RECENT DEVELOPMENT

DUBOIS V. PACKARD BELL CORP.: COMPLIANCE WITH STATE PROCEDURES AS A CONDITION PRECEDENT TO FEDERAL RELIEF UNDER TITLE VII

In *Dubois v. Packard Bell Corp.*,[1] the Court of Appeals for the Tenth Circuit held that a state employment commission's refusal to process a charge of employment discrimination on the ground that the charge was not filed in timely fashion with the state agency did not constitute a "termination of [state] proceedings" within the meaning of section 706(d) of Title VII of the Civil Rights Act of 1964,[2] and, therefore, the complainant could not invoke the extended-limitations-period for filing a grievance with the Equal Employment Opportunity Commission (EEOC).

The plaintiff had resigned from the Albuquerque Job Corps Center for Women, which was operated and controlled by Packard Bell

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1. 470 F.2d 973 (10th Cir. 1972).

2. 42 U.S.C. § 706(d) (1970), *as amended*, 42 U.S.C.A. § 2000e-5(e) (Supp. July, 1972). The original statute, under which the principal case was decided provided:

> (d) A charge under subsection (a) of this section shall be filed *within ninety days* after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved *within two hundred and ten days* after the alleged unlawful employment practice occurred, or *within thirty days* after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. *Id.* (emphasis added).

The current amended version provides:

> (e) A charge under this section shall be filed *within one hundred and eighty days* after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved *within three hundred days* after the alleged unlawful employment practice occurred, *or within thirty days* after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. 42 U.S.C.A.

Corporation, and filed a charge of employment discrimination with the EEOC 144 days later.[3] Pursuant to section 706(b) of Title VII,[4] the EEOC referred the charge to the appropriate state authority, the New Mexico Human Rights Commission, which declined to process the complaint on the ground that it was not filed in a timely manner.[5] The EEOC then asserted jurisdiction over the case[6] and began conciliation negotiations with Packard Bell. Following the failure of conciliation attempts, the EEOC notified the plaintiff of her right to sue in federal court.[7] After plaintiff's initiation of federal judicial proceedings, the

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§ 2000e-5(e) (Supp. July, 1972), *amending* 42 U.S.C. § 706(d) (1970) (emphasis added).

3. 470 F.2d at 974. Unlawful employment practices are defined in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1970), *as amended*, 42 U.S.C.A. § 2000e-5 (Supp. July, 1972). The exact nature of the discrimination alleged by the plaintiff in *Dubois* is not disclosed in the opinion.

4. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1970), *as amended*, 42 U.S.C.A. § 2000e-5(c) (Supp. July, 1972). Both provisions are identical, with the exception of the change in reference indicated:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) [(a) in the original version] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

The development of EEOC procedure under the subsection is discussed in notes 34-39 *infra* and accompanying text.

5. 470 F.2d at 974. N.M. STAT. ANN. § 4-33-9(A) (Supp. 1971) provides:

> Any person claiming to be aggrieved by an unlawful discriminatory practice . . . may file with the commission a written complaint . . . . All complaints must be filed with the commission within ninety (90) days after the alleged act was committed.

It is noteworthy that at the time of the principal case, the period for filing a charge with the EEOC in the absence of a state commission was also limited to ninety days. See note 2 *supra*.

6. See notes 34-39 *infra* and accompanying text.

7. Civil Rights Act of 1964 § 706(e), 78 Stat. 260 (1964), *as amended*, 42 U.S.C.A. § 2000e-5(f) (Supp. July, 1972). Under the original statutory procedure, which was applicable to the plaintiff in *Dubois*, the aggrieved party had to receive a "suit letter" from the EEOC before proceeding into federal court. In this letter, the EEOC notified the complainant that conciliation efforts had failed and that he could bring suit within thirty days after receipt of the letter. Receipt of the letter has been held to be a jurisdictional prerequisite to a suit in federal court. *See* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).

district court granted Packard Bell's motion for summary judgment,[8] holding that failure to file a charge of unlawful discrimination with the appropriate state agency within the ninety-day period prescribed by New Mexico law precluded application of the extended *federal* filing period provided in section 706(d).[9] Noting that the case was one of first impression, the Tenth Circuit relied primarily upon the legislative history of Title VII in affirming the lower court's dismissal of the case.[10]

Title VII: The Procedural Matrix

Title VII of the Civil Rights Act of 1964 was enacted in an attempt to eliminate employment discrimination based on race, color, religion, sex, or national origin.[11] In adopting the bill which was the precursor of Title VII, the House sought to delegate "primary responsibility for preventing and eliminating unlawful employment practices" to the EEOC, which was created by the measure.[12] However, the House bill, with its primary emphasis upon federal intervention in resolving employment discrimination disputes, was substantially altered when the Senate passed the Dirksen-Mansfield "leadership compromise" amendments.[13] One of the most significant changes effected by the Senate amendments is embodied in section 706(b), which provides that state

The 1972 amendments have changed the statutory scheme. The EEOC now has the power to bring a civil action against any respondent (except a governmental entity) from whom it has been unable to secure voluntary compliance. In cases involving a governmental entity, the charge must be referred to the Attorney-General, who then may bring a civil suit. The aggrieved party has the right to intervene in any suit brought by the EEOC or the Attorney-General. If the EEOC or the Attorney-General fails to enter into a conciliation agreement or file a civil action within one hundred and eighty days after the expiration of all applicable limitations periods, the EEOC must so notify the aggrieved party, who then has the right to bring a civil action in his own name within ninety days after receipt of the notice.

8. 470 F.2d at 974.

9. See note 2 *supra*.

10. 470 F.2d at 975.

11. H.R. REP. NO. 914, 88th Cong., 1st Sess. 86 (1963), *reprinted in* 1964 U.S. CODE, CONG. & ADMIN. NEWS 2391, 2401.

12. *Id. See also Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Schriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, reprinted in* 1964 U.S. CODE, CONG. & ADMIN. NEWS 2487, 2515.

13. Sen. Humphrey, one of the Senate leaders who introduced the Dirksen-Mansfield amendments, remarked:

> This is in the form of a substitute 'clean' bill that reflects 2 months of Senate debate on the version of the bill that was passed by the House. 110 CONG. REC. 12707 (1964).

See Vass, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 447 (1966).

and local fair employment practice commissions will be granted a period of at least sixty days to redress an employment discrimination grievance before the EEOC asserts jurisdiction.[14] This provision was deemed by its sponsors to be consistent with the preference indicated in the proposed measure for voluntary settlement of discrimination grievances at the local level;[15] however, in somewhat anomalous fashion, the measure as adopted cedes jurisdiction temporarily to the very state agencies whose ineffectiveness prompted passage of the Act.[16] Thus, under section 706(b) as enacted, if employment discrimination has been practiced in a state or a political subdivision thereof which has a law prohibiting such discrimination, the aggrieved party is required to file a charge with the appropriate state or local commission before pursuing any federal remedies.[17] Upon the expiration of sixty days following the filing of the complainant's charge with the state agency, the EEOC can then assert jurisdiction over the case.[18] There-

14. See note 4 *supra* for the text of this subsection. In a memorandum prepared by a staff member of the Senate Judiciary Committee, it is asserted that:

> One of the principal changes made by the Senate was to preserve State sovereignty. A State can maintain exclusive jurisdiction over unfair employment practices for a limited time if it has State or local laws prohibiting such practices. 110 CONG. REC. 14331 (1964).

The Republican floor manager of the bill, Sen. Case, remarked that:

> Clearly, under the mechanics of the bill in the form with which the leadership is concerned, more concern or more deference could not be given to the rights of the states. For example, the Federal agency which would be able to mediate in this connection could not consider taking any action for 2 months, if there were any State machinery at all. The States will be given that much time in which to deal with complaints. Only when the States have no colorable claim to give consideration to such matters can they be considered by the Federal Government in the time specified . . . . 110 CONG. REC. 13081 (1964).

15. Senator Humphrey expressed this philosophy before the Senate:

> The major substantive changes give increased emphasis to the role of State and local authorities and to methods of securing voluntary compliance. This is both salutary and consistent with the basic philosophy of the bill—that, whenever possible, the problem dealt with by the bill should be resolved locally and voluntarily. 110 CONG. REC. 13088 (1964).

See Love v. Pullman Co., 404 U.S. 522, 526 (1972); Cunningham v. Litton Indus., 413 F.2d 887, 890 (9th Cir. 1969); Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 402 (5th Cir. 1969), *cert. denied*, 403 U.S. 912 (1971); Johnson v. Seaboard Air Line Ry., 405 F.2d 645, 650-52 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Vigil v. American Tel. & Tel. Co., 305 F. Supp. 44, 46 (D. Colo. 1969), *aff'd*, 455 F.2d 1222 (10th Cir. 1972). *See also* Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 DUQUESNE L. REV. 1, 2-3 (1969); Note, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J. LAW & SOCIAL PROB. 1, 17-19 (1969).

16. In the first year and a half of EEOC operations, only 34% of the 1,495 complaints deferred to state agencies were actually processed by those agencies. Note, *supra* note 15, at 17.

17. See note 4 *supra*.

18. *Id.*

after, both state and federal commissions could proceed concurrently, with the proviso that a final judgment or settlement in one proceeding would terminate the other.[19] With respect to timeliness requirements in filing, an aggrieved party who pursued state remedies pursuant to the procedure established by section 706(b) was required to file a charge with the EEOC within the earlier of 210 days after the occurrence of the alleged discriminatory act, regardless of the status of state proceedings, or thirty days after receipt of notice that the state proceedings had been "terminated."[20] In contrast, an aggrieved party in a state without a remedial procedure for employment discrimination was required to file charges with the EEOC within ninety days after the alleged discriminatory act occurred.[21]

In 1972, subsequent to the events which gave rise to the *Dubois* case, Congress amended Title VII of the 1964 Act.[22] Among the changes effected by the 1972 amendments was a substantial expansion of the applicable limitations period for filing a charge with the EEOC. In the case of a complainant who is required to pursue state remedies, the charge must be filed with the EEOC within the earlier of 300 days after the discriminatory act occurred or thirty days after notice of the termination of state proceedings.[23] A complainant who proceeds directly with the EEOC must file the charges within 180 days after the alleged discriminatory act.[24]

In view of the procedural scheme of Title VII, the courts have generally held that certain statutory requirements constitute jurisdictional prerequisites to maintaining a suit in federal court.[25] For exam-

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19. Voutsis v. Union Carbide Corp., 321 F. Supp. 830, 833 (S.D.N.Y.), *rev'd*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972). The district court opinion was based on the goal of conservation of administrative and judicial resources, as well as principles of res judicata. The court of appeals reversed on the grounds that the settlement reached in the state proceeding was too vague to bind the plaintiff and thereby precluded a federal remedy. *See also* Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028, 1031 (9th Cir. 1970), *vacated*, 400 U.S. 1004 (1971).

20. See note 2 *supra*.

21. *Id.* *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 893 (5th Cir. 1970), wherein the court notes:

> There is nothing discriminatory about this result . . . . This is made clear by the inclusion of 42 U.S.C.A. § 2000e-5(b), which manifests the importance of local and private settlements by providing a different timetable for filing a charge with EEOC if there is a state or local fair employment practice committee. In short, some employees have local FECPs and some do not, thereby receiving a 'difference' in treatment under the statute.

22. The 1972 amendments were apparently adopted after the facts occurred in *Dubois*, since Judge Murrah's opinion does not mention the statutory changes.

23. See note 2 *supra*.

24. *Id.*

25. See note 7 *supra* for an additional example of procedural prerequisites.

ple, consistent with the congressional policy supporting extra-judicial settlement of discrimination charges, an aggrieved party is not permitted to bypass the EEOC and proceed directly into federal court.[26] Further, if a state has provided a procedure for the prosecution of employment discrimination complaints, the aggrieved party must avail himself of this procedure for sixty days before seeking redress from the EEOC[27]—even if the state-created remedies are unsuitable to the party.[28] Moreover, after receipt of notice from the EEOC of the right to sue in federal court, the complainant is restricted to a period of thirty days in which to file a complaint; indeed, failure to file suit in timely fashion constitutes an absolute bar to maintaining an action under Title VII.[29]

Judicial Construction: Liberal Interpretation of Remedial Legislation

Apart from those procedural requirements which are clearly mandated by the statute, however, courts have generally accorded a broad construction to the measure, including its procedural provisions.[30] Recognizing that procedural requirements imposed by

26. *See* Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968). *See also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1202-04 (1971). *But see* 110 CONG. REC. 14188, 14191 (1964) (remarks of Sens. Humphrey and Javits) (expressing the view that proceedings before the EEOC are not a condition precedent to an action in federal court).

27. Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028 (9th Cir. 1970), *vacated*, 400 U.S. 1004 (1971); EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1969); Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). *See generally Developments in the Law, supra* note 26, at 1212-16.

28. In Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028 (9th Cir. 1970), *vacated*, 400 U.S. 1004 (1971), the Ninth Circuit held that dismissal was proper where the plaintiff had deliberately bypassed the Arizona Civil Rights Commission and filed a charge with the EEOC. The Arizona CRC was empowered only to bring criminal charges or seek conciliation. The plaintiff sought injunctive relief and argued that a proceeding with the Arizona CRC would be an exercise in futility. The Ninth Circuit held that the power to seek voluntary compliance is "relief" under § 706(b) and that plaintiff's failure to follow the statutory procedure was fatal to his claim. The Supreme Court vacated the judgment and remanded the case for reconsideration in light of the suggestions made in the Solicitor-General's amicus brief. The Court did not, however, specify what those suggestions were. The Ninth Circuit's holding received implicit approval in the 1972 Amendments to Title VII. See notes 2, 4 *supra*.

29. *See* Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258, 1260 (N.D. Miss. 1971). *See generally Developments in the Law, supra* note 26, at 1209.

30. *See, e.g.*, Love v. Pullman Co., 404 U.S. 522, 527 (1972) ("[T]echnicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by

section 706 are vague[31] and that "the average complainant is not initially represented by counsel, has no knowledge of the niceties of the statute and generally makes his 'charge' in crude homemade fashion,"[32] the courts have held many of the formal requirements of the statute to be " 'directory' rather that 'mandatory.' "[33] For example, if a charge is filed with the EEOC before being filed with the appropriate state agency, the EEOC automatically forwards a copy to the state agency. Upon termination of the state proceedings or the expiration of sixty days, whichever is earlier, the EEOC will then assert jurisdiction over the case without further action on the part of the complainant.[34] With respect to this administrative practice, the Tenth Circuit in *Love v. Pullman Co.*[35] held that the statute contemplated a *second* filing of charges with the EEOC, rather than an automatic reassertion of jurisdiction by the Commission. However, a unanimous Supreme Court reversed the decision of the court of appeals, holding that the EEOC's existing procedure of automatic resumption of jurisdiction "complied with the purpose . . . of § 706(d), to ensure expedition in the filing and handling of those complaints,"[36] and that a second filing require-

trained lawyers, initiate the process."); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) ("It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969) ("Title VII of the Civil Rights Act of 1964 should not be construed narrowly . . . ."); Vigil v. American Tel. & Tel. Co., 305 F. Supp. 44, 47 (D. Colo. 1969), *aff'd*, 455 F.2d 1222 (10th Cir. 1972) ("Surely Congress did not intend to create a procedural morass, or a trap capable of capturing even the wary traveler."); Georgia Power Co. v. EEOC, 295 F. Supp. 950, 953 (N.D. Ga. (1968)), *aff'd*, 412 F.2d 462 (5th Cir. 1969) ("[C]ourts should not be overly technical or strict as to form . . . .").

31. *See, e.g.*, Cunningham v. Litton Indus., 413 F.2d 887, 889 (9th Cir. 1969) ("[T]he statute leaves much to be desired in clarity and precision . . . ."); Coleman, *supra* note 15, at 2 ("Title VII has been termed somewhat less than a model of legal draftsmanship. Nowhere is this indictment more deserved than in the sections dealing with procedures preliminary to court enforcement.").

32. Georgia Power Co. v. EEOC, 295 F. Supp. 950, 953 (N.D. Ga. 1968), *aff'd*, 412 F.2d 462 (5th Cir. 1969).

33. Thus, with only minor exceptions, the courts have adopted a permissive attitude toward Title VII's formal requirements, holding most of the limitations expressed in the statute to be "directory" rather than "mandatory." Consequently, the incidence of dismissals, non-suits and summary judgments stemming from the failure of complainants or the Commission to comply with the Act's legal technicalities have sharply declined. Coleman, *supra* note 15, at 29.

34. 29 C.F.R. § 1601.12 (1971). *See also* Coleman, *supra* note 15, at 8-9; *Developments in the Law, supra* note 26, at 1213.

35. 430 F.2d 49 (10th Cir. 1970), *rev'd*, 404 U.S. 522 (1972). The Tenth Circuit's opinion is criticized in Comment, *A Look at* Love v. Pullman Co., 37 U. CHI. L. REV. 181 (1969); *Developments in the Law, supra* note 26, at 1212-16.

36. 404 U.S. at 526.

ment would be a needless "procedural technicality," inappropriate to the statutory scheme.[37] In a subsequent case, *Vigil v. American Telephone and Telegraph Co.*,[38] the Tenth Circuit acknowledged its previous error in *Pullman* and recognized that the EEOC may hold a complaint in "suspended animation" pending the expiration of the sixty-day period of exclusive state jurisdiction.[39]

In *Dubois v. Packard Bell Corp.*, the Tenth Circuit distinguished the *Pullman* and *Vigil* decisions by noting that in those cases the appropriate state commissions had been given a "bona fide opportunity to act upon the claims—an opportunity denied the New Mexico Commission" in *Dubois* by the plaintiff's failure to meet the state statutory deadline.[40] The court stated that the legislative history of subsections 706(b) and (d) is so "manifestly clear as to remove all doubt" that the sole purpose of those subsections is to insure that states will be able to process employment discrimination cases before the plaintiff resorts to federal remedies.[41] The court of appeals expressed concern that a contrary holding "would enable a claimant to completely bypass state proceedings in favor of federal proceedings by simply waiting until the state is prevented . . . from considering the claim, and then [utilize] the extended filing provisions of subsection (d)—a result which flies in the face of the congressional intent."[42]

In its attempt to effectuate congressional intent, the Tenth Circuit clearly declined to give section 706(d) the "liberal interpretation [usually] accorded remedial legislation . . . ,"[43] notwithstanding the fact that the court expressly recognized that prior decisions had treated as "directory" those procedural requirements of Title VII which are not clearly mandatory on the face of the statute.[44] Several factors in the

37. *Id.* See note 30 *supra.*

38. 455 F.2d 1222 (10th Cir. 1972), *aff'g* 305 F. Supp. 44 (D. Colo. 1969).

39. *Id.* at 1224-25. The court held that the filing of a complaint with the EEOC, which must then be referred over to a state or local agency, tolls the running of the 210-day limitations period for filing with the EEOC under § 706(d).

40. 470 F.2d at 975. See note 5 *supra.*

41. 470 F.2d at 975.

42. *Id.* See notes 13-15 *supra* and accompanying text.

43. 470 F.2d at 975.

44. See notes 30, 33 *supra. See also* Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968), wherein three courts of appeals rejected the contention that there is an overall time limitation of 180 days in § 706 (ninety days to file the charge, followed by sixty days for the EEOC to conciliate and the thirty days to file a complaint in federal court after receipt of the "suit letter"). These cases reflect a "broad" interpretation of a procedural technicality which could have been inferred from § 706 without doing violence to the text of the statute.

instant case were undoubtedly influential in the court's decision to adhere strictly to statutory requirements. It is clear, as the court recognized, that the plaintiff in *Dubois* was attempting to use the extended filing period of section 706(d) to circumvent her failure to file the charge of employment discrimination within either the state or federal limitations period of ninety days. Further, the court was no doubt influenced by the strict construction given to the limitations periods in state remedial legislation by the New Mexico Supreme Court.[45] Indeed, prevention of forum-shopping by achieving harmony between the interpretations of state and federal provisions is a desirable result of the *Dubois* decision. Limited solely to its facts, the court reached a justifiable determination in the case.

However, *Dubois* is not expressly limited to its facts, and in light of the recent amendments to Title VII extending the limitations period for the filing of a complaint to 180 days after the alleged violation,[46] the case has a disturbing potential for disruption of the entire federal scheme for vindicating employment rights. It is conceivable that a state legislature which is either hostile to the objectives of Title VII[47] or which simply fails to adopt a liberal period for filing a grievance could enact a restricted limitations period which an aggrieved party would be required to satisfy in order to seek redress in *either* state or federal court. Indeed, if the precise factual situation in *Dubois* occurred subsequent to the effective date of the 1972 amendments, the court would be presented with the circumstance in which the federal filing period was satisfied by the complainant, but the state's filing period was not. Complete foreclosure of Title VII relief because of a complainant's failure to abide by stringent state requirements seems manifestly undesirable in light of the relative ineffectiveness of most

45. *See* Swallows v. City of Albuquerque, 61 N.M. 265, 266-67, 298 P.2d 945, 946-47 (1956), a workmeu's compensation case, wherein the New Mexico Supreme Court stated:

> Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as the remedy, and in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations . . . . If one does not protect himself and his rights uuder the law as written it is his misfortune, and this court should not by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the legislature has not seen fit to enact.

46. See note 2 *supra.*

47. At the present time, only 33 states and the District of Columbia have procedures for the redress of employment discrimination. *See* Coleman, *supra* note 15, at 8 n.29; Note, *supra* note 15, at 17. The major features of state fair employment practice laws are set out in Purdy, *Title VII: Relationship and Effect on State Action*, 7 B.C. IND. & COM. L. REV. 525, 527 (1966).

existing state procedures.[48] Thus, it is apparent that congressional amendment of section 706(d) is needed to limit the holding in *Dubois* to its facts. Such an amendment[49] would need to make clear that failure to file a timely charge with a state agency operates as a bar to federal relief *only* when the state's limitations period coincides with or exceeds the federally prescribed period. Obviously, to the extent that a federal limitations period operates effectively to preempt the controlling state period with respect to the processing of claims in the *federal* administrative system, the accommodation of state and federal

48. *See Developments in the Law, supra* note 26, at 1215:

> Insistence on formalistic requirements is particularly indefensible in light of the fact that the overall deferral scheme has little to recommend it. The mandatory sixty day deferral period does not encourage state agencies to enforce their anti-discrimination laws vigorously since the time period allowed is too short to reach a resolution of the problem. As a theoretical matter one might suppose that states would attempt to create strong remedies in order to keep the complainant in the state system after the sixty day period has elapsed. But as a practical matter, no trend in this direction seems to have developed; at the end of the mandatory sixty days, most complainants turn to the EEOC.

See also Note, *supra* note 15, at 18-19. Further, the present procedures are already confusing enough without the addition of a myriad of state limitations periods. See Comment, *supra* note 35, at 188:

> [T]oo often the procedural hurdles standing between an aggrieved individual and his potential remedy have the appearance of being designed to prevent the individual from ever receiving any relief. Turned away from the EEOC with instructions to see the state agency and then come back, many complainants might well conclude that they were once more "being given the runaround." Each additional procedural rule requiring further individual initiative acts as a screen to filter out the doubtful and the discouraged.

See also note 30 *supra*. *But cf.* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1177 (1965).

49. The current version of § 706(e) is set forth in note 2 *supra*. Below is a proposed version of that section designed to incorporate the changes suggested in the text:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unfair employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unfair employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under State or local law, whichever is earlier, and a copy of such charges shall be filed by the Commission with the State or local agency; *Provided that: if a State or local agency refuses to assert jurisdiction over a charge for the reason that the person aggrieved has failed to file a charge within a limitations period provided by State or local law which is shorter than one hundred and eighty days, such refusal of jurisdiction shall be a termination of proceedings under State or local law for purposes of this subsection, and the aggrieved person shall be entitled to file a charge with the Commission within thirty days after receipt of notice from the State or local agency that it has declined to assert jurisdiction over the charge* (proposed changes in italics).

processes is disrupted. Nonetheless, the overall congressional attempt to avoid emasculation of state procedures would seem to be satisfied by the EEOC's refusal to assert jurisdiction over a claim filed within the federally prescribed period until the appropriate state agency has, for whatever reason, refused to continue processing the claim, up to the statutorily prescribed period of sixty days. Enactment of such an amendment would enable states to take initial jurisdiction of the grievance, as contemplated by the Act,[50] but would prevent the frustration of federal rights by the passage or continuation of a restricted state limitations period—a result which the decision in *Dubois* makes possible.

50. See notes 13-15 *supra* and accompanying text. It should be noted that a plaintiff who fails to obtain relief under Title VII of the Civil Rights Act of 1964 may still pursue a remedy under 42 U.S.C. § 1981 (1970). The Supreme Court recently indicated that a right of action against private individuals may exist under § 1981. *See* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 41 U.S.L.W. 4311, 4314 (U.S. Feb. 27, 1973).