days for states with their own agencies). California has an agency, but Mississippi does not. 29 C.F.R. § 1601.74(a) (2016).

297. *Morgan*, 536 U.S. at 120.

298. See *supra* text accompanying notes 145–47 (explaining that courts have generally interpreted Title VII and President Carter’s 1978 Reorganization Plan to allow the Attorney General to pursue pattern-or-practice cases free from section 706’s administrative requirements).

299. See *supra* notes 273–75 and accompanying text (emphasizing that Congress passed the 1972 Act to *enhance* the effectiveness of pattern-or-practice cases).

300. See *supra* text accompanying notes 34–40, 47–50 (describing the evolution of Title VII and its enforcement mechanisms).

concurrent authority to sue both private and public employers.³⁰¹ From 1974, when the EEOC fully assumed enforcement of Title VII, to President Carter's Reorganization Plan in 1978, the EEOC had sole authority to sue both private and public employers.³⁰² Finally, since 1978, the EEOC has had authority to sue private employers, and the Attorney General has had authority to sue public employers.³⁰³

To read section 707(e) to mean that Congress intended to restrict relief in cases filed by the EEOC but not those filed by the Attorney General would require the following additional conclusions: First, Congress must have intended that from 1964 to 1972, private employers found to have engaged in a pattern or practice of discrimination would be required to provide relief to all victims, but that starting in 1972, when Congress was attempting to ramp up Title VII enforcement, those employers would be required to provide relief only to a fraction of the victims—those who experienced discrimination during the 180 or 300 days prior to the charge. Second, because Congress supported President Carter's decision to transfer the authority to litigate pattern-or-practice cases against public employers from the EEOC back to the Attorney General, Congress apparently supported subjecting public employers to significantly greater damages than private employers engaged in the same conduct, even though Title VII was initially intended to apply only to private employers. These conclusions defy both logic and the legislative record of the 1972 Act. In particular, given the special solicitude that state actors enjoy in the U.S. federal system, Congress surely would not have wanted to expose state actors to *greater* liability than private actors.

B. A Pattern or Practice of Discrimination Is a Continuing Violation Under Morgan

Even if section 706's limitations period did apply to the EEOC's section 707 cases, it would not restrict the scope of relief the EEOC could secure on behalf of victims because a pattern or practice of discrimination is the very definition of a continuing violation. Although the *Morgan* Court did not address the timely filing question

301. Occhialino & Vail, *supra* note 95, at 679.

302. *Id.*

303. Reorganization Plan No. 1 of 1978, § 5, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 719 (2012), *and in* 92 Stat. 3781 (1978).

for pattern-or-practice claims,³⁰⁴ much of its reasoning regarding hostile-work-environment discrimination applies to pattern-or-practice suits because both pattern-or-practice claims and hostile-work-environment claims constitute continuing violations. The Court explained in *Teamsters* that to prove a pattern or practice of discrimination, the government must show “more than the mere occurrence of isolated . . . or sporadic discriminatory acts.”³⁰⁵ Like a hostile work environment, a pattern or practice of discrimination inherently involves repeated conduct and “cannot be said to occur on any particular day.”³⁰⁶ Indeed, the government can bring a pattern-or-practice lawsuit without ever receiving allegations that an employer committed a discriminatory act in violation of Title VII.³⁰⁷ The EEOC can instead file its own charge based on the statistics it gathers.³⁰⁸

When the government brings a pattern-or-practice case, the very point is that it is accusing an employer not of discrete discriminatory acts but of a discriminatory policy or “standard operating procedure.”³⁰⁹ Accordingly, like the many acts that constitute a hostile work environment, individual acts committed pursuant to a discriminatory policy “collectively constitute one ‘unlawful employment practice.’”³¹⁰ The Court in *Morgan* held that where one act contributing to a hostile-work-environment claim occurred within the filing period, courts may grant relief for the full duration of the hostile environment.³¹¹ By extension then, as long as a pattern or practice of discrimination was in effect during the filing period, courts should consider the entire period of the discriminatory policy when assigning liability.

Defendant employers argue that applying the limitations period in this way would unfairly expose them to liability for stale claims.³¹² In

304. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 n.9 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

305. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

306. *Morgan*, 536 U.S. at 115.

307. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 84 (1984) (O'Connor, J., concurring in part and dissenting in part) (explaining that the EEOC can pursue a pattern-or-practice case based solely on employment statistics).

308. 42 U.S.C. § 2000e-6(e) (2012); *Shell Oil*, 466 U.S. at 84 (O'Connor, J., concurring in part and dissenting in part).

309. *Teamsters*, 431 U.S. at 336.

310. *Morgan*, 536 U.S. at 117.

311. *Id.*

312. Response Brief for Appellee at 53–57, *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015) (No. 13-2365), 2014 WL 1313604; Defendant's Memorandum of Law in Support of Defendant's Partial Motion to Dismiss Plaintiff's Complaint at 8–10,

FAPS, the court agreed with this argument, stating that the timely charge requirement, like any limitations period, provides “repose” for employers.³¹³ Many commentators also point out that employers may not have the documents to refute claims relating to events that occurred several years in the past.³¹⁴ But, as the Court in *Morgan* explained, allowing victims to recover for the entirety of a continuing violation “does not leave employers defenseless against . . . claims that extend over long periods of time.”³¹⁵ The section 706 limitations period is not a jurisdictional prerequisite to suit.³¹⁶ Accordingly, equitable doctrines, such as laches, estoppel, and waiver, are available to protect employers where unavailability of witnesses or other evidence in fact poses an unfair prejudice.³¹⁷

CONCLUSION

Congress passed Title VII of the Civil Rights Act of 1964 to eradicate discrimination throughout the economy and make persons whole for injuries suffered through employment discrimination. Yet, the current disparities in unemployment rates, wages, and representation in professional and leadership positions across race and gender show that we are still far from reaching this goal.³¹⁸ Pattern-or-

EEOC v. GMRI, Inc., No. MJG-13-2860, 2014 WL 3850030 (D. Md. Aug. 4, 2014), 2013 WL 10620236; Defendant’s Reply in Further Support of its Motion for Partial Summary Judgment at 3–4, EEOC v. Princeton Healthcare Sys., No. 10-4126, 2012 WL 5185030 (D.N.J. Oct. 18, 2012), 2012 WL 11789205; Defendant’s Reply Brief in Further Support of its Motion to Dismiss at 7–9, EEOC v. PBM Graphics, Inc., 877 F. Supp. 2d 334 (M.D.N.C. 2012) (1:11-CV-805), 2012 WL 10027999; Memorandum of Law in Support of Defendant’s Motion for Summary Judgment as to Time-Barred Claims at 3–6, EEOC v. Bloomberg LP, 751 F. Supp. 2d 628 (S.D.N.Y. 2010) (No. 07 Civ. 8383), 2010 WL 1701955; Defendants’ Motion to Limit the Class at 5–7, EEOC v. Custom Cos., Nos. 02 C 3768, 03 C 2293, 2004 WL 765891 (N.D. Ill. Apr. 7, 2004), 2003 WL 23683303.

313. EEOC v. FAPS, Inc., No. 10-3095, 2014 WL 4798802, at *24 (D.N.J. Sept. 26, 2014) (alteration in original) (quoting EEOC v. Bloomberg LP, 751 F. Supp. 2d 628, 645 (S.D.N.Y. 2010)).

314. See, e.g., Maatman & Strumwasser, *supra* note 215, at 84 (arguing that a charge-filing period would ensure that the EEOC files lawsuits while the relevant evidence is still discoverable).

315. *Morgan*, 536 U.S. at 121.

316. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982).

317. *Morgan*, 536 U.S. at 121.

318. See, e.g., U.S. BUREAU OF LABOR STATISTICS, NO. 1057, LABOR FORCE CHARACTERISTICS BY RACE & ETHNICITY, 2014 4 chart 3 (2015), <http://www.bls.gov/opub/reports/race-and-ethnicity/archive/labor-force-characteristics-by-race-and-ethnicity-2014.pdf> (illustrating the disparities in the average percentage of individuals employed “by occupation, race, and Hispanic or Latino ethnicity” in 2014).

practice cases, provided for under section 707 of Title VII, are a key component of the statute's enforcement scheme. Per Congress's design, these cases authorize the government to target employers who systematically discriminate against their employees and job applicants. When the government brings a pattern-or-practice case, it seeks to vindicate the public's interest in ensuring equal employment opportunity. Pattern-or-practice cases also enable the government to hold employers accountable for unlawful discrimination that litigation based solely on individuals' charges may not reach.

In the decades since Title VII was enacted, defendant employers have fought to restrict the government's ability to secure relief for victims of discrimination.³¹⁹ Among the statute's most heavily litigated provisions is section 707(e), which provides that the EEOC shall investigate and act upon charges of a pattern or practice of discrimination "in accordance with the procedures set forth" in section 706.³²⁰ Employers argue that this potentially powerful provision for eradicating discrimination, combined with the limitations period found in section 706, should be read so narrowly that it limits the class of victims eligible for relief in a pattern-or-practice suit to those harmed within 180 or 300 days prior to the underlying charge. The numerous district courts that have ruled on this issue have reached different conclusions: while some courts have applied the section 706 limitations period to pattern-or-practice cases, others have not.

A critical examination of Title VII and the Supreme Court's interpretations of its provisions demonstrate that Congress did not intend for section 706's limitations period to restrict recovery in EEOC pattern-or-practice cases. First, Congress designed pattern-or-practice cases to provide broad relief. Second, the history and legislative record of the Equal Employment Opportunity Act of 1972 indicate that Congress intended to bolster the effectiveness of pattern-

319. See, e.g., Defendants' Memorandum of Law in Support of Motion to Dismiss First Amended Complaint at 30, *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499 (S.D. Tex. 2012) (4:11-cv-03425), 2012 WL 1506101 (arguing that the section 706 limitations period restricts relief in section 707 cases); Defendant's Reply in Further Support of its Motion for Partial Summary Judgment at 2–4, *EEOC v. Princeton Healthcare Sys.*, No. 10-4126, 2012 WL 5185030 (D.N.J. Oct. 18, 2012), 2012 WL 11789205 (same); Defendant's Reply Memorandum in Support of its Motion to Dismiss Any Aspects of the Complaint Seeking Relief for Alleged Discrimination Prior to July 22, 2004 at 1–4, *EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376 (W.D.N.Y. Jan. 6, 2010), 2009 WL 5002312 (same); Defendants' Motion to Limit the Class at 5–12, *EEOC v. Custom Cos.*, Nos. 02 C 3768, 03 C 2293, 2004 WL 765891 (N.D. Ill. Apr. 7, 2004), 2003 WL 23683303 (same).

320. 42 U.S.C. § 2000e-6(e) (2012).

or-practice suits by transferring them to the EEOC. Reading a provision in the 1972 Act as making pattern-or-practice suits less effective plainly conflicts with that intent. Third, the actual language of Title VII does not provide a limitations period for section 707 cases. Fourth, Title VII's provision capping back-pay liability at two years indicates that Congress contemplated restricting employers' liability and considered such restrictions distinct from the section 706 filing period. Fifth, applying the section 706 filing period to restrict relief in pattern-or-practice cases produces inconsistent outcomes because a victim's ability to recover depends on arbitrary factors, such as the state in which they work or the type of employer for whom they work.

Even if applying the section 706 filing period in section 707 cases made sense, courts would still be mistaken in restricting relief to acts that occurred within 180 or 300 days prior to the charge. Like the hostile work environment described in *Morgan*,³²¹ a pattern or practice of discrimination is a continuing violation. Thus, assuming that the pattern or practice continues into the limitations period, the EEOC may secure relief for all individuals harmed by the practice while it was in effect. Arguments that application of the continuing violation doctrine would be unfair in this context are unfounded because equitable doctrines and the EEOC's administrative procedures protect defendant employers from litigating stale claims.

321. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (noting that a hostile-work-environment claim is considered a singular practice that consists of a series of separate acts), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).