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Title VII--Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by the EEOC within the 300-day Limitation of 706(e)

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Title VII—Timely Filing Requirement in Deferral States
Is Satisfied When the Initial Complaint Is Received by
the EEOC Within the 300-day Limitation of § 706(e)

Silver v. Mohasco Corp.*

I. Introduction

The Second Circuit’s decision in Silver v. Mohasco Corp.¹ involved the interpretation of the filing requirements for an employment discrimination suit under Title VII of the Civil Rights Act of 1964.² The Silver court held that a discrimination claim may be "filed" with the Equal Employment Opportunity Commission (EEOC) during the statutorily required state deferral period.

Title VII seeks to eliminate employment discrimination on the basis of race, color, religion, sex, or national origin.³ In order to effectuate this goal, the EEOC was established to supervise the complicated administrative and judicial enforcement scheme designed by Congress.⁴

The procedural requirements as stated in Title VII leave many questions unanswered. This comment will explore the specific statutory provisions involving interaction between the federal and state employment discrimination agencies, and the effect of this relationship on the time limitations for filing a Title VII claim.

A proper analysis of the Title VII filing requirements also requires exploration of the complex legislative history of the Act as well as investigation of relevant judicial decisions. Such an exploration is, therefore, included in this comment in order that the time limitations on filing may be more fully understood.⁵

II. Statement of the Facts

Ralph H. Silver, a man of the Jewish faith, was hired by the Mohasco Corporation on July 15, 1974. Silver alleged that throughout his relationship with Mohasco he was harassed and abused by the corporate officials in an effort to force his resignation. Silver believed that he was a victim of a plan by the corporation by which minorities were hired, harassed, and fired in a systematic manner in order to create a facade of equal employment opportunity in compliance with the mandates of Title VII.

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* 602 F.2d 1083 (2d Cir. 1979), cert. granted, 48 U.S.L.W. 3383 (U.S. Dec. 11, 1979) (No. 79-616).
1 Id.
5 A secondary issue raised by Silver involved the power of the court to consider allegations of blacklisting and false references by an employer subsequent to an employee’s discharge. This issue is not within the scope of this comment.
Silver was discharged by Mohasco on August 29, 1975, thirteen months after being hired. No action was taken by Silver until June 15, 1976, 291 days after his discharge. On this date he wrote to the Buffalo office of the EEOC alleging that he had been both hired and fired because of his religious beliefs. At this point, the complex procedural scheme of Title VII was set in motion. Upon receipt of Silver's letter, the EEOC forwarded it to the New York State Division of Human Rights (NYSDHR), the state counterpart to the EEOC. This deferral by the EEOC to the state agency was in compliance with the procedures of Title VII, which give the state agency 60 days to act on the charge before the EEOC may begin processing the claim. The EEOC advised the NYSDHR that it would automatically file the charges at the end of the 60-day deferral period. The EEOC formally processed Silver's charge on August 20, 1976.

On February 9, 1977 the NYSDHR issued a report stating that it had found no probable cause to believe that Silver had been discharged due to his religion. The EEOC without further investigation adopted the findings of the state agency as its own on August 24, 1977. At this juncture, the statutorily required "right to sue" letter was issued by the EEOC to Silver, allowing him to pursue his remedy in federal district court.

Silver filed formal charges in the Northern District of New York on November 23, 1977. The suit was dismissed by the district court on the ground that Silver's original filing with the EEOC had not been timely. The Second Circuit, viewing the time limitations of Title VII in a more liberal manner, reversed the decision and deemed the charges timely filed.

III. Title VII Procedure in Brief

The vehicle of enforcement for Title VII violations is the Equal Employment Opportunity Commission. The procedures to be followed by the agency are delineated in the Act and in periodic publications of rules and regulations formulated by the Commission itself.

The initial step of the procedure is the receipt of the aggrieved party's complaint by either the EEOC or the appropriate state agency. If a state or local agency is qualified to deal with the complaint, the law requires that the EEOC defer to the state or local agency for a period of 60 days, unless the state

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6 At the present time 43 states have such agencies. [1979] 8 LAB. REL. REP. (BNA) § 1601.74.
7 The following note from the EEOC to the NYSDHR was attached to the letter: This charge is being deferred to your agency pursuant to § 706(c) of the Civil Rights Act of 1964, as amended. The Commission will automatically file this charge at the end of the period, unless we are notified before the expiration of that period that your agency has terminated its proceedings. Brief for Appellee at 4, Silver v. Mohasco Corp., 602 F.2d 1083 (2d Cir. 1979) (quoting letter from EEOC to NYSDHR, June 15, 1976) (emphasis added).
8 Had the NYSDHR terminated proceedings within nine days, there is no doubt that Silver's charge would have been deemed timely filed. The language of § 706(e), allowing EEOC action upon termination of state proceedings, permits such claims to receive immediate attention. See text accompanying note 22 infra.
10 Id.
proceedings terminate earlier.\textsuperscript{11} If a state does not have an agency to deal with employment discrimination, the procedure is simplified in that the only time limitation applicable is one calling for filing with the EEOC within 180 days.\textsuperscript{12}

Upon expiration of the statutory deferral period, or immediately if the state has no agency to deal with the complaint, the EEOC may embark upon its own investigation of the claim.\textsuperscript{13}

At the termination of this investigation, the EEOC will issue a determination as to the validity of the claim.\textsuperscript{14} Should the Commission find reasonable cause to believe a violation has occurred, it will make efforts to remedy the situation through conference, conciliation, or persuasion.\textsuperscript{15} If conciliatory efforts by the Commission prove unsuccessful, the EEOC may bring suit on behalf of the individual in federal district court.\textsuperscript{16}

Regardless of whether the EEOC finds reasonable cause to believe that a violation has been committed, the private party may initiate a suit in federal district court to seek a remedy on his own behalf.\textsuperscript{17} Access to the federal judiciary is triggered by the EEOC's automatic issuance of a "right to sue" letter to the individual, which authorizes the party to bring suit within 90 days of receipt of the letter.\textsuperscript{18} The "right to sue" letter will be issued by the EEOC: (1) after a finding of no reasonable cause to believe a violation has occurred, or (2) after a finding of cause, failure of conciliation, and a determination that the case will not be litigated by the EEOC on behalf of the complainant.\textsuperscript{19}

This unique combination of administrative and judicial action in dealing with employment discrimination claims has caused a good deal of procedural confusion. An example of this confusion is found in the vague filing requirements of Title VII. Indeed, it was this very confusion which led the district court and the circuit court to come to different conclusions in Silver.

IV. Conflicting Definitions of "Filed"

The definition of a seemingly simple word—"filed"—is critical to the determination of the timeliness of a Title VII complaint. The dilemma in interpreting the word "filed" is due to the fact that the word is used in two portions of section 706 of Title VII without sufficient elaboration of its meaning.\textsuperscript{20}

\begin{footnotes}
\item[11] If the state agency has been in existence for less than one year, the deferral period is 120 days. 42 U.S.C. § 2000e-5(c) (1976) (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, § 706(c)).
\item[15] Id. Title VII indicates a strong preference for voluntary settlement.
\item[18] Id. A private party may also come before the courts without this "right to sue" letter via intervention in an action pursued on his behalf by the EEOC. Id.
\item[19] Id.
\end{footnotes}
Section 706(c) in pertinent part provides:

In the case of an alleged unlawful employment practice occurring in 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 . . . no charge may be filed . . . [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred twenty days during the first year after the effective date of such State or local law. . . .

The meaning of this section is not entirely clear when read in conjunction with a related portion of the statute, section 706(e). This section provides that:

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 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. . . .

There were two possible interpretations of section 706 available to the Second Circuit in Silver’s case. First, the statute can be read literally with “filed” meaning the same thing in both sections 706 (c) and (e). Under this view Silver’s claim could not have been “filed” with the EEOC until 60 days after the EEOC had deferred the claim to the state agency. Since Silver did not report his claim to the EEOC until 291 days after the alleged discriminatory firing occurred, waiting the 60 days as required by section 706(c) would mean that Silver’s claim was not “filed” with the EEOC until 352 days after the act occurred. Such a literal interpretation would cause Silver’s claim to be classified as untimely under section 706(e), which requires filing with the EEOC within 300 days after the alleged discriminatory act in those states in which deferral is required.

This literal interpretation requires that the aggrieved party’s claim reach the state agency, either directly from the party or via the EEOC deferral policy, within 240 days after the discriminatory act.

The second possible route open to the Second Circuit, and that which was adopted in Silver, is interpretation of the word “filed” in section 706(c) as different from the word “filed” in section 706(e). This equates the word “filed” in section 706(e) to mean “received.” The interpretation still requires the

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23 See text accompanying notes 45-50 infra.
24 This figure is arrived at by subtracting the 60-day mandatory deferral period of § 706(e) from the maximum 300-day time limitation for filing with the EEOC in § 706(e).
federal agency to refrain from processing the charge until the 60-day state deferral period has elapsed, and is consistent with the intent of section 706(c) to allow appropriate state agencies the initial opportunity to resolve disputes. This interpretation, however, would allow filing with the EEOC to occur within the state deferral period. Under this liberal view, Silver's claim would be considered filed for purposes of section 706(e) on the 291st day after the discriminatory act occurred, before expiration of the 60-day deferral period, and in apparent contravention of section 706(c).

V. Legislative History of the Title VII Filing Procedure

Examination of the legislative history of Title VII reveals a conflict as to the meaning and purpose of the time limitations for filing a claim when the claim is initially deferred to a state agency. The central issue in this conflict is the nature of the interpretation to be given to the word "filed."

A. The Case for Literal Interpretation

If the word "filed" is read literally, that is, filing with the EEOC is not permitted within the 60-day deferral to the state agency, then Mr. Silver's complaint must be classified as untimely. Silver took his initial action on the 291st day, therefore, if he were required to wait the 60 days before filing with the EEOC, the earliest possible date for federal filing would be 352 days after the discriminatory act. Viewed from this literal perspective, the aggrieved party must take initial action, either directly or via the EEOC deferral policy, within 240 days after the alleged discriminatory act. The figure 240, however, is found nowhere in the statute.

B. A More Restrictive Approach

The legislative history of section 706 reveals that its provisions were altered as the major ingredient of the Mansfield-Dirksen compromise. This compromise was a major factor in the passage of the Civil Rights Act of 1964. The primary provisions of the compromise called for short limitation periods and deferral to appropriate state agencies. The compromise provided for state action to settle employment discrimination problems whenever possible. This cession of power was an effort to respect individual state agencies that were already in existence, and those that might come into existence.

Due to the requirement of state action on claims, the compromise extended the filing limitation 120 days beyond that allotted in nondeferral states. In arguing on the Senate floor on behalf of the compromise, Senator Everett

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25 But see text accompanying notes 66-76 infra, discussing the tolling concept as applied to the filing limitations.

The following cases have recognized a second exception to the filing limitations in the case of a continuing violation: Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977); Macklin v. Spector Freight Sys. Inc., 478 F.2d 979 (D.C. Cir. 1973); Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969).


27 See note 11 supra.
Dirksen was quite specific as to the intended usage of the additional 120 days. He stated:

New subsection (d) [now labelled (e)] requires that a charge be filed with the Commission within 90 days [now 180 days] after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b) [now (c)], he may file the charge within 210 days [now 300 days] after the alleged [unlawful employment] practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The additional 120 days is to allow him to pursue his remedy by State or local proceedings.28

The language of Senator Dirksen indicates that the extended filing period was not intended to be a bonus for those who live in deferral states,29 but as an equitable provision for those who are required to pursue state remedies. The obvious fear of the Congress was that the time limitations on the federal right would expire while the party was involved in required state proceedings.

During the 1972 session of Congress, significant changes were made in the Civil Rights Act of 1964 via the Equal Employment Opportunity Act of 1972.30 The 1972 amendment affecting section 706(e) extended the period for filing with the EEOC from 90 to 180 days in nondeferral states, and from 210 to the present 300 days in deferral states. The remainder of the statute was not changed.

A conference report submitted by Representative John Dent, and accepted by the House, in conjunction with the 1972 amendments, offers support for an even more restrictive interpretation than the 240-day initial action interpretation of the literal approach. The report of Representative Dent construed the statute to require the complainant to take initial action with the EEOC or the appropriate state agency within 180 days after the occurrence of the discriminatory act.31 Two sections of the report described the procedure to be followed in both deferral and nondeferral states. The first sentence of each section indicated that the time limitation for initial action in both instances should be 180 days.32

A possible rationale for Dent’s approach is that a new state agency is required to be allowed 120 days to process a charge without EEOC action.33 This

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28 602 F.2d at 1093 (quoting EEOC's Legislative History of Titles VII and XI of the Civil Rights Act of 1964 at 3018) (emphasis added).
29 See Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1233 (8th Cir. 1975).
31 PROCEDURE WHERE NO STATE EQUAL EMPLOYMENT OPPORTUNITY LAW EXISTS
   (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
   
PROCEDURE WHERE STATE EQUAL EMPLOYMENT OPPORTUNITY LAW EXISTS
   (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
   
   If a charge is initially filed with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local agency has terminated proceedings.
118 Cong. Rec. 7569 (1972) (report of Representative Dent).
32 Id.
33 A "new state agency" refers to one which has been in existence for less than one year. 42 U.S.C. § 2000e-5(c) (1976) (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, § 706(c)).
deferral period plus the 180 days allowed in nondeferral states yields the maximum 300-day period for EEOC filing. Similarly, Representative Dent's approach would require filing with the EEOC within 240 days if the state agency was already existing, and thus allowed only a 60-day deferral period. This 60-day deferral period plus the 180 days allowed in nondeferral states yields a maximum 240-day period for EEOC filing. In light of the overall remedial purposes of Title VII, this second position, concerning states with preexisting state agencies, appears untenable and unjust. Indeed, it is misleading to require a complainant to make several computations, as suggested by the above approach, before arriving at the applicable filing limitation when the necessity to do this is not apparent on the face of the statute.

The legislative history indicates that the EEOC filing system was designed to allow individual state agencies time to act upon claims. It also appears to require that the 60-day deferral period be completed within the 300-day limitation indicated in section 706(e). Reading the statute literally, therefore, the initial filing with the state agency, either directly or through the EEOC deferral policy, must occur within 240 days after the discriminatory act. Under the more restrictive approach, initial action is required within 180 days after the discriminatory act. Thus, "filing" for purposes of section 706(e) cannot occur before or during the deferral period of section 706(c) under either the literal or more restrictive approach.

C. The Case for Liberal Interpretation

Although the final draft of the Equal Employment Opportunity Act of 1972, amending the Civil Rights Act of 1964, altered only the filing limitations of section 706(e), the legislative reports surrounding the Act are critical to an analysis of the filing requirements of Title VII.

The most persuasive evidence of Congressional intent to allow a complainant the full 300 days provided in section 706(e) to make his initial complaint may be found in the legislative reports. These reports explain why there was no need to change the existing statutory language of section 706(e) during the 1972 reevaluation of Title VII.

Congress would allow a complainant to "file" a claim with the EEOC within the 60-day deferral period, contrary to the language of section 706(c). Under this view, Silver's reporting of his claim to the EEOC on the 291st day would have satisfied the requirement of section 706(e) that a charge be filed with the EEOC within 300 days after the discriminatory act. A bill passed by the Senate in 1972 is illustrative of this Congressional viewpoint. This bill would have changed the language of section 706(c) from "no charge may be filed" to "the Commission shall take no action." 34 It was defeated in the House, however,

34 The proposed bill would have revised § 706(c) to read:
(c) In the case of a charge filed by or on behalf of a person claiming to be aggrieved alleging an 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 the Commission shall take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, except
because the change was deemed unnecessary in light of the existing judicial practice to interpret the language of section 706(c) in a manner consistent with the suggested change.\textsuperscript{35} The language of the proposed bill and the reasons for its defeat in the House indicate a Congressional intent to favor a liberal interpretation of the word "filed." Thus, a charge would be considered "filed" with the EEOC upon receipt, prior to the 60-day deferral to the state agency.

Strong support for a liberal interpretation of section 706 is found in the section-by-section analysis of the House-Senate Conference Committee report accompanying the Equal Employment Opportunity Act of 1972. It states:

Section 706 (c) and (d) . . . . No change in these provisions was deemed necessary in view of the recent Supreme Court decision of Love v. Pullman Co., ___ U.S. ___, 92 S. Ct. 616 (1972) which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. . . . Similarly, the recent circuit court decision in Vigil v. AT&T, ___ F.2d ___, 4 FEP cases 345 (10th Cir. 1972), which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706 (c) and (d) [now section 706(e)], a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period, is within the intent of this Act.\textsuperscript{36}

This report indicates that an interpretation allowing "filed" in section 706(e) to vary in meaning from "filed" in section 706(c) is not beyond the legislative intent. It is apparent that the drafters of the report believed that this interpretation had already been adopted by the federal courts. The clear import of the section-by-section analysis is that the full 300 days allowed in section 706(e) are available to a complainant for the purpose of making his initial filing with the EEOC. Thus, the charge may be filed with the EEOC within the 60-day state deferral period, notwithstanding the language of section 706(c).

Later, in the same document, the Committee further endorses those judicial decisions that have taken a liberal view of Title VII filing requirements. The report states:

Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected [by the Equal Employment Opportunity Act].\textsuperscript{37}

\textsuperscript{35} See text accompanying note 36 infra.


\textsuperscript{37} Id.
The legislative history of Title VII seems to conflict, in that support for both the strict and the liberal interpretation does exist. In the final analysis, however, the strong language of the House-Senate Conference Committee is persuasive in its endorsement of the liberal interpretation of the filing requirements applicable to Title VII.

VI. Effect of EEOC Regulations

The EEOC is authorized to issue regulations interpreting the procedural scheme of Title VII.38 The regulations in effect during the litigation of the Silver case contained a specific provision interpreting the filing requirements in situations where deferral to state agencies was required.39 Under this EEOC regulation, Silver’s claim would be “automatically filed” on the 300th day.

The district court found this regulation to be unauthorized by statute due to the conflict between section 706 and the then-effective regulation. As written, the regulation would have allowed active investigation by the EEOC on the 300th day, significantly diminishing the amount of time available for the exclusive state or local action. Thus, the court correctly concluded that the regulation frustrated the strong federal policy behind the deferral system.40

More recent regulations issued by the EEOC indicate a predisposition toward a more liberal interpretation.41 Through this interpretation it attempts to preserve the federal remedy when a charge is initially filed with the EEOC after 240 days have elapsed since the discriminatory act, yet before the 300-day limit has expired.

Although the intent of the EEOC is clear, the effect of the agency’s interpretation is minimal if it is not recognized by the judiciary. While some cases have held that the federal agency’s interpretation is to be given great deference,42 it is also apparent that the judiciary may seek to determine

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39 The regulation states:

In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency [a state agency approved by the EEOC], the case shall be deferred pursuant to the procedures set forth above: Provided, however, That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.


40 Although not applicable to Silver, it is noteworthy that the subsequent edition of the EEOC regulations deleted the “automatic filing on the 300th day” provision, and substituted the present regulation specifying that the § 706(e) filing requirements are satisfied on the day that the Commission initially receives the charge—the precise holding in Silver.

The present regulation states: “The timeliness of a charge shall be measured for purposes of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission.” 29 C.F.R. § 1601.13(a) (1978).

41 Id.

legislative intent through its own analysis and disregard the opinion of the EEOC.\textsuperscript{43}

VII. Judicial Interpretation

Recognizing that Title VII is a remedial statute designed to benefit the workingman, the judiciary has consistently resolved procedural questions with a bias toward liberality.\textsuperscript{44} The decision in Silver is a logical extension of this liberal interpretation.

A. The Love Decision

The primary source of judicial guidance in the interpretation of Title VII filing requirements is the Supreme Court decision in \textit{Love v. Pullman Co.}.\textsuperscript{45}

In Love, the complainant lodged a complaint with the EEOC alleging conduct by an employer in violation of Title VII. The EEOC filed the charge orally with the state agency. Subsequently, the state agency waived the opportunity to explore the complainant’s charge, and informed the EEOC. The EEOC treated the charge as filed on the day the state agency waived its right to process it. Without further action by the complainant, the EEOC began its own investigation. The investigation found probable cause to believe the charge to be true, but attempts by the EEOC at voluntary conciliation proved unsuccessful. The complainant then brought suit on his own behalf in accordance with Title VII procedure.

The Tenth Circuit,\textsuperscript{46} however, required a second filing by the complainant with the EEOC, after the state agency’s dismissal of the charge. Love’s failure to file with the EEOC a second time caused the circuit court to dismiss his case. On review, however, the Supreme Court found this second filing to be unnecessary since the EEOC already possessed sufficient information to conduct

\textsuperscript{43} See General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), where the Court states: “[C]ourts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.” \textit{Id.} at 141.

The Court in \textit{General Electric} cites \textit{Skidmore v. Swift & Co.}, 323 U.S. 134 (1944) as giving a proper view as to interpretation of administrative regulations. Although the \textit{Skidmore} case interpreted the Fair Labor and Standards Act, the case is analogous. The Court in \textit{Skidmore} stated:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of the reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

\textit{Id.} at 140.

\textsuperscript{44} See, e.g., Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970) in which the court stated: Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. 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.

\textit{Id.} at 891.

\textsuperscript{45} See also \textit{Wetzel v. Liberty Mut. Ins. Co.}, 511 F.2d 199 (3d Cir. 1975); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).


\textit{Love v. Pullman Co.}, 430 F.2d 49 (10th Cir. 1970).
an investigation. According to the Court’s interpretation the charge was automatically filed upon termination of the state proceedings.

Title VII is silent as to the procedure to be followed when a complaint is initially reported to the EEOC rather than the appropriate state agency. The procedure developed by the EEOC provided for referral of the claim to the appropriate state agency upon receipt, and automatic filing with the EEOC at the expiration of 60 days or upon termination of the state proceedings. It was this procedure that produced the basic issue in Love. The Supreme Court found that the automatic filing procedure used by the Commission upon termination of state proceedings “complied with the intent of the Act.”

The decision in Love was a step toward a more liberal approach in the interpretation of Title VII filing requirements. The violation in Love, however, was of a continuing nature bringing it within an exception to the 300-day limit. Thus, the “automatic filing” procedure used in Love fell unquestionably within the limitations of section 706(e), unlike the procedure followed in Silver. Since it was determined by the district court that Silver did not involve a continuing violation, the 300-day limit was therefore applicable.

B. Beyond Love

The “automatic filing” concept of Love, when applied to Silver, would place the official filing date at 352 days after the alleged discriminatory act. Therefore, the Silver court had to extend the Love decision to allow filing for purposes of section 706(e) to take place at the point of initial action with the EEOC. Strict application of the Love principle to the facts in Silver would yield a result contrary to that reached by the Second Circuit, because the Silver court held that the charge was filed upon receipt, before the deferral period, rather than after the deferral period as in Love. The liberal spirit of the Love decision, however, is the aspect of the case that guided the court in Silver.

In Silver, the Second Circuit found the “clear import of Love” to be that the charge was filed when initially received by the EEOC. Although such an interpretation is an overstatement of the Love decision, it provides an insight in-

47 404 U.S. at 526.
49 404 U.S. at 525.
50 A footnote in the Love decision is worthy of explanation. The relevant portion of this note provides: “[T]he statutory prohibition of § 706(b) [now (c)] against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt.” Id. at 526 n.5.

This note was the Court’s response to an EEOC regulation under the heading “Contents and Amendments [of the charge].” that allowed filing to occur on the date the initial complaint was received in order that any later amendments made might relate back to that date. This portion of the regulation was not primarily applicable in Love, as another portion of the regulation dealt specifically with filing dates in deferral states. 29 C.F.R. § 1601.11(b) (1977) (Contents and Amendments); 29 C.F.R. § 1601.12 (1977) (Deferrals to State and Local Authorities).
51 The tone of the Love decision is typified by the following quote: “Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.” 404 U.S. at 527.
52 See comments on the Love decision in Silver, 602 F.2d at 1087.
to the background of the liberal interpretation used by the court in its analysis of Silver.

C. Interpretation Among the Circuits

Four circuits have faced the question raised in Silver concerning the meaning of the word "filed" as used in section 706(c) and section 706(e). Two circuits have favored a liberal interpretation, allowing the claimant the maximum possible benefits of the section 706(e) filing limitations. One circuit has favored a literal approach, narrowing the time allowed for filing a claim, and another has appeared unsure as to which approach is appropriate.

The Tenth Circuit, in Vigil v. AT&T, held that a complainant who correctly filed with the state agency could file a valid charge with the EEOC within the state deferral period. This holding is in conflict with a literal reading of section 706(c), which would prohibit filing with the EEOC during this 60-day period. Upon expiration of the state deferral period, the EEOC began processing the claim. Thus, the EEOC in considering the claim to have been "filed" during the 60-day period, yet not taking any action until the deferral period expired, honored the strong federal policy underlying the deferral concept.

In Anderson v. Methodist Evangelical Hospital, the Sixth Circuit relied heavily on the equitable concept of tolling, used in the alternative in Vigil, to prevent the expiration of the statutory filing period. The court found that the initial EEOC filing tolled the section 706(e) time limitations during the period of the deferral to the state agency. Therefore, the charge was formally filed with the EEOC only after the 60-day deferral period had elapsed as is literally required by section 706(c). Use of the tolling concept avoids the difficulty in defining the word "filed," yet permits a claim such as Silver's to be considered timely even though more than 300 days have passed since the occurrence of the alleged discriminatory act.

Another case that relied heavily on the tolling concept was Richard v. McDonnell Douglas Corp. The Eighth Circuit found that the filing of an initial claim with the EEOC within the statutory period of section 706(e) tolled the then applicable 210-day time limitation. This tolling allowed for deferral to the state agency, but also preserved the federal remedy in the event that state action proved unsatisfactory.

The same court that decided Richard subsequently revised its liberal interpretation of the filing requirements of Title VII and adopted a very restrictive...

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53 Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723 (6th Cir. 1972); Vigil v. AT&T, 455 F.2d 1222 (10th Cir. 1972).
54 Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972).
56 455 F.2d 1222 (10th Cir. 1972).
57 It is noteworthy that as an alternative basis for its decision, the Tenth Circuit endorsed a tolling concept as applicable to the § 706(e) filing limitation.
58 464 F.2d 723 (6th Cir. 1972).
59 Id. at 725.
60 469 F.2d 1249 (8th Cir. 1972).
interpretation. Olson v. Rembrandt Printing Co.\textsuperscript{61} was decided on the premise that the complainant must file with either the state or federal agency within 180 days after the discriminatory act. This decision was based on a fairness consideration that residents of deferral states should not have a time advantage over residents of nondeferral states in the requirement for initial action upon an employment discrimination claim.\textsuperscript{62}

The opinion of the Seventh Circuit in Moore v. Sunbeam Corp.,\textsuperscript{63} written by Justice Stevens prior to his appointment to the Supreme Court, presents a thorough discussion of the issue faced in Silver. The complainant in Moore argued that his claim was filed for purposes of section 706(e) on the date of its initial receipt by the EEOC. The court found that neither the Love decision nor the legislative history allowed this practice to satisfy the statutory requirements. The Seventh Circuit thus prohibited filing with the EEOC for section 706(e) purposes during the state deferral period.

The Silver decision points out, however, that the Moore court refused to consider the section-by-section analysis accompanying the Equal Employment Opportunity Act of 1972 because the amendments were not yet in effect.\textsuperscript{64} This analysis specifically endorsed the Vigil decision allowing filing for purposes of section 706(e) to occur upon initial receipt of the claim.\textsuperscript{65}

**VIII. The Tolling Concept**

If the statutory time limitation of section 706(e) is viewed as a statute of limitation, many courts have reasoned that the equitable concept of tolling may be applied.\textsuperscript{66} Other courts have found that the time limitations of section 706(e) are jurisdictional prerequisites to a suit under Title VII, and therefore are not subject to tolling.\textsuperscript{67}

Application of the tolling concept would require that the reason for a late filing be explored in each individual case. While much judicial time would be required to undertake this case-by-case analysis, many courts have reasoned that the objectives served by Title VII warrant the additional effort.\textsuperscript{68}

\begin{itemize}
    \item \textsuperscript{61} 511 F.2d 1228 (8th Cir. 1975). See text accompanying notes 30-32 supra.
    \item \textsuperscript{62} Id. at 1232.
    \item \textsuperscript{63} 459 F.2d 811 (7th Cir. 1972).
    \item \textsuperscript{64} 602 F.2d at 1089 n.17.
    \item \textsuperscript{65} See text accompanying note 36 supra.
    \item \textsuperscript{67} See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Although the Supreme Court found in this case that a "jurisdictional prerequisite" to suit was a timely filing of a charge with the Commission, it is not clear that the Court intended to foreclose the possibility of equitable considerations extending the filing period. See note 73 infra and accompanying text.
    \item \textsuperscript{68} See also Smith v. Office of Economic Opportunity for Ark., 538 F.2d 226 (8th Cir. 1976); Greene v. Carter Carburetor Co., 532 F.2d 125 (8th Cir. 1976); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).
    \item \textsuperscript{69} See note 66 supra.
\end{itemize}

The most convincing example of a situation in which tolling would be appropriate is one in which the employer takes affirmative steps to deceive an employee as to the true reason for his discharge. If an employee were simply told that his position had been eliminated, he would have no reason to suspect that a possible illegal discriminatory act had occurred until he was informed of the hiring of a replacement. In this case considerations of equity and fairness dictate that the time limitation should begin to run when the discharged employee learns that his position was in fact subsequently filled rather than eliminated. Reeb v. Economic Opportunity Atlanta Inc., 516 F.2d 924 (5th Cir. 1975).
Of the three major cases relied upon in Silver as supportive of its holding, two relied exclusively on the tolling concept, and the other advanced the theory as an alternative basis for its decision.

Although the Second Circuit did not reach the tolling question in Silver, a discussion of the concept would have been appropriate, since the cases the court relied upon for support potentially extend the time limitations of section 706(e) indefinitely when equitable considerations so dictate.

The application of the tolling concept to section 706(e) was considered by the Supreme Court in Electrical Workers v. Robbins and Meyers, Inc. In that case, the Court found that resort to contractual grievance procedures did not provide sufficient reason for tolling the statutorily prescribed limitation period, as Title VII was an entirely independent remedy from that procedure. While some courts have found this case to stand for the proposition that tolling is never appropriate, language of the Court's opinion is ambiguous as to whether the tolling concept can be applied to other situations. Arguably, the Court's holding that the precise facts of that case did not provide sufficient reason for tolling could be interpreted as an implicit recognition that tolling may be appropriate in other circumstances.

Recently, the Supreme Court in Oscar Mayer & Co. v. Evans had the opportunity to consider the tolling concept as applied to the Age Discrimination in Employment Act (ADEA) of 1967. In Oscar Mayer, the Court avoided use of the word "tolling," but stated that the federal suit may be "held in abeyance" while the state deferral takes place.

Soon after his discharge, the complainant in Oscar Mayer inquired of the federal Age Discrimination in Employment Agency as to the requirement that he file a charge with the appropriate state agency. He was advised that he need not file with the state agency in order to preserve his federal remedy. This erroneous advice caused the complainant to forego state procedures.

70 Vigil v. AT&T, 455 F.2d 1222 (10th Cir. 1972).
71 602 F.2d at 1089 n.15.
72 429 U.S. 229 (1976).
73 Id. at 240. The Court stated:
Congress did provide in § 706(b) [now (c)] one exception for this 90 [now 180] day limitation period when it provided that the limitation period should run for a maximum additional 120 days when there existed "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." Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, and then firmly limited the maximum possible extension of the limitations period applicable thereto, we think that all of the petitioners' arguments taken together simply do not carry sufficient weight to overcome the negative implication from the negative language used by Congress.

Id. (emphasis added).
In the same opinion, however, the Court gave an indication that extension of the filing period might be appropriate in some cases. The Court stated:
In no way is this a situation in which a party has "been prevented from asserting his or her rights" [citations omitted]. There is no assertion that [the complainant] was prevented from filing a charge with the EEOC within 90 days.

Id. at 237 n.10.
75 29 U.S.C. § 626(d)(1976). The filing requirements of this Act are substantially similar to those in Title VII.
76 441 U.S. at 764.
The district court and circuit court in Oscar Mayer found that the maximum 300-day time limitation would bar the suit. The Supreme Court found that although the agency misled the complainant as to the necessity of pursuing his state remedy, he still was required to commence proceedings with the state agency. This was true even though the state statute of limitation had run.

The interesting aspect of the decision, however, is the Court’s order to the district court to “hold the charge in abeyance” until the state charge was filed and summarily rejected. In this case a valid filing with the federal agency did not occur until at least three years after the discriminatory act, far beyond the 300-day limitation of the ADEA procedural statute. Thus, equitable considerations permit tolling of the filing limitations under the ADEA, and analogously under Title VII.

Although the court in Silver had no need to consider the tolling concept once it had decided that sections 706(c) and (e) did not conflict, equities in future cases may require extension of the filing limitations beyond those stated in Title VII.

IX. Conclusion

In Silver v. Mohasco Corp. the Second Circuit extended the interpretation of Title VII filing requirements to comply with the stated policies and purposes behind the Civil Rights Act of 1964. The remedial theory of Title VII was the primary consideration in the Silver decision, which held that a claim is “filed” for purposes of section 706(e) upon receipt by the EEOC, before deferral to the appropriate state agency. This decision allows initial action by a complainant in a deferral state to be taken at any time within the 300 days provided in section 706(e).

The liberal interpretation of Title VII filing requirements by the Second Circuit in Silver thus was the logical extension of a judicial trend recognizing that those unskilled in the law should be given the benefit of the doubt in the interpretation of Title VII procedural requirements. The holding in the present case fulfills the policy behind Title VII by providing the widest possible scope of remedies for victims of employment discrimination.

A case of employment discrimination may require a party to refer to the United States Code for the first and only time in his life. An intelligent, but isolated reading of section 706(e) could easily lead one to believe that 300 days is the time limitation for filing an initial claim with the EEOC. A complainant should not be penalized for Congressional ambiguity, or because he does not possess the reading ability of one trained in statutory interpretation. This indeed is the level of skill required to find the “hidden” 240-day limitation advocated by the district court in Silver.

77 See notes 44 and 51 supra.

Mr. Silver had completed two years of law school and possessed a certain degree of skill in statutory interpretation; however, in considering a case of this sort the courts must consider the fact that the vast majority of potential plaintiffs will not have the benefit of such training.
A petition for certiorari in the *Silver* case has been granted by the Supreme Court. The Court should now affirm the *Silver* holding and clarify the statutory language of Title VII so that parties throughout the country have a definitive interpretation of the statutory filing periods.

*Douglas A. Schaarf*