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Recommended Citation

Angela D. Morrison, *Misconstruing Notice in EEOC Administrative Processing & Conciliation*, 14 Nev. L.J. 785 (2014).
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MISCONSTRUING NOTICE IN EEOC ADMINISTRATIVE PROCESSING & CONCILIATION

Angela D. Morrison*

INTRODUCTION

Federal courts have misconstrued notice in the US Equal Employment Opportunity Commission's ("EEOC" or "Commission") administrative processing and conciliation of charges of discrimination. By requiring that the notice given to employers during the Commission's processing of a claim be equivalent to that of notice in civil litigation, courts have conflated the purpose of notice in the former with the latter. Some of this conflation may be a consequence of the Supreme Court's tightening of pleading standards, class certification requirements, and other procedural requirements, which are primarily focused on providing adequate notice to a defendant regarding the scope of the plaintiffs' claims.

In the fifty years since Congress enacted Title VII of the Civil Rights Act of 1964, the procedural landscape for plaintiffs asserting claims under the Act has changed dramatically. A series of decisions by the courts in the 1980s and early 1990s meant that plaintiffs increasingly failed to reach the trial stage of their employment discrimination suits because courts decided their cases using "procedural devices."[1] In a series of more recent decisions, the Court has limited the ability of plaintiffs, particularly those making class allegations, to move beyond the pleading stage.[2] In the wake of these decisions, Defendant employ-

* Visiting Assistant Professor of Law, William S. Boyd School of Law. Thanks to Ann McGinley and Ruben Garcia for organizing the colloquium that led to this issue. Thanks also to the editors of the Nevada Law Journal, especially Brittany Llewellyn and Nicole Scott for their efforts on this essay. All errors are mine alone.

[1] Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 220 (1992). *See generally* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (discussing the impact of stricter summary judgment standards on employment discrimination cases).

[2] *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), will have on employment discrimination suits because plaintiffs now will be held to a plausible pleading standard), and Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1618 (2011) (analyzing impact that the decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 621–22 (2011) (discussing how the Supreme Court's recent decisions regarding procedural requirements for pleading and class certification, and the effect of mandatory arbitration create almost "insurmountable" procedural hurdles for plaintiffs in civil rights and consumer actions). *See also* Angela D. Morrison, Duke-*ing Out Pattern or Practice After* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87, 89 nn.2–3 (2013) (summarizing some of the literature regarding the negative impact Wal-Mart Stores,

ers have increasingly used a litigation tactic that centers on the sufficiency of the notice the EEOC provided them during the EEOC's pre-suit administrative processing of charges of discrimination.[3] In considering the employers' arguments, courts have assumed that conciliation and other steps in the EEOC's multi-step administrative process serve the same purposes of well-pleaded complaints and discovery in civil litigation and, therefore, require an attendant level of notice to the employer during the administrative processing.

When courts misconstrue notice in administrative proceedings, they impermissibly enlarge the due process rights of defendants in ways that undermine the effective enforcement of Title VII. Part I of this essay gives an overview of the EEOC's litigation authority and its administrative processing duties under Title VII. In Part II, the essay describes decisions in which courts have conflated notice in the EEOC's administrative processing of the charge with notice in civil litigation. Part III of the essay discusses the purposes of notice in civil litigation, and contrasts those purposes with the purposes of notice in the EEOC's administrative processing. Importantly, a civil action under Title VII results in a trial and formal finding of liability while administrative processing results in an opportunity to voluntarily comply with Title VII. Finally, Part IV highlights the harm caused when courts import the principles underlying notice in the litigation stage of an employment discrimination suit to their review of the EEOC's administrative processing. By not acknowledging the very different rights at stake in the two proceedings, courts have failed to take into account basic principles governing due process and erroneously have required higher levels of notice for employers at the expense of Title VII enforcement.

I. THE EEOC'S AUTHORITY & CHARGE HANDLING OBLIGATIONS UNDER TITLE VII

Through the Civil Rights Act of 1964,[4] Congress created the EEOC to receive, investigate, and attempt to resolve through voluntary compliance charges of employment discrimination alleged under Title VII of the Act.[5] However, the Act granted no independent authority to the EEOC to file suit against employers whom the EEOC found had engaged in unlawful discrimination.[6] Rather, the United States Attorney General through the Department of Justice had authority pursuant to Title VII, section 707, to bring suit against

Inc. v. Dukes, 131 S.Ct. 2541 (2011), is expected to have on the ability of private litigants to bring pattern or practice claims under Title VII); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 708–09 (2012) (noting the negative impact the Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), will have on plaintiffs' ability to bring employment discrimination lawsuits where the employees have signed a binding arbitration clause).

[3] Littler, a national law firm representing employers in employment law and labor disputes, in its annual report on EEOC litigation highlighted employer challenges to the EEOC's conciliation as a means to obtain a dismissal of an EEOC suit. LITTLER, ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2013, at 44–45 (2014), *available at* http://www.littler.com/files/press/pdf/Annual%20Report%20on%20EEOC%20Developments%20-%20FY%202013.pdf.

[4] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241 (1964).

[5] *Id.* at § 706(a).

[6] *See id.* at § 706(e).

employers.[7] As a result, conciliation and other "informal methods of conference . . . and persuasion"[8] were the only means by which the EEOC could redress employment discrimination under the Act.

In 1972, Congress amended the Civil Rights Act of 1964, supplementing the EEOC's administrative processing authority with independent litigation authority.[9] As amended, Title VII now permitted the EEOC to bring suit in its own name, in federal district court, asserting either that an employer had engaged in a pattern or practice of discrimination or that an employer had discriminated against an individual employee or a group of employees.[10] The EEOC still was required to comply with the administrative processing procedures in 42 U.S.C. § 2000e-5(b) prior to bringing suit.[11] Nonetheless, "[t]he key to the whole legislation [was] the enforcement powers granted to the Commission, the ability to go into the Federal district courts to enforce compliance with the act."[12]

Congress again amended Title VII through the Civil Rights Act of 1991.[13] The Act expanded the remedies available to victims of employment discrimination to include not only injunctive and equitable relief, but also compensatory and punitive damages.[14] Importantly, the Act's definition of "complaining party" included the EEOC, allowing the EEOC to seek punitive and compensatory damages under the statute.[15]

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[7] *Id.* at § 707(a).

[8] *Id.* at § 706(a).

[9] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4–5, 86 Stat. 103, 104–07 (1972).

[10] *Id.*

[11] 42 U.S.C. §§ 2000e-5(b), 2000e-6(e) (2012).

[12] 118 CONG. REC. 7569 (Mar. 8, 1972) (remarks of Sen. Dent).

[13] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071. The Act provides for recovery by complaining individuals for intentional discrimination:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1981(a)(1).

[14] 42 U.S.C. § 1981(a)(1). Compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Id.* § 1981(b)(3).

[15] *Id.* § 1981(d)(1). The statute defines the complaining party in pertinent part as the following:

> The term "complaining party" means—
>
> (A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 . . . .

Id. This subsection was part of a technical amendment requested by the EEOC chairman Evan J. Kemp to clarify the EEOC's ability to seek punitive and compensatory damages. 137 CONG. REC. 28,860–61 (Oct. 29, 1991). Mr. Kemp argued that the change was needed because without it, the EEOC's enforcement abilities would be undermined:

Before the EEOC can bring suit in federal court, it must meet conditions precedent through its multi-step administrative processing.[16] These include receipt of an underlying charge and notice of the charge to the employer, an investigation, a reasonable cause determination, and an attempt to conciliate.[17] A charge is "a jurisdictional springboard" from which the EEOC begins its investigation of an employer's alleged violation of Title VII.[18] The charge may be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission."[19] The Act requires that charges "be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."[20] The purpose of the oath or affirmation is "to provide some degree of insurance [for employers] against catchpenny claims of disgruntled, but not necessarily aggrieved, employees."[21] The information required in the charge is set forth in the regulations.[22] Once the charge is verified, the EEOC must notify the employer about the charge within ten days.[23]

> It would undermine the Commission's ability to enforce Title VII . . . if private parties, but not the EEOC, are allowed to seek the enhanced remedies. Indeed, if that were the case the Commission might have a duty to refer all cases of intentional discrimination to private attorneys because, by filing suit, the Commission would dramatically reduce the relief available to the victims. This would be true especially in the case of sexual harassment claims; because there is often no back pay at stake in those cases, the only monetary remedy would be compensatory and punitive damages.

Id. at 28,861.

[16] *See* 42 U.S.C. § 2000e-5(b) (2012) (charges, filing, allegations, notice to respondent, contents of notice, investigation by the EEOC, determination of reasonable cause, conciliation); *Id.* § 2000e-8 (EEOC investigative authority); 29 C.F.R. § 1601.21 (2013) (reasonable cause determination: procedure and authority).

[17] 42 U.S.C. § 2000e-5(b), (f).

[18] EEOC v. Gen. Elec. Co., 532 F.2d 359, 364 (4th Cir. 1976) ("The charge merely provides the EEOC with 'a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices.' ") (quoting EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975)).

[19] 42 U.S.C. § 2000e-5(b).

[20] *Id.*

[21] Edelman v. Lynchburg Coll., 535 U.S. 106, 115 (2002).

[22] EEOC v. Shell Oil Co., 466 U.S. 54, 67 (1984) (affirming that the statute delegates the determination of the form and contents of a charge of discrimination to the EEOC). The current regulations require that the following content be included in a charge of discrimination:

> (1) The full name, address and telephone number of the person making the charge . . . ;
>
> (2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . . ;
>
> (4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and
>
> (5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

29 C.F.R. § 1601.12(a) (2013).

[23] 42 U.S.C. § 2000e-5(b):

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment

The notice should state the basis of the charge "including the date, place and circumstances of the alleged unlawful employment practice."[24]

After serving notice of the charge to the employer, the EEOC must conduct an investigation into the charge.[25] Under the statute, the EEOC has broad investigative powers and the EEOC "shall at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation."[26] The EEOC's investigation may consist of interviewing the charging party(ies) and other witnesses, obtaining a position statement from the employer, on-site inspections, and requests for information and production of other evidence.[27] Title VII also authorizes the EEOC to issue administrative subpoenas as part of its investigation and the EEOC can seek enforcement of its subpoenas in federal court.[28] The investigation is linked to the charge of discrimination because the evidence the EEOC seeks must be "relevant" to the charge.[29] The Court has stated that the relevance limitation, however, "is not especially constraining."[30] Courts have upheld the EEOC's broad investigatory powers because "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired."[31]

Accordingly, once the EEOC commences its investigation, "if the investigation turns up additional violations the Commission can add them to its suit."[32] The EEOC may investigate whether an employer discriminated against a class of employees, even if the investigation was initiated by a charge of individual discrimination.[33] After an investigation has started, the investigation

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practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . within ten days.

[24] *Id.*

[25] *Id.* ("Whenever a charge is filed . . . the Commission . . . shall make an investigation thereof.").

[26] 42 U.S.C. § 2000e-8(a); *Shell Oil Co.*, 466 U.S. at 63.

[27] 42 U.S.C. § 2000e-9 (granting the EEOC the same investigative authority as that granted to the NLRB under 29 U.S.C. § 161); *The Charge Handling Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/employers/process.cfm (last visited Apr. 8, 2014) [hereinafter *Charge Handling Process*].

[28] 42 U.S.C. § 2000e-9 (granting the EEOC the same administrative subpoena power in conducting its investigations as that granted to the NLRB pursuant to 29 U.S.C. § 161). The regulations also set forth the categories of evidence for which the EEOC has subpoena power: "(1) The attendance and testimony of witnesses; (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and (3) Access to evidence for the purposes of examination and the right to copy." 29 C.F.R. § 1601.16 (2013).

[29] *Shell Oil Co.*, 466 U.S. at 68 (quoting 42 U.S.C. § 2000e-8). *See also Charge Handling Process*, *supra* note 27.

[30] *Shell Oil Co.*, 466 U.S. at 68.

[31] *Id.* at 69.

[32] EEOC v. Caterpillar, Inc., 409 F.3d 831, 833 (7th Cir. 2005); *see also* EEOC v. Hearst Corp., 553 F.2d 579, 580 (9th Cir. 1977); EEOC v. Gen. Elec. Co., 532 F.2d 359, 365 (4th Cir. 1976); EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

[33] EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc., 639 F.3d 366, 369 (7th Cir. 2011).

> When the EEOC investigates a charge of race discrimination for purposes of Title VII, it is authorized to consider whether the overall conditions in a workplace support the complaining employee's allegations. Racial discrimination is "by definition class discrimination," and information concerning whether an employer discriminated against other members of the same class

can continue regardless of whether the charging party has settled with the employer and requested to withdraw the charge of discrimination.[34]

And, although investigation is one of the conditions precedents to subsequent EEOC litigation, an inadequate investigation does not result in dismissal of the EEOC's case.[35] Rather, courts reviewing the investigation merely determine whether the EEOC failed to investigate the charge.[36] If the EEOC finds "reasonable cause to believe the charge is true," it issues a letter of determination to the employer and charging party.[37] At that point, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[38] Thus, in the letter of determination, the EEOC invites the employer to resolve the allegations through conciliation.[39] The process is confidential[40] and the EEOC will seek "to obtain agreement that the [employer] will eliminate the unlawful employment practice and provide appropriate affirmative relief."[41] If the conciliation is successful, the terms of the conciliation agreement are reduced to writing and the EEOC, the employer, and the charging party sign the agreement.[42] The EEOC will notify the employer in writing if the EEOC is "unable to secure from the [employer] a conciliation agreement acceptable to the Commission" and the EEOC may then bring a lawsuit.[43]

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for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination.

Id. (citing EEOC v. United Air Lines, Inc. 287 F.3d 643, 653 (7th Cir. 2002)). *See also* EEOC v. United Parcel Serv., 587 F.3d 136, 140 (2d Cir. 2009) (finding erroneous a district court's refusal to enforce EEOC administrative subpoena seeking nationwide information).

[34] *See, e.g.*, EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593, 597 (7th Cir. 2009); *cf.* EEOC v. Fed. Express Corp., 558 F.3d 842, 854 (9th Cir. 2008) (EEOC retained authority to issue administrative subpoena even after it issued employee a right to sue letter and employee had joined a class action against FedEx); *but see* EEOC v. Hearst Corp., 103 F.3d 462, 469–70 (5th Cir. 1997) (finding that once the charging party receives a notice of right to sue and files a lawsuit, the EEOC's "time for *investigation* has passed").

[35] *See, e.g.*, EEOC v. KECO Indus., Inc., 748 F.2d 1097, 1100, 1102 (6th Cir. 1984) (finding that sufficiency of the EEOC's investigation was not reviewable in subsequent EEOC litigation).

[36] EEOC v. James Julian, Inc., 736 F. Supp. 59, 61 (D. Del. 1990) ("[A] court shall only disallow a suit by the Commission if it is evident that the Commission failed to even undertake an investigation.").

[37] 42 U.S.C. § 2000e-5(b) (2012); 29 C.F.R. § 1601.14(a) (2013). The EEOC's reasonable cause determination (or no reasonable cause determination) is not evidence of discrimination in any subsequent litigation. *Gen. Elec. Co.*, 532 F.2d at 370 n.31 ("The Commission's determination does not establish rights or obligations; the [employer] is entitled to a trial *de novo* in the district court."). *Accord Caterpillar, Inc.*, 409 F.3d at 833 ("The existence of probable cause to sue is generally and in this instance not judicially reviewable."); Georator Corp. v. EEOC, 592 F.2d 765, 767 (4th Cir. 1979) ("[T]he court will not determine whether substantial evidence supported the Commission's preadjudication finding of reasonable cause.").

[38] 42 U.S.C. § 2000e-5(b).

[39] *Charge Handling Process*, *supra* note 27.

[40] The statute sets forth penalties for disclosing information revealed during conciliation. 42 U.S.C. § 2000e-5(b).

[41] 29 C.F.R. § 1601.24(a).

[42] *Id.*

[43] 42 U.S.C. § 2000e-5(f)(1) (2012); 29 C.F.R. § 1601.25 (notification in writing); 29 C.F.R. § 1601.27 (civil action by the EEOC).

II. Courts Have Conflated the Purpose of Notice in Administrative Proceedings with the Purpose of Notice in Litigation

The EEOC's efforts to conciliate charges of discrimination have been the subject of much litigation in lawsuits filed by the EEOC in federal court.[44] Defendants have argued that the EEOC's failure to investigate or inadequate efforts to conciliate deprive the court of subject matter jurisdiction or form the basis of an affirmative defense.[45] Courts that have been presented with arguments based on the EEOC's administrative processing have come up with various standards to review the sufficiency of the EEOC's pre-suit conciliation efforts.

Four different rules regarding the EEOC's conciliation efforts have emerged from federal courts. The Sixth, Seventh, Tenth, and most of the courts in the Ninth Circuit, look at whether the EEOC offered conciliation to the employer and defer to the EEOC's determination that conciliation has failed.[46] The Eleventh and Fifth Circuits impose a searching inquiry on the EEOC's efforts during its conciliation and require the EEOC to "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."[47] The Second

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[44] *See, e.g.*, Serrano v. Cintas Corp., 699 F.3d 884, 904–05 (6th Cir. 2012); EEOC v. Agro Distrib., LLC, 555 F.3d 462, 467–69 (5th Cir. 2009); EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003); EEOC v. Delight Wholesale Co., 973 F.2d 664, 669 (8th Cir. 1992); EEOC v. St. Anne's Hosp. of Chi., Inc., 664 F.2d 128, 131 (7th Cir. 1981); EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978); EEOC v. Evans Fruit Co., 872 F. Supp. 2d 1107, 1112–13 (E.D. Wash. 2012); EEOC v. Timeless Invs., Inc., 734 F. Supp. 2d 1035, 1052–53 (E.D. Cal. 2010); EEOC v. Hometown Buffet, Inc., 481 F. Supp. 2d 1110, 1114 (S.D. Cal. 2007); EEOC v. Scolari Warehouse Mkts., Inc., 488 F. Supp. 2d 1117, 1129 (D. Nev. 2007); EEOC v. Cal. Teachers Ass'n, 534 F. Supp. 209, 212 (N.D. Cal. 1982); EEOC v. Canadian Indem. Co., 407 F. Supp. 1366, 1367 (C.D. Cal. 1976).

[45] *See, e.g.*, EEOC v. PBM Graphics Inc., 877 F. Supp. 2d 334, 348 (M.D. N.C. 2012) (employer argued that the district court "lack[ed] jurisdiction to consider any allegations in the complaint that were not also raised in the underlying administrative charge that led to the EEOC's investigation"); EEOC v. Riverview Animal Clinic, P.C., 761 F. Supp. 2d 1296, 1300 (N.D. Ala. 2010) ("Defendant's second affirmative defense asserts that [the EEOC] failed to satisfy the conditions precedent to instituting an action pursuant to Title VII. . . . [T]his affirmative defense is based on [the EEOC's] alleged failure to engage in the conciliation process in good faith.").

[46] *See, e.g.*, EEOC v. KECO Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984); *St. Anne's Hosp. of Chi., Inc.*, 664 F.2d at 131; *Zia Co.*, 582 F.2d at 533 (conciliation efforts must be made in good faith); *Evans Fruit Co.*, 872 F. Supp. 2d at 1112–13; EEOC v. Global Horizons, Inc., 860 F. Supp. 2d 1172, 1180 (D. Haw. 2012); *Timeless Invs., Inc.*, 734 F. Supp. 2d at 1052; *Hometown Buffet, Inc.*, 481 F. Supp. 2d at 1114; *Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d at 1129. *But see* EEOC v. La Rana Hawaii, LLC, 888 F. Supp. 2d 1019, 1046 (D. Haw. 2012) (staying the EEOC's suit and ordering the EEOC to "redo" conciliation with defendants because the EEOC had not given the defendants the "number or identity of Claimants identified during its investigation, [and] specific instances of harassment or discrimination").

[47] *Asplundh Tree Expert Co.*, 340 F.3d at 1259. *See also Agro Distrib., LLC*, 555 F.3d at 468. The Eighth Circuit, as discussed below, has also adopted a searching inquiry of the EEOC's efforts despite its earlier decision in *Delight Wholesale Co.*, that implied that the court would give deference to the EEOC's determination of its conciliation efforts. EEOC v. CRST Van Expedited, Inc. 679 F.3d 657 (8th Cir. 2012).

Circuit reviews the good faith efforts of the EEOC to engage in conciliation unless the employer "refuses the invitation to conciliate or responds by denying the EEOC's allegations."[48] Finally, the Seventh Circuit has rejected the existence of an affirmative defense based on the EEOC's administrative processing of a charge of discrimination, and requires only that the EEOC "has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient."[49]

With the exception of the Seventh Circuit,[50] those courts that have expressly considered the purposes behind the EEOC's administrative processing have stated that the EEOC's pre-suit efforts provide the employer with notice of the allegations.[51] However, the courts do not draw distinctions between the purposes of notice in the administrative processing and notice in any lawsuit later initiated by the EEOC. In their decisions, courts have varied about the amount of notice or disclosure required, but have been consistent in framing the disclosure and notice obligations as flowing from the EEOC to the employer. What the decisions demonstrate is that courts view the administrative processing as an adjudicative arena in which employers have the same or similar due process rights to notice of claims as they receive in litigation. As discussed next, the cases range from requiring some level of notice that describes generally the EEOC's allegations, to explicitly making the sufficiency of the EEOC's notice in investigation and conciliation the same as the notice required in subsequent litigation.

In *Serrano v. Cintas*, the district court found that the EEOC had failed to comply with its conditions precedent to suit by not investigating or conciliating its class-wide claims and it granted the Cintas' motion for summary judgment.[52] On appeal, the Sixth Circuit reversed.[53] The Sixth Circuit confirmed its precedent that "it is inappropriate for a 'district court to inquire into the sufficiency of the Commission's investigation' " but at the same time stated "a

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[48] EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1535 (2d Cir. 1996).

[49] EEOC v. Mach Mining, LLC, 738 F.3d 171, 184 (7th Cir. 2013).

[50] *Id.* The Seventh Circuit did not discuss or consider the purpose of notice in its decision. In *Mach Mining*, the employer argued that the conciliation provision in Title VII created an "implied affirmative defense" that allowed the employer to seek dismissal of the EEOC's lawsuit because it "failed to engage in good-faith conciliation before filing suit." *Id.* at 172. The Seventh Circuit Court of Appeals rejected the argument and held that Title VII did not create an affirmative defense based on failure to conciliate. *Id.* at 184. The court based its finding on several reasons; first, it determined that court review of conciliation conflicted with Title VII's confidentiality provisions governing conciliation. *Id.* at 175. Second, it determined that there was no workable standard to review the conciliation process. *Id.* at 178. Third, it found that review of the conciliation process would undermine the EEOC's conciliation efforts and that judicial review was unnecessary because the EEOC has "powerful incentives to conciliate." *Id.* at 178–80 (noting that the agency is limited by its budget and personnel resources, and that Congress and the executive can check the EEOC's practices); *see also* Morrison, *supra* note 2 at 136–39 (2013) (discussing the EEOC's political accountability). Finally, the court noted that because the statute leaves the decision of whether to accept an offer in conciliation to the EEOC, any review of conciliation would have to be about the process not the substance, and so the remedy would be more process, not dismissal. *Mach Mining, LLC*, 738 F.3d at 183–84.

[51] *See* discussion of cases *infra* Part II.

[52] Serrano v. Cintas Corp., 699 F.3d 884, 904 (6th Cir. 2012).

[53] *Id.* at 905.

district court should determine whether the EEOC made a good-faith effort to conciliate the claims it now asserts, thereby providing the employer with *ample notice* of the prospect of suit."[54] The court found that the EEOC had given the company notice that it was investigating class-wide claims through its letter of determination and by stating in its proposed conciliation agreement that it was seeking "relief for 'other similarly situated qualified female applicants.' "[55] Thus, in *Serrano*, the Sixth Circuit determined that the EEOC was required to provide notice of its claims during the administrative processing sufficient to inform the employer about the scope of its claims and linked the notice to later litigation.

The Eight Circuit also has found that the EEOC's pre-suit notice to the employer must include the scope of its claims but requires the EEOC to provide notice regarding the size and make-up of its class of claimants. In *EEOC v. CRST Van Expedited, Inc.*, the Eighth Circuit upheld the dismissal of the EEOC's claim alleging that CRST had subjected a class of female employees to a hostile work environment.[56] During the lower court litigation, the district court ordered the EEOC to make available for deposition any women in the class for whom it sought relief.[57] The EEOC identified two hundred and seventy women and had made one hundred and fifty women available for depositions.[58] Eventually, the court dismissed many of the women from the EEOC's suit—sixty-seven of them because it found the EEOC had not identified each victim of the hostile work environment during the administrative processing and conciliation.[59] In making that determination, the court stated "[t]he Letter of Determination did not provide CRST with any *notice* as to the size of the 'class . . . and prospective employees [subjected] to sexual harassment.' And, during conciliation, the EEOC was unable 'to provide [CRST] names of all class members . . . , or an indication of the size of the class.' "[60] In affirming the district court's decision, the Eighth Circuit adopted the district court's reasoning.[61] The court in *EEOC v. La Rana Hawaii, LLC*, also focused on whether the EEOC disclosed enough information to "put Defendants on notice of the class or its claims" during the EEOC's administrative processing.[62]

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[54] *Id.* at 904 (quoting EEOC v. KECO Indus., Inc., 748 F.2d 1097, 1100, 1102 (6th Cir. 1984) (emphasis added)).

[55] *Id.* The Sixth Circuit also found that because the company "expressed no interest . . . in reaching a settlement . . . '[t]he EEOC [was] under no duty to attempt further conciliation.' " *Id.* at 904–05 (quoting KECO Indus., Inc., 748 F.2d at 1101–02).

[56] EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 676–77 (8th Cir. 2012).

[57] *Id.* at 670.

[58] *Id.* at 669 n.3, 670.

[59] *Id.* at 670–71. Besides not recognizing the inherent differences and purposes of notice in the administrative processing of charges as opposed to the role of notice in litigation, the decision does not take into account how class allegations normally work. Not even a private class action under Rule 23(b)(3) must name each potential class member pre-certification or even before a determination of liability on class claim, but instead is allowed to seek additional class members through discovery and through the post-judgment class notification process.

[60] *Id.* at 676 (quoting EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, 2009 WL 2524402 at *7, *8 (N.D. Iowa Aug. 13, 2009)) (emphasis added).

[61] *Id.* at 676–77.

[62] EEOC v. La Rana Hawaii, LLC, 888 F. Supp. 2d 1019, 1045–46 (D. Haw. 2012).

Other courts have explicitly referenced notice in their decisions about the reviewability or adequacy of the EEOC's investigation or conciliation. In *EEOC v. Swissport*, the court focused on the notice provided to the employer during the administrative processing, specifically using language in *CRST* to incorporate the steps in the EEOC administrative processing as part of the notice that a defendant is entitled to in any subsequent litigation. "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, *and the allegations in the complaint* is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation."[63] Similarly, in *EEOC v. Bloomberg*, the district court explicitly linked the "notice" given in the administrative processing to that in subsequent litigation, " '[e]ven the most recalcitrant employer . . . is due the process that Title VII mandates. Congress surely did not intend that employers . . . face the moving target of allegedly aggrieved persons that [the employer] faced in both the administrative and legal phases of this dispute.' "[64] In these decisions, the courts expressly have equated the employer's right to notice in the EEOC administrative processing to that in subsequent litigation, and do not appear to draw a distinction between the two. As outlined below, the "notice" in the EEOC's administrative processing and notice in civil actions are different, and conflating the two risks improperly enlarging an employer's due process rights and undermining the effective enforcement of Title VII.

III. Notice in EEOC Administrative Processing is Not the Same as Notice in a Civil Action

The purposes and treatment of notice in the context of litigation versus the purpose of notice in the EEOC's administrative processing demonstrate that the two types of notice are not the same and courts should not treat them the same. Ultimately, civil procedure seeks to ensure "accurate determinations of right, reached through fair process, without delay, and freely available to everyone."[65] To that end, notice of the claims becomes important in civil litigation. The end result of civil proceedings conducted under the Federal Rules of Civil Procedure is a trial with a formal finding on liability. Thus, the stakes for the parties are high.

In contrast, the main purpose of notice in the Commission's administrative handling of a charge is to provide the employer with the information it needs to conduct its own investigation into whether it violated Title VII and to allow the employer to preserve its records so it is not later forced to defend itself against stale claims. In turn, that employers maintain their records and data assists the

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[63] EEOC v. Swissport Fueling, Inc., 916 F. Supp. 2d 1005, 1037 (D. Ariz. 2013) (quoting EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 675 (8th Cir. 2012) (emphasis added)).
[64] EEOC v. Bloomberg L.P., No. 07 Civ. 8383(LAP), 2013 WL 4799150 at *10 (S.D.N.Y. Sept. 9, 2013) (quoting EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, 2009 WL 2524402 at *18 (N.D. Iowa Aug. 13, 2009)).
[65] James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on* Iqbal*, A Day in Court and a Decision According to Law*, 114 Penn. St. L. Rev. 1257, 1260 (2010).

EEOC in identifying discrimination, in particular, systemic discrimination through its investigation. Moreover, the employer's own investigation also serves the purpose of encouraging the employer's voluntary compliance with Title VII. Finally, the end result of the EEOC's administrative processing is quite different from the end result in an adjudication. Any determination by the EEOC regarding cause is not binding on the employer; it leads to an invitation from the EEOC to voluntarily resolve the charge through informal conciliation.

A. Notice in Title VII Civil Actions—End Result Trial and Formal Finding of Liability

The requirement that the complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief"[66] is designed to " 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' "[67] Notice at the pleading stage not only serves to give notice of the suit to the defendant but also serves a gatekeeping function meant to protect the court and the defendant from embarking on a needless and expensive discovery process.[68] In *Ashcroft v. Iqbal*,[69] the Court described the gatekeeping function that requiring a well-pleaded complaints serves: "Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[70] Both of these purposes, providing fair notice of the claims and ensuring that the plaintiff's claim has a basis in the law, bind the controversy thereby protecting "the autonomy of parties and the privacy of the public."[71]

Throughout discovery, disclosure regarding the factual basis of the claim is an ongoing requirement for both parties either through initial disclosures under Rule 26 or through the discovery mechanisms listed in Rules 27–37.[72] In drafting the discovery rules, Charles Clark believed that "[d]iscovery and summary judgment would allow for the rapid 'disclosure of all facts and matters in dispute, followed by prompt and final adjudication wherever that is feasible.'

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[66] FED. R. CIV. P. 8(a)(2).

[67] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) (quoting Conley v. Gibson, 335 U.S. 41, 47 (1957)). For a discussion of whether the Court's decisions in *Twombly* and *Iqbal* changed what is required to give a defendant in an employment discrimination suit "fair notice" and the continuing viability of *Swierkiewicz*, see Professor Sullivan's discussion in *Plausibly Pleading Employment Discrimination*, *supra* note 2 at 1617–20, 1624–49.

[68] Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 867 (2010); Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN. ST. L. REV. 1247, 1251 (2010).

[69] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[70] *Id.* at 678–79. This essay does not consider the challenges *Iqbal* may pose for plaintiffs asserting claims under Title VII given the complexity of Title VII's different proof structures and the problem of proving discriminatory motive as to individual actors. However, Professor Charles Sullivan has discussed these challenges and offered some potential solutions. Sullivan, *supra* note 2, at 1614.

[71] Maxeiner, *supra* note 65, at 1267.

[72] FED. R. CIV. P. 27–28, 30–31 (depositions); FED. R. CIV. P. 33 (interrogatories); FED. R. CIV. P. 34 (requests for production or inspection); FED. R. CIV. P. 35 (examinations); FED. R. CIV. P. 36 (requests for admission); FED. R. CIV. P. 37 (sanctions for failing to disclose).

"[73] The Court has stated that the purpose of the discovery rules is focused on more precisely identifying the legal claims and avoiding surprise at trial:

> The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[74]

Thus, the disclosure obligations associated with discovery were designed with an eye towards an adjudication of the parties' claims.

Finally, notice to the defendant comes up again in class certifications under Federal Rule of Civil Procedure 23 and is focused on the employer's ability to defend itself in the suit, obtain individualized determinations of damages, and raise affirmative defenses. In *General Telephone Co. of the Southwest v. Falcon*, the Court suggested that part of the reason Federal Rule of Civil Procedure 23(a) requires that the representative plaintiffs' claims to be typical of the class claims, is that it provides notice to employers regarding the types of claims it will need to defend.[75] The Court in *Wal-Mart v. Dukes*, reiterated this concern through its emphasis on what it viewed as the common source of the harm and indivisible nature of the remedy permitted in a Rule 23(b)(2) certified class.[76] If a Rule 23(b)(2) class seeks to remedy a harm that an employer took towards the class as a whole, then it follows that the employer would have actual knowledge of the pattern or practice and know how to defend itself in the suit. However, if the class simply seeks to remedy several, individual harms, then the employer would not necessarily be aware of the source of the harm for each individual wrong, making the claims difficult to defend.[77] As a result, the Court was especially concerned with the impact that treating the class as a whole would have on the employer's entitlement to an individualized determination of each employee's eligibility for backpay, to raise affirmative defenses as to each employee's claim, and to prove that its action was lawful as to each

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[73] Ronald J. Allen & Alan E. Guy, Conley *as a Special Case of* Twombly *and* Iqbal*: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 115 PENN. ST. L. REV. 1, 8 (2010) (quoting Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1941)).

[74] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[75] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982) ("[W]ithout reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend . . . .") (quoting Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring)).

[76] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2557 (2011). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

[77] Additionally, notice of the type of claims for which the class seeks certification serves not only the defense of the current claim, but also ensures "that future employers have adequate notice of which policies will pass muster under Title VII and which will not. If all class actions settle, only relatively specific analysis of the merits at the certification stage can provide this information." Deborah M. Weiss, *A Grudging Defense of* Wal-Mart v. Dukes, 24 YALE J.L. & FEMINISM 119, 135 (2012).

employee.[78] In short, the notice concerns underlying the Court's decision centered on what was at stake in the adjudication—a finding of liability that would result in automatic imposition of damages for the defendant without the opportunity for the defendant to dispute the amount as to that particular class member.

B. Notice in EEOC Administrative Processing—End Result Opportunity to Voluntarily Comply with Title VII

As outlined above, notice to the employer comes up in the context of the EEOC's administrative processing of a charge in four areas: (1) notice to the employer of the charge; (2) notice to the employer through the letter of determination regarding whether the EEOC found cause to believe the discrimination occurred; (3) notice to the employer that it has the opportunity to engage in conciliation; and (4) notice that the conciliation has failed.[79] Although the EEOC is required to give notice of the charge to the employer through its administrative processing, such notice does not serve the equivalent function as a complaint filed in a lawsuit.[80] Instead, the charge provides notice to the EEOC that the charging party believes an employer has violated Title VII and lets the EEOC know it must undertake an investigation.[81] The purpose of the notice of the charge to employers is to give "fair notice of the existence and nature of the charges against them."[82] In some ways this tracks the purposes of notice in litigation. However, the benefit notice provides to the EEOC broadens that function of notice in administrative processing so that it also ensures that the agency can fulfill its mandate to enforce Title VII.

This is further illustrated by two policies "latent" in Title VII that are also served through notice of the charge to the employer.[83] The first is a Congressional desire that employers comply voluntarily, without resort to litigation, with the anti-discrimination provisions of Title VII.[84] The second policy is to encourage employers to "create and retain personnel records pertinent to their treatment of [protected individuals]."[85] This serves the needs of employers and the EEOC. Employers need to gather records, in part, "in anticipation of a court

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[78] *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2560–61.

[79] *See supra* Part I and notes 16–17, 37–43.

[80] EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984) ("[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit.").

[81] *Id.* In *EEOC v. Watkins Motor Lines, Inc.*, the Seventh Circuit considered whether the EEOC could bring a subpoena enforcement action after the charging party had settled, with the settlement agreement contingent on his charge being withdrawn. EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593, 594–95 (7th Cir. 2009). The lower court treated the charge "as if" it had been withdrawn and determined that the withdrawal deprived it of subject matter jurisdiction over the enforcement action. *Id.* at 595. The Seventh Circuit reversed and noted that the lower court may have been confused by what the *Shell* court meant by "jurisdiction." *Id.* "The Justices appear to have meant the EEOC's jurisdiction, not the court's." *Id.*

[82] *Shell Oil Co.*, 466 U.S. at 77.

[83] *Id.*

[84] *Id.* (noting, however, that the "hope proved overly optimistic, and the recalcitrance of many employers compelled Congress in 1972 to strengthen the EEOC's investigatory and enforcement powers").

[85] *Id.* at 78.

action" so that they are not forced to address "stale claims."[86] Preserving records also serves the need of the EEOC "to make informed decisions at each stage" of the administrative processing, i.e., the investigation, the cause determination, and conciliation.[87] As a result, Title VII gave the EEOC "a broad right of access to relevant evidence" during its investigation.[88] Moreover, when the EEOC seeks enforcement of an administrative subpoena during the investigation, the court does not look at whether the charge is "well founded" or "verifiable," rather it determines whether the information the EEOC seeks through the subpoena is "relevant" to the charge.[89] Thus, the notice the EEOC provides to the employer of the initial charge of discrimination serves as a starting point for the EEOC's investigation, lets the employer know to preserve records for the EEOC's investigation and for a potential lawsuit, and gives the employer notice to conduct its own investigation into the allegations.

For example, in *EEOC v. Shell Oil Co.*, the Supreme Court examined how the charge, notice of the charge, and the EEOC's investigative authority were linked and what was required under the statute for each.[90] The EEOC Chair through a charge of discrimination alleged that Shell Oil Company had engaged in a pattern or practice of discrimination against "[b]lacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment."[91] In the charge, the Chair also listed the location where the discrimination took place, six occupational categories that were affected by the pattern or practice based on race and seven that were affected by the pattern or practice based on sex.[92] As part of its investigation into the charge, the EEOC requested that the company provide the EEOC with information from the company's personnel records.[93] Shell Oil Company, in discussions with the EEOC, asserted that the charge was not supported by facts, provided some employment statistics in an attempt to demonstrate it had not engaged in discriminatory practices, and requested that the EEOC withdraw the charge.[94] The company did not provide the information the EEOC had requested from the company's files.[95] The EEOC then issued a subpoena for the records; Shell Oil Company did not comply with the subpoena, and so the EEOC filed a subpoena enforcement action in federal court.[96]

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[86] Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 372 (1977).

[87] Univ. of Pa. v. EEOC, 493 U.S. 182, 191 (1990). The case was a subpoena enforcement action in which the employer argued that the EEOC's administrative subpoena was unenforceable because the information sought by the subpoena was protected either by privilege or the First Amendment. *Id.* at 192.

[88] *Id.* at 191.

[89] *Id.*

[90] *Shell Oil Co.*, 466 U.S. at 62–64.

[91] *Id.* at 57.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 57–59.

[95] *Id.* at 59.

[96] *Id.* at 59–60.

Shell Oil Company argued that the subpoena could not be enforced because the charge did not state sufficient facts to support the charge.[97] The Supreme Court found that requiring the EEOC "to specify the persons discriminated against, the manner in which they were injured, and the dates on which the injuries occurred . . . would radically limit the ability of the EEOC to investigate allegations of patterns and practices of discrimination."[98] The Court determined that because the investigation must still be relevant to the charge, that in a pattern or practice claim initiated by the EEOC, the Commissioner should describe "the groups of persons" the EEOC believes were affected by the pattern or practice, "the categories of employment positions" affected, "the methods by which the discrimination may have been effected, and the periods of time" in which the pattern or practice occurred.[99] In *Shell Oil Co.*, the Court found that the Chair's charge met those requirements.[100]

The Court also found that the EEOC's notice of the charge to Shell Oil Company served the purposes of the statute in three respects.[101] It gave fair notice to the employer about the allegations.[102] By providing information about "the areas and time periods" in which the EEOC alleged Shell Oil Company had discriminated, the EEOC ensured that Shell Oil Company "if it [were] so inclined" could conduct its own investigation into the allegations and voluntarily comply with Title VII.[103] It also notified the company about the documents that could be relevant to the investigation to guarantee that the company did not accidentally destroy them.[104] The Court also rejected Shell Oil Company's contention that Title VII required the EEOC to disclose to the company the statistical data on which the EEOC based its allegations because the statute provided no support for that interpretation and such disclosure would not serve any of the purposes of the notice requirement.[105] The disclosure of that additional information was not necessary to give Shell Oil Company fair notice of the allegations: it would not further the goal of notifying the company that it needed to identify and preserve relevant evidence and it would not assist Shell Oil Company in voluntarily complying with Title VII.[106] As to the latter point, the Court noted that any "good-faith effort" on the part of a company to comply with Title VII would require the company to initiate its own investigation into the charge and "revelation of the evidence that precipitated the charge would not relieve the employer of the duty to conduct such an inquiry."[107] This highlights another difference between notice in litigation and notice in the EEOC's administrative processing. In administrative processing, because of the focus on voluntary compliance, the employer is not bound by the EEOC's findings.

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[97] *Id.* at 60.
[98] *Id.* at 70.
[99] *Id.* at 73.
[100] *Id.*
[101] *Id.* at 79.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 79–80.
[106] *Id.* at 80.
[107] *Id.*

The final step of the administrative processing, conciliation, relies on the employer's voluntary compliance. Unlike the final step in civil litigation—a trial or adjudication on the merits in which a decision is imposed on the litigants—both parties (the EEOC and the employer) enter into an agreement in conciliation voluntarily.[108] In the debates leading up to the passage of the 1972 Amendments, some legislators were concerned that the EEOC's efforts to conciliate were judicially unreviewable as written in the 1964 Act, and proposed language that would allow defendants to challenge the conciliation process in later litigation.[109] Their concerns largely were based on a belief that employers, through the conciliation process, were being "asked for more than the law required."[110] In response to the proposal, Senator Javits argued that allowing judicial review would ignore that conciliation is voluntary and he recognized that making conciliation unreviewable does not abridge anyone's rights:

> I think the other critical point is that negotiations for settlement are traditionally without prejudice. The . . . amendment would seek to make the negotiation of a settlement a judicial proceeding, again an absolutely unheard of provision. No one's rights are cut off. The [employer] can appeal [the notice of conciliation failure within the EEOC] . . . . Also, the party most affected—to wit, the basic party in interest—the claimant, as it were—is not cut off from a suit that he is not a party to the settlement of.[111]

The Senate rejected the proposed amendment.[112] The history of the EEOC's conciliation and litigation authority make clear that a key difference between administrative processing and litigation is the nature of the rights at stake.

Accordingly, the Supreme Court has found that in subsequent litigation, the EEOC's claim is not limited to that of the charging parties in the charge of discrimination.[113] And, in subsequent litigation the court is not bound by the EEOC's finding of cause or no cause.[114] Therefore, despite some similarities between the purposes of notice in litigation and administrative processing, what is at stake in each proceeding is decidedly different. Because an employer is not bound by the EEOC's findings in its charge processing and is not required to conciliate, the notice provided to the employer during the administrative processing does not have to be the equivalent of that provided in litigation where an employer faces a finding that will subject it to liability.

IV. Misconstruing Notice in the EEOC's Administrative Processing Impermissibly Enlarges Employer's Due Process Rights at the Expense of the Effective Enforcement of Title VII

Courts that fail to take account of the differences between notice and disclosure in litigation and notice and disclosure in the EEOC administrative

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[108] *See* 118 Cong. Rec. 3,805 (Feb. 14, 1972) (statement of Sen. Javits) ("[T]here is no compulsion on the [employer]—he does not have to enter into the conciliation agreement in any way, shape or form . . . .").
[109] *See id.* at 3,803, 3,805.
[110] *Id.* at 3805–06.
[111] *Id.* at 3806–07.
[112] *Id.* at 3807.
[113] Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 331 (1980).
[114] *Id.* at 332.

processing, erroneously conflate the process that is due for employers in each proceeding, run afoul of Congressional intent, and injure the effective enforcement of Title VII. First, procedural rules in litigation "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' "[115] Requiring notice and full disclosure during the EEOC administrative processing and conciliation, both enlarges the employer's substantive rights and abridges the employee's right to redress.

The employer's substantive right at issue during the EEOC administrative processing is an opportunity to voluntarily resolve and comply with Title VII.[116] In rejecting the argument that the EEOC must meet the class certification requirements under Rule 23 because otherwise defendants would be deprived of the notice class certification provides, the Court in *General Telephone Company of the Northwest, Inc. v. EEOC* stated, "[t]he courts, however, are not powerless to prevent undue hardship to the defendant . . . . The employer may, by discovery and other pretrial proceedings, determine the nature and the extent of the claims that the EEOC intends to pursue against it."[117] Barring litigation of the EEOC's conciliation efforts does not mean that employers will be subjected to undue hardship. Employers still have the ability through pleading and discovery to determine the scope of the claims and the substance of the allegations against them prior to being subjected to trial.[118]

The process to challenge adequacy of notice in administrative processing, then, is not through an affirmative defense or through a jurisdictional challenge in subsequent EEOC litigation on the merits. Employers should challenge the initial notice and the scope of the EEOC's litigation during the administrative processing—in response to the EEOC's request for information and documents.[119] Similarly, employers have the option of not conciliating if they believe the EEOC's claims are without merit and taking their chances that the EEOC will not file a lawsuit in which the factual findings and the EEOC's

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[115] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)).

[116] *See supra* Part III.B (discussing an employer's right to resolve an action through the EEOC's notice requirements).

[117] *Gen. Tel. Co. of the Nw., Inc.*, 446 U.S. at 333.

[118] For example, in *EEOC v. Hotspur Resorts Nev.*, No. 2:10-cv-2265-RCJ-GWF, 2011 WL 4737409, at *1 (D. Nev. Oct. 5, 2011), the court granted the employer's motion for a more definite statement under Rule 12(e).

[119] *See, e.g.*, EEOC v. United Air Lines, Inc., 287 F.3d 643, 649 (7th Cir. 2002). In *United Air Lines*, the EEOC was investigating a charge of discrimination that alleged United Air Lines had discriminated on the basis of national origin (American) and sex (female and pregnancy) when the airline failed to pay into the French social security system on behalf of the American employees, resulting in American employees "not [being] compensated for absences from work due to illness or temporary disability whereas French employees are." *Id.* at 646. The EEOC issued an administrative subpoena to United Air Lines that sought information not only related to American flight attendants in France and their French comparators, but also sought information related to all of the airline's employees residing abroad. *Id.* at 654. United Air Lines objected to the subpoena and did not provide the information requested, so the EEOC brought an enforcement action in federal court. *Id.* at 648. Although the district court enforced the subpoena, the Seventh Circuit reversed because the subpoena was overly broad and sought information not relevant to the initiating charge. *Id.* at 655.

cause determination will be given no deference. Employers should not be able to have it both ways; either the EEOC's administrative processing is binding on the employer and requires the type of due process rights that attach to binding adjudications, or the EEOC's administrative processing is not binding on the employer and the court owes no deference to the EEOC's factual findings in subsequent litigation.

Second, Congress intended that the administrative processing of a charge should not interfere with the right to redress violations of Title VII through litigation. To ensure the effective enforcement of Title VII, Congress intentionally privileged the individual and the EEOC's right to redress a violation of Title VII over the EEOC's role in the administrative processing of the charge. In its Conference report on the 1972 Amendments, the Senate wrote:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.[120]

This intent to ensure the right to redress is further illustrated by Congress' passage of the Civil Rights Bill of 1991, in which Congress included compensatory and punitive damages within the potential remedies available under Title VII.[121] In expanding the remedies, Congress explicitly found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."[122] Rather than mandate that all complaints be resolved administratively, Congress created a system in which remedial rights are "paramount."

The Court's decision in the arbitration context illustrates the primacy of remedial rights in the statutory scheme of federal anti-discrimination laws. In *EEOC v. Waffle House, Inc.*, the employer challenged the EEOC's ability to seek individual relief on behalf of an employee who had signed an arbitration agreement.[123] One of the reasons the Court rejected the employer's arguments was because it would "jeopardize the EEOC's ability to investigate and select cases from a broad sample of claims" given the increasing use of employment arbitration clauses as a condition of employment.[124]

Finally, requiring the EEOC to provide the same notice to employers in its administrative processing as it must in litigation will undermine the effective enforcement of Title VII in concrete ways: it risks undermining the confidentiality of conciliation; forcing the EEOC to reveal the identity of all claimants may result in fewer people coming forward to report violations; and allowing employers to litigate the sufficiency of notice in the administrative processing needlessly introduces delays and inefficiencies in the litigation.

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[120] Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 366 (1977) (quoting 118 CONG. REC. 7,168 (Mar. 6, 1972)).

[121] *See supra* Part.I and note 14.

[122] Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071.

[123] EEOC v. Waffle House, Inc., 534 U.S. 279, 291–92 (2002).

[124] *Id.* at 296 n.11.

Title VII and the EEOC's regulations mandate that the EEOC maintain the confidentiality of the conciliation.[125] Making public anything "said or done during and as a part of" conciliation will subject the person who reveals the information to a fine of up to $1,000 and/or a term of imprisonment for up to one year.[126] The court in *EEOC v. Mach Mining, LLC* discussed these confidentiality provisions and concluded that Title VII "make[s] all details of the conciliation process strictly confidential," and thus allowing an affirmative defense for failure to conciliate conflicts with the statute.[127]

In some cases, the EEOC may need to maintain the anonymity of potential claimants and not doing so could deter victims of discrimination from coming forward. For example, the nature of the allegations, the immigration status of the claimants, or the risk of retaliation may justify anonymity. Indeed, the Committee Conference Report for the 1972 Amendments states that one of the reasons Congress amended the statute to allow the Commissioner to bring a charge is it "would enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals."[128] Potential claimants may fear retaliation if they are identified during conciliation as having provided information to the EEOC during its investigation.[129]

That the EEOC received 31,208 charges of retaliation in its most recently reported fiscal year, demonstrates that an employee's fear of retaliation is not baseless.[130] Moreover, particularly vulnerable segments of the workforce may fear retaliation because of their immigration status or the immigration status of their family members:

> Workers fear calling attention to themselves because they risk employer retaliation or ICE detection. They will not want to make affirmative complaints regarding their labor and employment conditions. Nor will they be willing to exercise their rights as workers to enforce labor protections.[131]

In its most recent strategic plan, the EEOC reiterated its commitment to focusing on cases in which discriminatory employment practices affect "vulnerable

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[125] 42 U.S.C. § 2000e-5(b) (2012); 29 C.F.R. § 1601.26(a) (2013).

[126] 42 U.S.C. § 2000e-5(b).

[127] EEOC v. Mach Mining, LLC, 738 F.3d 171, 174–75 (7th Cir. 2013).

[128] 118 CONG. REC. 7,167 (Mar. 6, 1972).

[129] *Cf.* Morrison, *supra* note 2, at 143 (describing the ability of the EEOC to initiate an investigation through a Commissioner's Charge on behalf of an individual employee who cannot file a Charge because he fears retaliation) (citing EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984)).

[130] *Charge Statistics FY 1997 Through FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 8, 2014) (listing data that shows the EEOC received 31,208 charges alleging retaliation under Title VII, which makes up 31.4 percent of all charges the EEOC received in FY 2012).

[131] Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 310 (2010). *See also* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 403 (2011) (discussing impact of state and local immigration regulation on the enforcement of Title VII); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 895 (2008).

workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them."[132]

Employer challenges to the EEOC administrative process also result in delays and inefficiencies in subsequent litigation. The Supreme Court has recognized that some employers may "have no interest in complying voluntarily with the Act, [and] wish instead to delay as long as possible investigations by the EEOC."[133] The same could be said of litigation. Federal Rule of Civil Procedure 1 states: "[the rules shall] be construed and administered to secure the just, speedy, and, inexpensive determination of every action." Requiring that notice and disclosure of information during the EEOC's administrative processing of charges be the equivalent of the notice and disclosure given to defendants during litigation does not result in the "speedy, and, inexpensive determination" of Title VII claims. Court time is expended in making a determination under such an approach. In each case, courts would have to examine the merits as determined in the administrative processing. Such a subjective test requires a fact intensive inquiry that would also waste court resources. For instance, in *EEOC v. Mach Mining, LLC*, the court described the two years of litigation that occurred relating to whether the EEOC had conciliated in good faith:

> The parties have spent nearly two years sparring over whether [the failure to conciliate in good faith] is a sufficient ground for dismissing the discrimination case. [It] has been the subject of extensive discovery requests by Mach Mining seeking information about the EEOC's investigation and conciliation efforts. The defense has also slowed discovery on the merits of the underlying discriminatory hiring claim. Mach Mining has asserted failure to conciliate as a basis for objecting to a number of the EEOC's discovery requests.[134]

This type of litigation is neither speedy nor inexpensive, and "impose[s] significant costs on both sides, as well as on the court."[135]

Moreover, once the court finds that the employer received proper notice and the EEOC disclosed the relevant information, the inquiry into the merits of the claim will begin. Allowing collateral inquiry into the EEOC's administrative processing of charges is not consistent with Rule 1's mandate that court procedure be administered in a just manner. Without a bright line rule or governing set of principles, courts may reach inconsistent determinations regarding when notice is sufficient and whether the EEOC's disclosure of information during conciliation was consistent with "good faith" efforts. As the current circuit split demonstrates, this result is already occurring.[136]

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[132] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at 1 (2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

[133] Univ. of Pa. v. EEOC, 493 U.S. 182, 194 (1990) (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 81 (1984)).

[134] EEOC v. Mach Mining, LLC, 738 F.3d 171, 173 (7th Cir. 2013).

[135] *Id.* at 179.

[136] *Id.* at 183 ("Given Title VII's deliberate silence concerning the details of conciliation, it is not surprising that other courts have struggled to provide meaningful guidance on how to judge the process."). *See also id.* at 176 n.2 (providing a compilation of cases illustrating the inconsistencies in the decisions reached by courts about the proper scope of review of conciliation).

Conclusion

This essay argues that courts have not looked carefully at the purposes of notice in determining a governing set of principles for collateral attacks on the EEOC's administrative processing. Instead, courts have misconstrued notice in the charge handling procedures by conflating it with the purposes of notice in litigation. This view fails to take account of the important differences between the two, most importantly, what is at stake for employers in each proceeding. As a result, courts are doing real harm to the EEOC's ability to effectively enforce Title VII.