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The Tides Are Turning: EEOC Pattern Or Practice Lawsuits Must Adhere To Title VII's 300-Day Limitation Period

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THE TIDES ARE TURNING:

EEOC PATTERN OR PRACTICE LAWSUITS MUST ADHERE TO TITLE VII’S 300-DAY LIMITATION PERIOD

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I. TITLE VII’S LIMITATIONS PERIOD IS “ARGUABLY THE MOST MUDDLED AREA IN ALL OF EMPLOYMENT DISCRIMINATION LAW”\(^1\)

In 2012, federal courts across the nation issued rulings that strike at the heart of the EEOC’s attempts to secure a broad interpretation of the limitations period in Section 707 of Title VII of the Civil Rights Act of 1984.\(^2\) To employers’ satisfaction, this trend signifies a shift away from courts’ previous interpretations of statutory language. These rulings caution the EEOC that modern courts are applying the 300-day limitations period expressly set forth in Section 706 to pattern or practice claims brought pursuant to Section 707.\(^3\) This

\(^1\) See generally 2 Barbara Lindermann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 1315 (Paul W. Cane, Jr., 3d ed. 1996).

\(^2\) See 42 U.S.C. § 2000e-6. Pattern or practice claims are commonly referred to as Section 707 cases because the authority is derived from Section 707 of Title VII. Thus, the text of this article refers to the original legislative section numbers and the parallel United States Code Provisions are cited within the footnotes.

changing tide is welcome news to employers because applying the plain language of Section 707 can work to wipe out large numbers of the EEOC’s claims.

Whether Section 707 incorporates the charge-filing period of Section 706 “is a question that has divided district courts and has eluded the courts of appeals.”

No court of appeals has directly addressed the issue. The “older” cases state that the

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2012).

4 See EEOC v. Freeman, 2010 WL 1728847, at *2 (comparing district court cases).


... even if it were controlling ... Serrano did not explicitly address the applicability of the statute of limitations in Section 706 to Section 707 pattern or practice claims. Instead, the court in Serrano addressed the issue of whether the EEOC can pursue a pattern or practice claim under Section 706, rather than Section 707. The Serrano court found that a pattern or practice claim may be brought pursuant to Section 706, but did not address whether the statute of limitations in Section 706 is applicable to pattern or practice claims brought under Section 707. As such, the Serrano case is of limited application, and cannot be said to constitute an intervening application, and cannot be said to constitute an
300-day statute of limitations “does not apply when the EEOC brings a pattern or practice suit.”6 In those instances, courts interpreted Title VII to allow the EEOC to obtain relief for all claimants harmed by a discriminatory policy, irrespective of the date the harm occurred. More recent district court cases, however, hold that “the EEOC is bound by the 300-day limitations period when proceeding pursuant to either Section 706 or Section 707.”7
Because interpretation of the statute of limitations in Section 707 is complex and has both legal and practical ramifications, it is hoped that a court of appeals, and perhaps the Supreme Court, will address whether Section 706’s 300-day limitation applies to Section 707. Until that time, however, employers and the EEOC are well advised to have a comprehensive understanding of the shifting reach of Title VII’s statute of limitations.

To the practicing lawyer, the procedures imposed by Title VII are often the most important – and vexing – features of the controlling law. If parties miss filing dates, Title VII’s complex procedural scheme can effectively limit or foreclose the remedies available. This article attempts to assist employers litigating with the EEOC through a comprehensive review of the application of Section 706’s 300-day charge-filing period to Section 707 pattern or practice claims. Notably, this is the first law review article to address this significant shift in the legal landscape for Title VII enforcement actions.

Part II of this article begins with an overview of the EEOC’s increased interest in high-profile, high-impact, systemic litigation. Part III of this article describes the administrative process of Sections 706 and 707 charges. Part


IV of this article introduces the split among courts that have examined if Section 706’s 300-day charge-filing period applies to Section 707 cases. Parts V and VII analyze employers’ and the EEOC’s arguments on each side of the split. Part VIII suggests there is a growing consensus that Title VII’s language implicates and requires that claims brought pursuant to Section 707 comply with Section 706’s 300-day limitations period. Ultimately, this article proposes that appellate courts follow recent district court rulings and apply the plain language of Title VII by applying the 300-day limitations period to Section 707 claims. Alternatively, this article proposes that if courts are unable to clarify Section 707’s time-charge period, then Congress should.

II. THE EEOC’S INCREASING EMPHASIS ON SYSTEMIC LITIGATION

In April 2005, the EEOC announced and initiated its Systemic Program, the objective of which is to get “more bang for the buck” by litigating discrimination claims that affect large groups of employees.9 The EEOC defines systemic lawsuits as cases that involve “pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an

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industry, occupation, business, or geographic area.”¹⁰ Since the adoption of the Systemic Program, the EEOC has devoted increased resources to litigate and resolve systemic cases.

Nearly two years after the initiation of the Systemic Program, the number of the EEOC’s pattern or practice lawsuits the EEOC filed rose from only fifteen in 2006 to thirty-eight in 2008.¹¹ In 2008, the EEOC filed seventeen systemic lawsuits, up from eleven systemic lawsuits in the preceding year.¹² In 2009, the EEOC continued to devote its resources to the Systemic Program and initiated still more large-scale discrimination lawsuits. Then acting Chairman of the EEOC, Stuart Ishimaru, noted that the past few years had been “just the start” of the EEOC’s systemic litigation initiative.¹³ He stated

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that the EEOC would work “smarter and harder” in 2010.

The EEOC did just that, and in 2010 the Commission brought more systemic cases than ever before.\textsuperscript{14} That year, the EEOC initiated a total of 250 lawsuits, 60 of which were pattern or practice cases.\textsuperscript{15} The EEOC also actively investigated 39 pattern or practice charges.\textsuperscript{16} The EEOC’s 2010 litigation agenda continued to accelerate and demonstrated that the Commission would continue to file more employment discrimination charges against employers.

In 2011, the EEOC investigated and filed 261 lawsuits – trumpeting its focus on “high priority. . . issues that impact large numbers of job seekers, and employees.”\textsuperscript{17} Of these 261 lawsuits, “67 involved up to 20 claimants, and 23 involved claims of systemic discrimination involving ‘large numbers of people.’”\textsuperscript{18} The EEOC’s budget request stated that the “priority


\textsuperscript{15} Id. In 2010, the EEOC resolved 285 pending lawsuits for a total of $85 million in settlement proceeds.

\textsuperscript{16} Id.


for agency resources continues to be litigation of systemic cases” and that it would continue to “prioritize spending for the Systemic Initiative . . . [since] systemic cases generate substantial media and other public notice, [and] help to deter other employers from engaging in similar prohibited conduct.”

The pure number of filings, coupled with the EEOC’s various statements throughout the year, underscored the EEOC’s commitment to pursuing its Systemic Initiative and litigating pattern or practice cases. Nevertheless, many consider 2011 a devastating year for the EEOC because several district courts issued scathing opinions and multi-million dollar sanction awards against the EEOC, criticizing its “sue first, aim later” tactics.

19 FY 2012 Congressional Budget Justification, Submitted to the Congress of the United States February 2011, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 2011), available at http://www.workplace classaction.com/eeocbudgetjustify.pdf. The EEOC also noted that as “a greater proportion of [the EEOC’s] litigation docket is focused on systemic cases, the amount of resources needed to perform the work will rise.” Id.

In 2012, the EEOC’s volume of filings dropped. The EEOC’s 2012 Performance and Accountability Report noted that the EEOC only filed 122 lawsuits in 2012.\(^2\) The dip in filings “shows the agency respond[ed] to some if its litigation defeats” and reflects the EEOC’s attempt to “push for quality over quantity” in 2012.\(^2\) Nevertheless, the decrease in total lawsuits filed by the EEOC between 2011 and 2012 highlighted the EEOC’s increased focus on pursuing systemic discrimination lawsuits.\(^2\) “By the end of FY 2012, systemic suits accounted for 20% of all of the EEOC’s active merits suits, the largest proportion on the EEOC’s active docket since it began tracking in FY 2006.”\(^2\) Additionally in 2012, the EEOC developed its Strategic Enforcement Plan, the blueprint for EEOC litigation through 2016.\(^2\) Under the Strategic


\(^2\)Abigail Rubenstein, EEOC Lawsuit Filings Dip As Agency Focuses On Case Quality, LAW 360 (Oct. 5, 2012) (quoting Gerald L. Maatman, Jr.).

\(^2\)Gerald L. Maatman, Jr. and Christopher J. DeGroff, EEOC-Initiated Litigation: Case Law Developments in 2012 and Trends To Watch For in 2013, Seyfarth Shaw LLP (2012).

\(^2\)Id. at 6.

Enforcement Plan, “the EEOC anticipates that systemic filings will account for 22% to 24% of all pending lawsuits by FY 2016.”

The Obama administration has also placed a priority on the regulation of employment and workplace issues. Nine days after President Obama’s first inauguration, the President signed the Lilly Ledbetter Fair Pay Act into law to overturn the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Company.* By the end of his first month of presidency, President Obama signed three executive orders affecting obligations of employers that contract with the federal government. In President Obama’s February 13, 2013 State of protecting immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.


27 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2009); see Pub. L. 111-2, 123 S. 5 (2009). The Act provides that the limitations period under the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973 restarts for aggrieved employees upon the receipt of each paycheck that allegedly reflects a discriminatory compensation decision. Nothing in the Act suggests that the EEOC is immune to the 300-day limitations period when it brings a pattern or practice case.

28 See EXECUTIVE ORDER 13494, Economy in Government Contracts (enacted Jan. 30, 2009); EXECUTIVE ORDER 13495, Nondisplacement of Qualified Workers Under Services Contracts (enacted Jan. 30, 2009); EXECUTIVE ORDER 13496, Notification of Employee Rights
the Union Address, he asked Congress to pass the Paycheck Fairness Act to expand the landmark 1963 Equal Pay Act that prohibits wage discrimination based on gender.\textsuperscript{29} If the bill is passed, companies will have to show that differences in wages are not based on gender. The bill also seeks to ban retaliation against employees who reveal their own wages or seek information about wage practices by their employers.

The Obama administration’s mounting political support for the EEOC’s efforts to combat discrimination – coupled with the EEOC’s release of its 2012 Strategic Enforcement Plan – underscores the progress the EEOC has made toward litigating systemic claims and its intent to continue in this arena. Thus, now – more than ever – employers must take steps necessary to prevent, and when necessary, defend systemic claims. When applicable, employers are well served to assert a statute of limitations argument that can act to remove as time-barred many charges from the lawsuit, therefore reducing the scope of the litigation and potential employer liability and exposure. The discussion that follows provides a comprehensive review of the steps necessary to initiate individual and pattern or practice

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\textsuperscript{29} The Paycheck Fairness Act was reintroduced in the U.S. Senate (S. 797) and the U.S. House of Representatives (H.R. 1519) on April 12, 2011. In response to President Obama’s dedication to equal pay, Congresswoman Terri A. Sewell said “I applaud President Obama for his commitment to ensuring that all Americans can pursue the American dream and climb the ladder of success. I fully support his plan to address the issues that are critically important to the people of my district and all Americans — workforce development, job creation, and securing equal pay for equal work.” Staff Reporter, \textit{Statement from Congresswoman Terri A. Sewell On The State of the Union Address}, US OFFICIAL NEWS (PAKISTAN), Feb. 13, 2013.
lawsuits under Section 706 and Section 707.

III. THE ADMINISTRATIVE PROCESS OF § 706 AND § 707 – “AN OBSTACLE COURSE” WHICH “PLACES THE EEOC AT THE COURTHOUSE DOOR”

Title VII authorizes the EEOC to bring civil suits to eradicate employment discrimination. Congress’ intent in creating Title VII was to “eliminate, through formal and informal procedures, employment discrimination based on race, color, religion, sex, or national origin.” Title VII enumerates several procedural steps that the EEOC must complete before filing a lawsuit.

When filing Section 706 and Section 707 charges, the person claiming to be aggrieved, his or her representative, or a member of the Commission is required to file a charge with the EEOC. For the charge to be considered valid and timely,


31 Congress’ “primary objective” when creating Title VII was to “bring employment discrimination to an end.” Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982); see also Occidental Life Ins. Co. v. EEOC, 432 U.S. at 358-59; General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980) (“when the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”).


34 See 42 U.S.C. §2000e-16 (1988) (stating that the charge must be “in writing under oath or affirmation and shall contain such information
Section 706 expressly states that the aggrieved party must file a charge of discrimination with the EEOC within 180 days of the alleged unlawful employment practice. In a deferral state, where the complainant instituted proceedings with a state or local agency, the filing period is 300 days to permit processing by the nonfederal agency. Forty-eight states have their own internal agencies to deal with employment discrimination claims, and therefore in most cases, the 300-day rule applies. Thus, this article will refer to the filing period as 300-days throughout. The time limitation is expressly set forth in Section 706 and states as follows:

A charge under this section shall be filed within one hundred and eighty days [300 days in some states] after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) and shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person grieved has initially instituted proceedings with State or local agency with authority to grant or seek relief from such practice or to institute criminal

and be in such form as the Commission requires. . . .

); Anne Noel Occhialino and Daniel Vail, Why The EEOC (Still) Matters, 22 HOFSTRA LAB. & EMP. L.J. 671, 693 (2005) (citing EEOC v. Sell Oil Co., 446 U.S. 54 (1984)) (“the filing of a charge facilitates the EEOC’s ability to vindicate the public’s interest in eradicating employment discrimination by ‘plac[ing] the EEOC on notice that someone... believes that an employer has violated... [T]itle [VII.’”)

35 Id.
36 Id.
37 Thus, in most cases the 180-day rule is extinct. Id.
proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.\(^{38}\)

Therefore, if the aggrieved party files a claim with the EEOC 300 days after the discriminatory event, the charge is late and their claim is meritless.\(^{39}\)

Section 707 cases must “be conducted in accordance with the procedures set forth in Section 706.”\(^{40}\) In relevant part, Congress added to Section 707(e), “[a]ll actions shall be conducted in accordance with the procedures set forth in Section 706.”\(^{41}\) At issue among courts across the nation, and

\(^{38}\) Id.

\(^{39}\) See Laurie M. Stegman, An Administrative Battle Of The Forms: The EEOC’s Intake Questionnaire And Charge Of Discrimination, 91 Mich. L. REV. 124, 125 (1992) (“[a]lthough the Supreme Court as held that timely filing a charge is not a jurisdictional requirement but rather akin to a statute of limitations, federal courts dismiss numerous claims when plaintiffs, failing to comply wit this procedural requirement, offer explanations insufficient to toll the filing limitations period.”); Angelino v. The New York Times Co., 200 F.2d 73, 87 (3d Cir. 1999) (internal citations omitted) (failing to comply with the 300-day rule is not “jurisdictional, but rather an affirmative defense subject to waiver, tolling, and other equitable remedies.”).


\(^{41}\) When asserting a Section 707 claim, the EEOC is subject to the procedures of Section 706, as set forth in Section 707(e): Investigation and action by Commission pursuant to filling of charge of discrimination; procedure. Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the
discussed in this article, is whether this clause also incorporates Section 706’s 300-day limitations period to Section 707 actions.

After the charge is filed, the EEOC must notify the employer before it begins an investigation. Afterward, the Commission may elect to begin an investigation to determine if there is reasonable cause to believe that the charge is true. If the EEOC’s investigation reveals that there is reasonable cause, it must engage in efforts to eliminate the discrimination through “conference, conciliation, and persuasion.”

These steps are mandatory and failure to comply with these pre-suit obligations warrants dismissal of the EEOC’s charges.

Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act. Through this clause, Congress incorporated the investigation requirement, cause finding, and conciliation procedures of Section 706 into Section 707 pattern or practice cases. Id.

Notice must be served on the employer within ten days after the charge is filed. Id. If the alleged discrimination occurred in a state that has a law prohibiting the “unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice,” the EEOC may not act on the charge until sixty days pass.

When drafting Title VII, Congress intended “to encourage the private settlement of claims as an informal means toward the end of eliminating discrimination without overburdening the courts or the EEOC.” EEOC v. Henry L. Walner & Associates, 91 F.3d 963, 968 (7th Cir. 1996).

(affirming dismissal of the EEOC’s lawsuit because the EEOC “wholly failed to satisfy” Title VII’s pre-suit investigation and
If the EEOC’s efforts to conciliate fail, then the claimant can go forward with the lawsuit or the EEOC can file the case in its own name.\(^{46}\)

**A. Section 706 – Precise Definition Of A Timely Charge**

Lawsuits brought pursuant to Section 706 enable the EEOC to sue on behalf of one or more persons aggrieved by an unlawful employment practice.\(^{47}\) Section 706 lawsuits involve allegations that an employer intentionally took an adverse action against an applicant or employee because of a protected characteristic such as race or sex.\(^{48}\)

By contrast, when the EEOC brings a Section 706 suit, it “stands in the shoes of those aggrieved persons in the sense that it must prove all of the elements of their . . . claims to obtain individual relief for them.”\(^{49}\) Thus, if the case proceeds, it does so under the framework first articulated in *McDonnell Douglas* conciliation requirement); see *EEOC v. U.S. Steel Corp.*, 877 F. Supp. 2d at 13 (citing *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1304 (W.D. Pa. 1977)) (“every step in the statutory scheme, including notice, investigation, determination, and conciliation ‘is intended to be a condition precedent to the following step and, ultimately, to suit.’”).

\(^{46}\) 42 U.S.C. § 2000e-5(f); *General Tel. v. EEOC*, 466 U.S. at 327.

Under Section 707 action, Title VII grants the EEOC the authority “to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.” 42 U.S.C. § 2000e-6(f).


\(^{48}\) See *EEOC v. Scolari Warehouse Mtks., Inc.*, 488 F. Supp. 2d at 1143.

Under *McDonnell Douglas*, the EEOC bears the burden of proving a *prima facie* case of individual discrimination that was motivated by a protected factor. Establishing a *prima facie* case requires a showing that the claimant: (1) is a member of a protected class; (2) was qualified for the position; (3) an adverse employment action occurred; and (4) he or she was replaced by someone outside the protected group or was treated less favorably than other similarly situated employees outside the protected group. If the EEOC demonstrates a *prima facie* case, the burden shifts to the defendant “to articulate a legitimate, nondiscriminatory or nonretalitory reason for its employment action.” In the final stage of *McDonnell Douglas*, the EEOC must prove by a preponderance of the evidence that the employer’s articulated reason was mere “pretext” for discrimination. If the employer fails to refute the plaintiff’s claims, the district court may hold that a violation of Title VII occurred, and determine whether prospective relief is appropriate.

Of key importance to the EEOC and aggrieved individuals

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50 See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *EEOC v. JBS USA, LLC*, 2011 WL 3471080, at *4 (citing *Serrano v. Cintas Corp.*, 711 F. Supp. 2d 782, 794 (E.D. Mich. 2010)) (“the *Teamsters* framework generally applies to pattern or practice claims brought under Section 707, whereas the *McDonnell Douglas* framework generally applies to pattern or practice claims brought under Section 706.”).

51 *McDonnell Douglas Corp.*, 411 U.S. at 802.

52 *Id.*

53 *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007).


55 *Teamsters*, 431 U.S. at 361.
— if the EEOC prevails in a Section 706 lawsuit, “the full range of legal remedies available to individuals is generally available to the EEOC.”\textsuperscript{56} Thus, under Section 706, the EEOC is entitled to equitable relief, compensatory, and punitive damages.\textsuperscript{57}

**B. Section 707 – “A Trap For The Unwary”\textsuperscript{58}**

Pursuant to Section 707, the EEOC also has the authority to bring pattern or practice suits when an employer engages in acts prohibited by Title VII.\textsuperscript{59} Pattern or practice allegations seek “to eradicate systemic, company-wide discrimination and counts on an objectively verifiable policy or practice of

\textsuperscript{56} EEOC v. Carolls Corp., 2011 WL 817516, at *3.
While the EEOC’s power is broad, it is not indefinite. \textit{Kolstad v. Am. Dental Ass’n.}, 527 U.S. 526, 545 (1999). Damages are limited to $300,000 per injured party for employers with more than 501 employees. \textit{See} PUB. L. NO. 102-166 (codified as § 1981(a)(1)). For back pay awards, remedies are limited in scope to any party to “two years prior to the filing of the charge with the Commission.” § 2000e-5(g)(1).
\textsuperscript{59} See 2000e-6(e). Government enforcement actions are not governed by Federal Rule Of Civil Procedure 23 even though pattern or practice suits affect groups of individuals. \textit{See generally} 5 James Wm. Moore et al., \textit{MOORE’S FEDERAL PRACTICE} § 23.04 (3d ed. 2007). It is also well established that Rule 23 does not apply to the EEOC when it asserts a claim pursuant to Section 706. \textit{See General Tel. Co. v. EEOC}, 446 U.S. at 324 (explaining that the EEOC may sue an employer on behalf of a group of aggrieved persons without certifying the case as a class action or complying with the prerequisites of Federal Rule of Civil Procedure 23). Congress expanded the EEOC’s enforcement powers with its 1972 amendments, which authorized the EEOC to initiate civil actions in federal court against private employers reasonably suspected of engaging in a pattern or practice of discrimination. 42 U.S.C. § 2000e-5(f), - (6)(e).
discrimination by a private employer against its employees.”

Whereas Section 706 lawsuits require proof of intentional discrimination, no intent is required to prove a pattern or practice of discrimination under Section 707. Thus, if the EEOC proceeds with its pattern or practice cause of action, the burden of proof differs from Section 706 allegations. “In pattern or practice cases, the EEOC can utilize the *Teamsters* framework. First, the EEOC must establish a *prima facie* case of discrimination by demonstrating that unlawful discrimination was a ‘regular procedure or policy’ followed by the employer.” To establish a pattern or practice of discriminatory treatment under Section 707, the EEOC must show ‘more than the mere occurrence of isolated or accidental or sporadic discriminatory acts.’” The EEOC must “show that the discrimination was the defendant’s ‘standard operating procedure – the regular rather than the unusual practice.’” If the EEOC establishes its *prima facie* case, the employer may defend itself by challenging the plaintiff’s proof or by providing non-discriminatory explanations for the facially discriminatory procedures.

Finally, Section 706 differs from Section 707 because “[t]he 1991 amendments to Title VII expanded the remedies available for Section 706 claims from purely equitable

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60 *EEOC v. Mitsubishi Motor Mfg. of America*, 990 F. Supp. at 1070.
63 *Id.* (quoting *Obrey*, 400 F.3d at 694).
64 *Teamsters*, 431 U.S. at 360.
remedies, including backpay, to include punitive and compensatory damages, without similarly expanding the damages available for claims brought pursuant to Section 707.” 65 Thus, under Section 706 “[t]he EEOC is entitled to equitable relief, and may also usually pursue compensatory and punitive damages,” whereas under Section 707 those remedies are not available to the EEOC. 66

IV. “TITLE VII IS A STATUTE RIFLE WITH PROCEDURAL REQUIREMENTS WHICH ARE SUFFICIENTLY LABYRINTHINE TO BAFFLE THE MOST EXPERIENCED LAWYER” 67

For many years, federal district courts sided with the EEOC, finding the limitations period in Section 706 inapplicable to Section 707 claims. 68 Those cases date back to the very enactment of Section 707. 69 Perhaps most widely


69 The 1972 amendments to Section 706 of Title VII of the Civil Rights Act of 1964 gave the EEOC authority to institute civil actions in federal courts against employers suspected of unlawful discrimination. PUB. L. No. 92-262 § 4, 86 Stat. 104 (codified at 42
cited by the EEOC is *EEOC v. Mitsubishi Motor Manufacturer of America*, issued by the U.S. District Court for the Central District of Illinois in 1998.\(^{70}\) In *EEOC v. Mitsubishi*, the EEOC asserted that the employer condoned a hostile work environment and claimed the employer engaged in a pattern or practice of sexual harassment.\(^{71}\) The employer asserted a procedural argument, “seeking to bar certain individuals from obtaining individual relief by arguing that a 300-day statute of limitations applies to cut off all individual claims that were not filed with the EEOC 300 days before the Commissioner’s charge was filed.”\(^{72}\) In language that haunted employers for years to follow, the court opined:

> Although Section 707(e) indicates that a Section 707 action is subject to the procedural requirements of Section 706, there is no statutory language, no regulation, no case, and no commentator which definitively holds that there is any limitations period applicable to a Section 706 action.

\(^{70}\) *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. at 1084.  
\(^{71}\) *Id.*  
\(^{72}\) *Id.* at 1082.
Pattern or practice case initiated by the filing of a Commissioner’s charge. In fact, the very nature of a pattern or practice case attacking systemic discrimination by a company seems to preclude the application of a limitations period. Because this Court finds . . . that a Section 707 pattern or practice case is not subject to a limitations period, all individual claims that seek relief based on this pattern or practice will be allowed into the individual relief phase. The fact that some claims might otherwise be time-barred under Section 706, which does expressly contain its own limitations period, both for individual and Commissioner charges, is irrelevant.73

EEOC v. Mitsubishi held that, despite Section 707’s requirement mandating adherence to the procedural requirements of Section 706, its time bar does not apply to Section 707 cases.74 Notably, the court’s only support where the EEOC was a party was EEOC v. Continental Oil Corporation.75 In dicta, the court in EEOC v. Mitsubishi even recognized that such a precedent “might place an impossible burden on defendants in other cases to preserve stale evidence.”76 Nevertheless, for years following EEOC v.

73 Id. at 1083-84.
74 Id. at 1085 (citing EEOC v. Harvey L. Walner & Assoc., 91 F.3d at 968) (“Section 707 suits may be brought by EEOC on its own initiative ‘without certain of the prerequisites to a civil action under [§ 706]’”).
75 EEOC v. Continental Oil Co., 393 F. Supp. at 170. The Court also relied on a commentator’s view. See 4 Lex K. Larson & Arthur Larson, EMPLOYMENT DISCRIMINATION § 75.02[2] (2d ed. 1997) (“more than one unlawful act needed to constitute a pattern or practice of employment discrimination and other parts of § 706 establishing certain time limitations have questionable application to pattern or practice litigation.”).
76 Id. at 1087.
Mitsubishi, district courts similarly found that the time bar does not apply to Section 707 allegations.\(^\text{77}\)

**A. The Rebirth Of Section 707 Statute Of Limitation Litigation**

Beginning in 2002, courts began to reverse course in a flurry of rulings addressing whether the limitations period in Section 706 applies to pattern or practice claims brought under Section 707.\(^\text{78}\) The shift in district courts’ interpretations of the

\(^{77}\) See, e.g., *EEOC v. Continental Oil Co.*, 393 F. Supp. 167 (D. Colo. 1975) (holding that § 2000e-5(f)(1) does not act as a limitations period within which the EEOC must file suit, but the opinion did not mention the separate 180-day limitations provision of § 2000e-4(e)); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (“in short, the literal language of Section 706(f)(1) simply cannot support a determination that it imposes a 180-day time limitation on EEOC enforcement suits.”); *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *EEOC v. AT&T Technologies, Inc.*, Case Nos. 78-CV-3951 & 82-CV-1542, 1987 WL 26142, at *2 (N.D. Ill. Dec. 1, 1987) (“[the EEOC is also subject to the filing procedure of Title VII]; *EEOC v. Rymer Foods, Inc.*, 1989 U.S. Dist. LEXIS 9003, at *4; *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968-69 (7th Cir. 1996) (a pattern or practice suit does not require a valid, timely charge); *EEOC v. Dial Corp.*, 156 F. Supp. 3d 926 (N.D. Ill. 2001); *EEOC v. Scolari Warehouse Mktgs., Inc.*, 488 F. Supp. 2d at 1136; *EEOC v. LA Weight Loss*, 509 F. Supp. 2d at 535; *EEOC v. KCD Construction Incorp.*, 2007 WL 1129220, at *42; *EEOC v. Sterling Jewelers, Inc.*, 2009 U.S. Dist. LEXIS 122102, at *5; *but see EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1260 (M.D. Ala. 1980) (internal citations omitted) (“this Court is of the opinion that the clear language of § 2000e-6(e) makes the procedures of § 2000e-5(e) applicable to pattern or practice suits and that the 180-day period set out in § 2000e-5(e) is one of those procedures.”).

statute of limitations was spurred by the Supreme Court’s ruling in National Railroad Passenger Corporation v. Morgan, where it resolved complexities relating to the continuing violations doctrine.\(^79\) The Supreme Court’s ruling in Morgan included a footnote stating that its ruling gave “no occasion . . . to consider the timely filing question with respect to pattern or practice claims brought by private litigants.”\(^80\) The footnote “seems to have accelerated the rebirth of Section 707” statute of limitations cases.\(^81\) Now, more than ever, the question of whether Section 707 incorporates the charge-filing period of Section 706 is being re-examined by courts from coast to coast.

**B. The Modern Trend**

Within the past twelve years, eighteen courts have ruled on the charge filing issue. Thirteen courts have held that the 300-day statute of limitations set forth in Section 706 applies to Section 707 allegations;\(^82\) and five courts have held that the


\(^{80}\) Id. at 109, n.9 (internal citations omitted).


\(^{82}\) EEOC v. Custom Cos., Case Nos. 02-CV2768, 03-CV2293, 2004 U.S. Dist. LEXIS 5950, at *10-11; EEOC v. Kovacevich “5” Farms,
limitations period does not apply. Additionally, from 2011 to present day, all eight courts that addressed the issue held that the statutory period set forth in Section 706 applies to Section 707 claims. This trend is indicative of a broader retrenchment by some federal courts regarding the 300-day charge-filing period.

Case No.  2007 U.S. Dist. LEXIS 32330  (E.D. Ca. June 4, 2007);  
EEOC v. Freeman, Case No. 09-CV-2573, 2010 WL 1728847, at *2 (D. Md. April 27, 2010);  
EEOC v. Presrite Corp., Case No. 11-CV-260, 2012 WL 3780351;  
EEOC v. U.S. Steel Corp., 2012 WL 3017869 at *5;  

83 EEOC v. Dial Corp., 156 F. Supp. 3d 926 (N.D. Ill. 2001);  
EEOC v. Scolari Warehouse Mkts., Inc., 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007) (holding that “a Section 706 claim is subject to timeliness requirements because the individual nature of the claims may be isolated even when brought on a class-wide basis; no such limitation exists for Section 707 claims because isolating instances of systemic discrimination would be impossible.”);  
EEOC v. LA Weight Loss, 509 F. Supp. 2d 527, 535 (D. Md. 2007);  
EEOC v. KCD Construction Incorp., Case. No. 05-CV-2122, 2007 WL 1129220, at *4 (D. Mn. April 16, 2007);  

EEOC v. Freeman, Case No. 09-CV-2573, 2010 WL 1728847, at *2 (D. Md. April 27, 2010);  
EEOC v. Presrite Corp., Case No. 11-CV-260, 2012 WL 3780351;  
EEOC v. U.S. Steel Corp., 2012 WL 3017869, at *5;  
V. EMPLOYERS’ ARGUMENTS IN SUPPORT OF APPLYING THE 300-DAY LIMITATION PERIOD

Employers have an interest in arguing that the EEOC’s claims, whether based on Section 706 or Section 707, cannot include charges that accrued before the 300-day charge filing period set forth in Section 706. Because Title VII bars enforcement actions based on untimely charges, it “provides repose for employers and prevents them from having to defend against long-stale claims.” Without the 300-day charge-filing period, a decision made in 1964 could be the subject of litigation in 2029 and therefore the EEOC would “resuscitate claims that died years ago.”

Application of the 300-day charge-filing period reduces the EEOC’s ability to extract large settlements under the threat

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86 Id.; As stated by Justice Jackson, statutes of limitations are “practical and pragmatic devices to spare the courts from litigation of stale claims.” Chase Securities Co. v. Donaldson, 325 U.S. 304, 13 (1994). See also Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 630-31 (200) (recognizing that a short charge-filing deadline “protect[s] employers from the burden of defending claims arising from employment decisions that are long past” and reflects Congress’ strong preference for [] prompt resolution”).
87 Brief for Defendant at 14, EEOC v. Kaplan Higher Edu. Corp., Case No. 10-CV-2882 (Apr. 21, 2011); See Adrienne Nicole Calloway, Casenote 180 Days or No Equal Pay: Limiting Employment Discrimination Suits in Ledbetter v. Goodyear Tire & Rubber Co., 59 MERCER L. REV. 59, 798 (2008) (“[c]onsequently, strict enforcement of the statutes of limitations is compatible with the purpose of promoting fairness to employers by not continually holding them liable for injuries they have caused.”); Statutes of limitations are “wise and beneficial laws, not designed merely to raise a presumption of a payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten or be incapable of explanation by reason of the death or removal of the witness.” Bell v. Morrison, 26 U.S. 1 (Pet.) 350, 360 (1828).
of expansive pattern or practice allegations.\textsuperscript{88} It also reduces costs of defending claims and leads to lower amounts of back-pay damages because the discrimination will not have occurred over the course of many years, but instead over only 300 days.\textsuperscript{89}

Enforcing the 300-day charge-filing period serves another important purpose: to ensure that lawsuits are filed while evidence is available, memories are recent, and witnesses are accessible.\textsuperscript{90} If the EEOC is unencumbered by a charge-filing period, the discovery process will be inhibited because relevant documents may have been lost or destroyed, and witnesses’ memories may have failed over time.\textsuperscript{91}

\textsuperscript{88} The larger the size of the pool of potential claimants, the EEOC is apt to demand larger settlement dollars.
\textsuperscript{89} Elizzabeth Landau, \textit{Workplace Class Actions Brought Big Bucks In 2007}, Law 360 (Jan. 15, 2008) (quoting Gerald L. Maatman, Jr.) (“Inflation is one reason the stakes rise over time . . . when you’re dealing with back pay, people’s salaries rise over time . . . back pay today is worth more than back pay a few years ago.”).
\textsuperscript{90} See Charles C. Callahan, \textit{Statutes Of Limitation-Background}, 16 OHIO ST. L.J. 130, 134 (1995) (“it has been remarked that the periods of limitation which differentiate types of actions are determined with reference to the preservation of evidence on which the action depends.”); \textit{Id.}
\textsuperscript{91} Without a charge-filing period, the discovery process would be hampered by “the difficulty of preserving evidence, the frailty of memory and the contingency of the death of witnesses . . .” \textit{Doyle v. West}, 60 Ohio St. 438, 444,54, N.E. 469 (1899); \textit{Shepard v. Thompson}, 122 U.S. 231, 236 (1886) (“the statute of limitations was not designed to protect persons from claims fictitious in nature but from ancient claims, whether well or ill founded, which may have been discharged but the evidence of discharge may be lost.”); \textit{Developments-Statutes Of Limitations}, 63 HARV. L. REV. 1177, 1185 (1950) (“the periods of limitation are graduated mainly with regard to the nature of the evidence on which the actions rest or by which they can be defeated.”); Charles C. Callahan, \textit{Statutes Of Limitation—Background}, 16 OHIO ST. L.J. 130, 113-34 (1995) (the purpose of the charge-filing period is to preserve “a potential defendant’s evidence,
Employers supporting this interpretation, and courts adopting it, generally assert four bases for the position that the 300-day limitations period applies to Section 707 claims. First, employers rely on the plain language of Sections 706 and 707. Second, employers assert that Title VII’s statutory and legislative history supports application of the charge-filing period. Third, employers state that the EEOC cannot expand its substantive rights through its own interpretation of Title VII.92 Finally, employers rely on the modern trend among district courts, which apply the plain language of Section 707.

A. “In Interpreting A Statute, A Court Should Always Turn First To One, Cardinal Canon Before All Others.”93

Employers’ strongest argument rests in the plain language of Title VII. Employers assert that Section 707’s express language imposes the 300-day charge-filing period set forth in Section 706.94 Employers rely on Section 707(e), which states

not a plaintiff’s; and it is limited to the protection of defendants from “bad” claims—that is, claims which it is assumed he could have resisted successfully had evidence been available.”).

94 See, e.g., EEOC v. Kaplan, 2011 U.S. Dist. LEXIS 50035, at *10 (finding “the language of §§ 706(e)(1) and 707(e) to be plain” and applying the limitations period in Section 706(e)(1) suits under section 707); EEOC v. Bloomberg L.P., 751 F. Supp. 2d at 649 (S.D.N.Y. 2010) (holding that the limitation period in Section 706 applies to “pattern or practice” claims); EEOC v. Freeman, 2010 U.S. Dist. LEXIS 41336, at *12-13 (holding that the “plain language of Section 706(e)(1), which is incorporated into Section 707 via subsection (e), precludes the EEOC from seeking relief for individuals who were not subjected to an unlawful employment practice during the 300 days before the filing of the triggering
“[a]ll such actions under Section 707 shall be conducted in accordance with the procedures set forth in Section 2000e-5” i.e., Section 706 of Title VII.\(^95\) Through the phrase “in accordance with,” Section 707 “clearly and unambiguously incorporates wholesale the provisions of” Section 706.\(^96\)

The Supreme Court’s ruling in *Kimel v. Florida Board of Regents* supports this assertion. In *Kimel*, the Supreme Court considered the language of the Age Discrimination in Employment Act, which states: “[t]he provisions of this chapter shall be enforced *in accordance with* the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.”\(^97\) The Supreme Court found it “unmistakably clear in the language of the statute” that Congress incorporated

\(^95\) 42 U.S.C. § 2000e-6(e).


\(^97\) *Kimel v. Florida Bd. of Regents*, 528 U.S. at 73-75 (citing 29 U.S.C. § 626(b) (emphasis added)).
Section 216(b) into Section 626(b). 98

Likewise, in Steadman v. S.E.C., the Supreme Court examined Section 5(b) of the SEC Administrative Procedure Act, which states that an administrative agency “shall give all interested parties opportunity for . . . hearing and decision on notice in accordance with Sections 556 and 557 of this title.” 99 The Supreme Court held that the words “in accordance with” make the provisions of Section 556 applicable to adjudicatory proceedings under Section 554. 100

Employers argue that as in Kimel and Steadman, the plain language of Section 707 applies the limitations period set forth in accordance with Section 706. 101 Therefore, employers assert

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98 Id. at 73-74.  
100 Id. at 97.  
101 Employers also rely on legislatures and regulatory bodies that incorporate the language “in accordance with,” presumably because it avoids ambiguity. Brief for Defendant at 5, EEOC v. Freeman, Case. No. 09-CV-2573 (citing Rule 109(2)(b) (“Any motion for attorneys’ fees in civil rights discrimination cases shall be prepared in accordance with the Rules for Guidelines For Determining Attorneys’ Fees in Certain Cases that are an appendix to these Rules”) (emphasis added); Rule 112(2)(b) (“All communications shall be directed to and filed with the Clerk and a copy of them served upon the opposing party or counsel in accordance with Fed. R. Civ. P. 5”) (emphasis added); MD Code, § 5-103(i) (“Forest mitigation banking under this section shall be conducted in accordance with standards adopted under Subtitle 16 of this title”) (emphasis added); MD Code, § 12-206 (“Except as otherwise provided in this article, a hearing under the Maryland Vehicle Law shall be conducted in accordance with Title 10, Subtitle 2 of the State Government Article) (emphasis added); 16 U.S.C. § 3373(b) (“Hearings held during proceedings for the assessment of civil penalties shall be conducted in accordance with section 554 of Title 5”); 42 U.S.C. § 10155(c)(3) (“Judicial review of any environmental impact statement or environmental assessment
that because Section 707’s plain language applies the procedures set forth in Section 706, the 300-day charge-filing requirement applies to pattern or practice claims.\textsuperscript{102}

B. “\textit{History Teaches Everything Including The Future}”\textsuperscript{103}

When the text of the statute is clear, “the judicial inquiry is complete.”\textsuperscript{104} Nevertheless, employers assert that if courts consult the legislative history of Sections 706 and 707, it reflects Congress’ efforts to restrict the EEOC’s authority though imposing the 300-day charge-filing period.

When creating Section 706, congressmen were careful to implement temporal limits to protect employers from the EEOC. Senator Everett Dirkson first proposed a charge-filing limitation period on the scope of EEOC investigations.\textsuperscript{105} He asked Congress: “What protection is afforded to an employer from fishing expeditions by investigators, in their zeal to

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{102} Prepared pursuant to this subsection shall be conducted \textit{in accordance with} the provisions of section 10139 of this title (emphasis added).
  \item\textsuperscript{103} Alphonse de Lamartine, \textit{History of the French Revolution} of 1848 at 21 (translated from French) (J. & H. Cox Brothers) (1948).
  \item\textsuperscript{104} See, e.g., \textit{Connecticut Nat’l Bank v. Germain}, 503 U.S. 249, 253-54 (1992) (when the words of a statute are clear, “this first canon is also the last: ‘judicial inquiry is complete.’”); \textit{Pavelic & Leflore v. Marvel Entm’t Grp.}, 493 U.S. 120, 126 (1989) (“Our task is to apply the text, not to improve upon it.”); \textit{Boyle v. United States}, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments base don statutory purpose, legislative history, or the rule of lenity.”); \textit{Ratzlaf v. United States}, 510 U.S. 135, 147-48 (1994) (“we do not resort to legislative history to cloud a statutory text that is clear.”).
  \item\textsuperscript{105} 110 CONG. REC. 6449 (1964).
\end{itemize}
\end{footnotesize}
enforce Title VII?" 106 The Supreme Court later addressed Senator Dirkson’s question in *EEOC v. Shell Oil*, where it explained that the purpose of Section 706’s charge-filing requirement was to limit the EEOC. The Court stated:

> It is important to note that the Commission’s power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission’s investigatory power is significantly narrower than that of the Federal Trade Commission or the Wage and Hour Administrator, who are authorized to conduct investigations . . . whether or not there has been any complaint of wrongdoing. 107

Congress crafted 706’s limitations period to reflect the EEOC’s interest in protecting the civil rights of those who “promptly assert their rights, [and] also [to] protect[] employers from the burden of defending claims arising from employment decisions that are long past.” 108 By choosing “what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.” 109

106 *Id.*
In 1971, Representative John Erlenborn testified before Congress regarding amending Title VII to grant the EEOC the authority to bring pattern or practice cases. Representative Erlenborn urged Congress to impose a limitations period on pattern or practice claims, and stated, “I just [do not] buy [the] position that in the year 2050 a claim can run back to 1964, and I think that Congress should turn its attention to this problem.”

One year later, Congress did just that. Through the 1972 amendment to Title VII, Congress authorized the EEOC to litigate Section 707 claims, and also to promote the “integrated, multi-step enforcement process” that is triggered by a charge of discrimination. Congress remained concerned about exposing employers to unlimited liability from stale claims and therefore made three critical amendments to Title VII. First, Congress added Section 707(e) to Title VII, which extended Section 706’s procedural requirements. Congress did not extend these procedural requirements to Section 707 actions brought by the Attorney General. Second, Congress amended Section 707 by requiring the EEOC to notify the employer of a charge by serving notice of the “alleged unlawful employment

111 Id.
112 EEOC v. Shell Oil, 466 U.S. at 62; Occidental Life, 432 U.S. at 368.
113 EEOC v. Shell Oil, 466 U.S. at 62.
114 42 U.S.C. § 2000e-6(c), (e).
practice on [the] employer . . . within ten days.\footnote{EEOC v. Shell Oil, 466 U.S. at 63 (Congress’ objective in applying a notice provision was “to provide employers fair notice” of the accusations and to give them “an opportunity to gather and preserve evidence in anticipation of a court action.”).} Third, Congress amended Section 706(g) and Section 707(e) by placing a two-year time limit on back pay liability.\footnote{See Legislative History of the Equal Employment Opportunity Act of 1972: Hearings on H.R. 1746 Before the S. Comm. On Labor & Public Welfare, 92d Cong. 249 (1971) (statement of Rep. Erlenborn).}

Based on the foregoing, employers assert the legislative history of Sections 706 and 707 confirms that Congress intended to apply the 300-day charge-filing period to both statutes.

C. The EEOC Does Not Have Inherent Authority To Subvert The 300-Day Charge-Filing Period

Through suing in the public interest, the EEOC has a “preeminent role in remedying employment discrimination.”\footnote{EEOC v. Custom Cos., 2004 WL 765891, at *10} Employers argue that the EEOC’s authority, however, does not permit it to expand its substantive rights through its own interpretation of its power.\footnote{Id.; EEOC v. Burlington, 536 F. Supp. 2d at 659.}

Several courts have held that despite the EEOC’s important role in society, Congress did not grant it authority to “reviv[e] stale claims.”\footnote{See, e.g., EEOC v. Burlington, 536 F. Supp. 2d at 659 (stating that the EEOC cannot “bootstrap[] individual damage claims”); EEOC v. Custom Cos., 2004 WL 765891, at *11 (“barring the claims of those employees who were employed outside of the filing period here would do little to frustrate the primary public purpose of the EEOC’s enforcement action because it would not impeded the EEOC’s ability to end custom’s purported hostile environment through injunctive

\footnote{EEOC v. Shell Oil, 466 U.S. at 63 (Congress’ objective in applying a notice provision was “to provide employers fair notice” of the accusations and to give them “an opportunity to gather and preserve evidence in anticipation of a court action.”).}
the U.S. District Court for the District of Maryland stated that the EEOC “has a vital and important mission, but it must play on the same field subject to the same rules as individuals.”

Additionally, in *General Telephone Co. of the Northwest, Inc. v. EEOC*, the Supreme Court pointed out that “procedural rules do not, and cannot, permit the EEOC to revive discrimination claims . . . which are time-barred. . . .” Thus, employers contend that the EEOC does not have the unique authority to seek relief for otherwise stale claims.

**D. The Majority Rules**

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120 *EEOC v. Freeman*, 2011 WL 1728847. In *EEOC v. Freeman*, an African-American woman filed a charge of discrimination with the EEOC asserting that the employer unlawfully discriminated against her because of her race when it rejected her employment application based on her credit history. *Id.* Based on the information the EEOC uncovered during its investigation, the Commission filed a claim asserting that the employer engaged in a nationwide pattern or practice of discrimination against job applicants based on the applicants’ races. The employer filed a partial motion to dismiss and argued that the EEOC could not seek relief for individuals who were subjected to an unlawful employment practice more than 300 days before the filing of the administrative charge. *Id.* The court stated that the “based on the plain language of Sections 706 and 707 and the inapplicability of the continuing violation doctrine . . . . [the] EEOC may not seek relief for individuals who were denied employment more than 300 days before the filing of the administrative charge.” *Id.* In a strong conclusion, the court stated that “[i]f Congress intended to make an exception for the EEOC to revive stale claims . . . it should have said so.” *Id.* (citing *Canada’s Tavern, Inc. v. Town of Glen Echo*, 260 M. 206, 271 A.2d 664, 665 (Md. 1970)).


Employers also assert that the majority of district courts that have expressly addressed this issue have held that the charge-filing period of Section 706(e)(1) applies to pattern or practice cases brought by the EEOC under Section 707.\footnote{But see supra note 5 discussing the EEOC’s argument that the in 
\textit{Serrano v. Cintas Corp.}, the Sixth Circuit held that a 300-day statute of limitations is inapplicable to both Sections 706 and 707.}


For example, in \textit{EEOC v. United States Steel Corp.}, the U.S. District Court for the Western District of Pennsylvania applied the plain language of Section 707.\footnote{\textit{EEOC v. U.S. Steel Corp.}, 2012 WL 3017869, at *5.} In this case, the EEOC initiated an action on behalf of Abigail DeSimone against her employer. The EEOC argued that the employer required DeSimone, and other employees, to undergo random alcohol breath testing during their probationary periods in violation of the American with Disabilities Act. The EEOC asserted that the employer discriminated under both Section 706 and Section 707 by maintaining a nationwide policy of requiring probationary employees to undergo random alcohol tests.\footnote{The EEOC also asserted that the employer did not have a
EEOC’s claims of discrimination were time barred under Section 706. The court agreed and dismissed as time-barred any acts of discrimination that occurred 300 days before the charge that gave rise to the EEOC’s lawsuit.

Less than two weeks after the ruling in *EEOC v. United States Steel Corp.*, the U.S. District Court for the Eastern District of Washington issued another notable decision relating to the applicability of the 300-day limitations period. In *EEOC v. Global Horizons, Inc.*, the EEOC alleged that the employer and its contractors engaged in unlawful acts including human trafficking, confiscation of passports, providing substandard housing, and wage and hour violations. The

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**Footnotes:**

127 The employer relied on *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) for the proposition that the EEOC failed to “specifically plead that it . . . met its statutory pre-suit obligations to investigate, issue reasonable cause findings and conciliate its claims, or to name any of the presently unidentified aggrieved employees who make up the purported class.” *Id.* at 14-15. The Court held that the EEOC’s complaint properly met Rule 9(c) of the Federal Rules of Civil Procedure and stated that *Iqbal* and *Twombly* do not “eviscerate” Rule 9, which states that “in pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or have been performed.” *Id.*; see Kevin P. McGowan, *EEOC ‘Pattern Or Practice’ Suit Subjected To 300-Day Limitations Period, Court Rules*, *Employment Policy & Law Daily* (July 27, 2012), available at EPLD d7, 2012 WL 3041024 (citing Fed. R. Civ. Pro. 9(c)).

128 Subsequently, the employer filed a Motion for Summary Judgment as to the EEOC’s remaining allegations. On February 20, 2013, the court granted the employer’s motion. *EEOC v. U.S. Steel Corp.*, Case No. 10-CV-1284 (Feb. 20, 2013).


130 *Id.*
employer filed a motion to dismiss arguing, among other things, that the 300-day limitations period in Section 706 applied to the EEOC’s pattern or practice claims pursuant to Section 707. The U.S. District Court for the Eastern District of Washington agreed and held that the “300-day statute of limitation is a ‘procedure’ that applies to an action brought under [Section 707].”

Likewise, in *EEOC v. Presrite Corp.*, the employer moved for partial judgment on the pleadings to challenge alleged acts of sex discrimination occurring more than 300-days before the Commissioner’s charge. This case was filed in the U.S. District Court for the Northern District of Ohio, the same district court that issued the ruling in *EEOC v. Kaplan* one year earlier, which dismissed significant portions of the EEOC’s claims as time-barred. Judge Patricia A. Gaughan relied on the court’s reasoning in *EEOC v. Kaplan* and held that Section 706’s 300-day time limitation period applies to pattern or practice claims brought by the EEOC under Section 707. The

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131 Even though the Court applied the 300-day statute of limitations, which bared a significant amount of the EEOC’s claims, the Commission proceeded with its remaining litigation. On February 20, 2013, the Court dismissed the EEOC’s remaining allegations and held that the employer’s random alcohol testing policy was a job-related business necessity and therefore the employer could lawfully administer the test to probationary employees. See *EEOC v. United States Steep Corp.*, 2012 WL 3017869, at *5.
134 *EEOC v. Presrite Corp.*, 2012 WL 3780351, at *2 (citing *EEOC v. Kaplan*, 790 F. Supp. 2d 619 (N.D. Ohio 2011)) (relying on the plain language set forth in Section 706, which mandates that Section 707 actions are taken in accordance with the procedures in Section 706,
court’s ruling made very clear that it “follows its decision in Kaplan and finds that the EEOC’s claims under Section 706 and 707 are time barred to the extent they relate to employment decisions made by [the employer] more than 300 days prior to the Commissioner’s charge.”\textsuperscript{135}

Other courts have reached the similar conclusion. In \textit{EEOC v. Princeton Healthcare System}, the U.S. District Court for the District of New Jersey held that “Section 707 commands that parties adhere to the limitations set out in Section 706(e)(1), which clearly bar claims for failure to timely file charges.”\textsuperscript{136} The court reasoned that the EEOC is not exempt from the plain language of the controlling statutes. The court stated that if Congress intended to make an exception for the EEOC to revive stale claims under Section 706 and 707, it should have said so.\textsuperscript{137} Refusing to “read exceptions into the statute which do not exist on its face,” the court granted the employer’s motion for summary judgment as to those claims outside the filing period.\textsuperscript{138}

Similarly, in \textit{EEOC v. Global Horizons}, the U.S. District Court for the District of Hawaii joined other courts’ across the

\textsuperscript{135} Id. at *3.
\textsuperscript{137} Id. (citing \textit{EEOC v. Freeman}, 109 FEP Cases 279 (D. Md. 2010)).
\textsuperscript{138} The Court also refused to apply the continuing violations doctrine to the EEOC’s allegations. The Court ruled stated that “each employment termination by [the employer], if unlawful, constitutes a distinct violation, and therefore the continuing violation doctrine does not apply.” Id.
nation and rejected the EEOC’s efforts to litigate claims filed beyond the 300-day limitations period. The court held that the “EEOC is, in fact, constrained by the time limitation [set forth in Section 706].”

Not long ago, no clear trend had emerged in district courts that have addressed the issue of whether Section 706’s

139 Id. at 31 (emphasis in original). In this case, “the EEOC attempted to force a square peg into a round hole by transforming headline grabbing allegations of human trafficking into a Title VII pattern or practice case; even more problematic is that the EEOC attempted to argue that there is no applicable statute of limitations that applies to the Section 707 pattern or practice claims it asserted in the case.” Gerald L. Maatman, Jr. and Laura Maechtlen, District Court Joins A Harmony Of Rulings That Apply § 706’s Limitations Period To EEOC Pattern Or Practice Allegations Brought Under § 707 Of Title VII, THE WORKPLACE CLASS ACTION BLOG (Nov. 26, 2012), available at http://www.workplaceclassaction.com/eeoc-litigation/district-court-joins-a-harmony-of-rulings-that-apply-706s-limitations-period-to-eeoc-pattern-or-prac. In 2011, some of the defendants filed motions to dismiss the EEOC’s complaint based on the 300-day statute of limitations. In November 2011, the court held that the EEOC was not constrained by a statute of limitations period in Section 707 cases. EEOC v. Global Horizons, Inc. et al., Case No. 11-CV-00257, 2011 WL 5325747 (June 28, 2012). Because Global Horizons appeared in the action later than the other defendants, in 2012 it filed a motion to dismiss portions of the EEOC’s claims. EEOC v. Global Horizons, Inc., 2012 U.S. Dist. LEXIS 160729, at *12. The court explained that under the law of the case doctrine, it is not precluded from “reversing its previous position and finding that Section 707 pattern or practice claims are subject to Section 706’s statute of limitations.” Id. at 30. Id. Subsequently, the EEOC filed a Motion for Reconsideration, relying on Serrano v. Cintas Corp. for the proposition that the 300-day statute of limitations does not apply to Section 707 claims. See Brief for EEOC at 4-5, EEOC v. Global Horizons, Inc., Case No. 11-CV-00257 (Nov. 21, 2012) (citing Serrano v. Cintas Corp., Case Nos. 1-CV-2629 & 11-CV-2057, 2012 WL 548182 (6th Cir. Nov. 9, 2012). The court denied the EEOC’s motion and Serrano “did not explicitly address the applicability of the statute of limitations in Section 706 to Section 707 pattern or practice cases.” EEOC v. Global Horizons, Inc., Case No. 11-CV-00257 (E.D. Wash. Jan. 30, 2013); see supra note 5.
300-day limitations period is applicable to the EEOC’s pattern or practice allegations. Slowly – but steadily – decisions addressing this issue tilt the split in favor of employers. The recent rulings make it clear that by the end of 2012, the majority of district courts apply the 300-day limitation period to Section 707 cases.

V. THE EEOC’S CONFLICTING VIEWS ON THE 300-DAY LIMITATIONS PERIOD

The EEOC uniformly asserts that the 300-day charge filing period set forth in Section 706 does not apply to Section 707 pattern or practice allegations. The practical application of the EEOC’s argument would allow it to seek back-pay for all aggrieved individuals, regardless of the date the discrimination occurred.

The EEOC asserts that a strict interpretation of the charge-filing timeframe would deny legal redress to victims of employment discrimination who do not file their claims within the brief 300-day limitations period. As Judge Learned Hand said in 1945:

[i]t cannot be that statutes of limitation are in any degree for the purpose of reliving courts of the trial of issues which have become hard to decide by loss of evidence. Courts are maintained to settle disputes no matter how parties may embroil themselves; it would be a strange doctrine which forbade people to deal with their

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140 Id. at 9.
affairs as they wish lest the judges should be unduly vexed.  

In support of its argument, the EEOC asserts five bases. First, the EEOC claims that the absence of an express statute of limitations in the text of Section 707 means that it contains no charge-filing requirements. Second, the EEOC asserts that applying the time limitation of Section 706 to a pattern or practice suit under Section 707 is contrary to Congress’ intent when it enacted the 1972 amendments to Title VII. Third, the EEOC contends it has the primary responsibility to root out systemic discrimination in the workplace and therefore it is not subject to a charge-filing period. Fourth, the EEOC claims that courts should not impose a limitations period on Section 707 claims due to the “nature of pattern or practice claims.” Finally, the EEOC asserts that case law supports its position.

A. The EEOC’s Interpretation Of Section 707’s “Plain Language”

The EEOC concedes that Section 707 incorporates the “procedures” of Section 706. Nevertheless, it asserts that no limitations period applies to Section 707. The EEOC relies on a

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142 U.S. v. Curtiss, 14 F. 2d 639 (2d Cir. 1945).
143 EEOC v. Occidental, 432 U.S. at 360 (holding that because Section 706 does not contain a statute of limitations to bring a lawsuit, there is none); see Brief for EEOC at 22, EEOC v. Sterling Jewelers, Inc., Case No. 08-CV-707 (Dec. 31, 2008).
145 See Brief for Defendant at 2, EEOC v. Bloomberg L.P., Case No. 07-CV-08383 (May 26, 2010).
literal reading of Section 707’s text and argues that absent an express time-charge period in Section 707, no limitation applies.\textsuperscript{146} It relies on \textit{EEOC v. LA Weight Loss}, where the U.S. District Court for the District of Maryland noted that although Section 707 refers to the procedures in Section 706, the language of the statute is “not so plain as to warrant application of [Section 706’s] limitations period for individual charges to pattern or practice claims brought by the EEOC under [Section 707].”\textsuperscript{147}

The EEOC also asserts that Section 707’s mandate that the EEOC and employers apply the “procedures” of Section 706 is a reference to the EEOC’s \textit{administrative procedures} – not the charge-filing period.\textsuperscript{148} In support, the EEOC relies on the text of Section 707(e), which states that the EEOC may “investigate” and “act on” Section 707 charges and that “such actions” must be in accordance with Section 706.\textsuperscript{149} The EEOC asserts that the terms “action” and “such actions” only indicates that the EEOC has to apply Section 706’s procedures to its investigations and conciliations under Section 707 charges.\textsuperscript{150}

\textsuperscript{146} \textit{EEOC v. Occidental}, 432 U.S. at 360-61 (“in short, the literal language of Section 706(f)(1) could not support application of a statute of limitations because there was no express language establishing so in the text.”); \textit{United States v. Fresno Unified Sch. Dist.}, 592 F.2d 1088, 1096 & n.5 (9th Cir. 1979), \textit{cert. denied}, 4444 U.S. 832 (1979); 118 CONG. REC. 7565 (1972) (Remarks of Rep. Perkins).

\textsuperscript{147} \textit{EEOC v. LA Weight Loss}, 509 F. Supp. at 535.


\textsuperscript{149} \textit{see U.S. v. Allegheny-Ludlum Indus.}, Inc., 517 F.2d 826 (5th Cir. 1975).

\textsuperscript{150} Brief for EEOC at 26, \textit{EEOC v. Global Horizons, Inc. et al.}, 2012
As support, the EEOC “suggests that a statute of limitations has ‘substantive importance’ and thus cannot be considered a ‘procedure’ under Section 707(e).”

Thus, the EEOC argues that to find that the plain language of Section 707 requires a charge-filing period would be to ignore the structure and provisions of Sections 706 and 707.

**B. Challenging Congress’ Intent**

Second, the EEOC challenges employers’ interpretation of the legislative history of Section 707. According to the EEOC, history does not “establish[] the legislative intent to specifically apply the statute of limitations in Section 706 to Section 707.”

The EEOC asserts that prior to 1972, the

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U.S. Dist. LEXIS 105993 (E.D. Wash. July 27, 2012). The EEOC contrasts Section 707’s language with the text of Section 707(a), which explicitly describes the EEOC’s authority and it imposes no limitations on the timeframe for relief. See 42 U.S.C 2000e-6(a); Brief for EEOC at 9, EEOC v. Freeman, 2010 WL 1728847 (D. Md. April 27, 2010) (No. 09-CV-2573).

See Brief for Defendant at 2, EEOC v. Bloomberg L.P., Case No. 07-CV-08383 (May 26, 2010); but see, EEOC v. Occidental, 432 U.S at 372 (holding that the limitations period in Section 706 is part of a “procedural framework” that includes “a sequential series of steps” within the Act’s overall enforcement structure.”); EEOC v. Burlington Med. Supplies, Inc., 536 F. Sup. 2d 647, 659 (E.D. Va. 2008) (calling statutes of limitations “paradigmatic procedures”) (internal citations omitted).

See EEOC v. Scolari, 488 F. Sup 2d at 1136 (holding that although “indirectly, that statute of limitations for 707 claims may be illogical because there is no certain date from which the limitations period could run.”). For a discussion of the legislative history of Title VII’s charge-filing provision, see EEOC v. E.I. DuPont de Nemours & Co., 516 F.2d 1297, 1302 (3d Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1257-58 (6th Cir.); EEOC v. Christiansburg Garment Co., 276 F. Supp. 1067, 1070 (W.D. Va. 1974).

See Brief for Defendant at 5, EEOC v. Bloomberg L.P., Case No.
Department of Justice (DOJ) had the authority to bring a civil action if it had reasonable cause to believe that an employer engaged in a pattern or practice of discrimination. When the DOJ brought pattern or practice lawsuits, it was not subject to a limitations period. The EEOC claims that the 1972 amendments to Title VII granted the EEOC authority to litigate pattern or practice lawsuits on the same broad basis as the DOJ - without a limitations period.

The EEOC further opines that neither the House nor the Senate Committee Report on the 1972 amendments to Title VII reveal congressional intent to apply a charge-filing period to Section 707 claims. The EEOC relies on these Reports for the proposition that if Congress intended to apply the administrative charge period in Section 706 to Section 707, it


155 General Telephone of the Northwest, Inc. v. EEOC, 446 U.S. at 327.

156 Id.

157 Id. (“it is clear that with the 1972 amendments Congress intended the EEOC to proceed in the same manner [as the DOJ].”).

158 EEOC 1. H.R. REP. No. 92-238, at 61-131 (1971), reprinted in 1972 U.S.C.C.A.N. at 2137-2186 (stating that Section 707 “[a]ssimilates procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the Commission may provide an administrative procedure to be the counterpart of the present Section 707 action.”); Garcia v. United States, 469 U.S. 70, 76 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill” and “eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.”) (internal citations omitted).
would have said so.\textsuperscript{159}

C. The EEOC’s Distinct Role

The EEOC also suggests that it is not subject to the 300-day charge-filing period because of its preeminent role in remedying workplace discrimination. The EEOC argues that it “is independent from” and obtains “far more expansive [rights] than private litigants.”\textsuperscript{160} The EEOC asserts that “Title VII clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.”\textsuperscript{161} Thus, the EEOC concludes that its enforcement authority is expansive, and it should not be constrained by a limitations period when litigating Section 707 claims.\textsuperscript{162}

\textsuperscript{159} When Congress implemented the 1972 amendments, it was aware of the EEOC’s backlog of cases, and that the Commission was taking longer than 300-days to process complaints. Thus, if the 300-day provision were “construed as a limit on the time in which the EEOC could sue, it would mean that Congress knowingly imposed conditions on the EEOC that could not possibly be met.” William L. Hallam, \textit{Time Limitations on The Filing Of Title VII Suits By The Equal Employment Opportunity Commission}, \textit{WASH. & LEE L. REV. Vol. XXXV} at 22 & n. 12 (citing H.R. REP. NO. 92-238, 92d CONG., 1ST SESS. 12, \textit{reprinted in} [1972] 2 \textit{U.S. CODE CONG. & AD. NEWS} 2137, 2147); 118 CONG. REC. 696, 69 (1972) (Remarks of Sen. Dominick).


\textsuperscript{162} See, e.g., \textit{EEOC v. Kimberly Clark Corp.}, 511 F.2d 1352,1359 (6th Cir. 1975) (stating “[i]f the [EEOC’s] complaint is well-founded, it will be entitled to relief that will protect the interests of past, present, and future employees of [defendant]. . . Furthermore, the eradication of discrimination by race and sex promotes public interests and transcends private interests”); \textit{EEOC v. Sterling, Inc.}, 2010 WL
D. The Nature Of A Pattern Or Practice Violation

Next, the EEOC contends that imposing the 300-day charge-filing period on Section 707 claims is “wholly at odds with the nature of a pattern or practice violation.” The EEOC relies on the structure of a Section 707 case, which requires a pattern or policy of unlawful actions that constitute a single practice. The EEOC asserts that because pattern or practice violations manifest over time, an individual’s discrete act cannot trigger the charge-filing period.

E. Just Because It’s Older, Doesn’t Mean It’s Outdated — Or Does It?

Finally, the EEOC contends that case law supports its position that no charge-filing period applies to Section 707 lawsuits. The EEOC consistently relies on EEOC v. Scolari Warehouse Markets, Inc., where the EEOC brought a Section 707 pattern or practice case against the employer alleging a hostile work environment, sexual harassment, and retaliation. The employer moved for summary judgment, arguing among other things, that significant portions of the claims were time-barred by the 300-day statute of limitations. In a short but pointed response, the U.S. District Court for the District of

86376, at *2 (emphasizing the “fundamental difference between the rights asserted by the EEOC and those asserted by an individual employee”).

163 Brief for EEOC at 29, EEOC v. Global Horizons, Inc., Case No. 11-CV-00257 (Sept. 6, 2011).


Nevada simply stated, “a statute of limitations does not apply when the EEOC brings a pattern or practice suit.” Thus, despite recognizing the distinction between Section 706 and Section 707, the court permitted the EEOC to skirt the limitations period and pursue its Section 706 claim as a pattern or practice case under the *Teamsters* framework.

The EEOC also relies on *EEOC v. LA Weight Loss*, issued by the U.S. District Court for the District of Maryland. The EEOC asserted that the employer engaged in a pattern or practice of failing to hire male applicants. Following years of discovery, the employer filed a motion for summary judgment stating that “the deadline for filing an individual charge of unlawful employment practice in [Section 706] applies to the EEOC’s pattern or practice claim brought under [Section 707].”

The court noted that a “few district courts” apply the 300-day statute of limitations period to Section 707 claims, but citing to *EEOC v. Scolari Warehouse*, the court stated that “others have not, finding that the application of a limitation period in a [Section 707] action does not make intuitive or legal sense.” Relying on *EEOC v. Scolari Warehouse*, the court refused to apply the plain language of Section 707 and

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166 *EEOC v. LA Weight Loss*, 509 F. Supp. 2d at 1136.
167 *Id.* at 532.
168 *Id.*
169 *Id.* at 534.
permitted the EEOC to advance claims of applicants who were rejected prior to the 300-day charge-filing period.\textsuperscript{171}

The EEOC also relies on \textit{EEOC v. Sterling Jewelers, Inc.}, where it sought to hold the employer liable for alleged conduct that began in January 2003.\textsuperscript{172} The employer moved to dismiss portions of the EEOC’s claims that sought relief for discrimination occurring 300 days prior to the first administrative charge.\textsuperscript{173} The district court referred the motion to Magistrate Jeremiah J. McCarthy for report and recommendation. Magistrate Judge McCarthy heard oral arguments, where the employer’s attorney argued that if the 300-day charge-filing period did not apply to Section 707 claims, “the EEOC could sue Sterling back to 2000, 1985, or all the way back to 1964 when the statute was arisen.”\textsuperscript{174}

In Magistrate Judge McCarthy’s report and recommendation, he disagreed with the employer and stated that “whether or not their application leads to a harsh result, I am not at liberty to rewrite the deadlines which Congress has established (or failed to establish).”\textsuperscript{175} Magistrate Judge McCarthy further opined that “Congress, like everyone else, has been aware of this interpretation for over 30 years, and has not

\begin{footnotes}
\footnotetext[171] {\textsuperscript{171} \textit{Id.} at 536.}
\footnotetext[172] {\textsuperscript{172} \textit{EEOC v. Sterling, Inc.}, 2010 WL 86376, at *2.}
\footnotetext[173] {\textsuperscript{173} \textit{Id.}}
\footnotetext[174] {\textsuperscript{174} \textit{Id.} at *15 (quoting Gerald L. Maatman, Jr., defense counsel for Sterling); see also \textit{EEOC v. CRST Van Expedited, Inc.}, 615 F. Supp. 2d 679 F.3d 657 (8th Cir. 2012) (“To adopt the EEOC’s construction of Title VII would permit the EEOC to destroy all principles of repose and force employers to defend against zombie-like claims from the distant past”).}
\footnotetext[175] {\textsuperscript{175} \textit{Id.}}
\end{footnotes}
seen fit to amend the Act. . . [and] If it has not done so, neither can I. Respectful of the legislative process that crafted this scheme, we must give effect to the statute as enacted . . . and we have repeatedly rejected suggestions that we extend or truncate Congress’ deadlines.”

Thus, on October 1, 2009, Magistrate Judge McCarthy held that the time limitations in Section 706 did not limit the EEOC’s allegations and he therefore recommended that the employer’s motion for partial dismissal be denied. On January 6, 2010 Judge Richard J. Arcara of the U.S. District Court for the Western District of New York adopted Magistrate Judge McCarthy’s proposed findings of the Amended Report and Recommendation and denied the employer’s motion to dismiss.

The EEOC argues that the foregoing cases provide support to its position that no charge-filing period applies to Section 707. The EEOC also asserts that numerous other federal courts

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176 Id.
177 Magistrate Judge McCarthy also held that the EEOC asserted a continuing violation so as to avoid dismissal at the pleading stages.
178 *EEOC v. Sterling Jewelers, Inc.*, 2010 WL 86376 (W.D.N.Y. Jan. 6, 2010). On January 19, 2010, the employer filed a motion for certification of an interlocutory appeal. The employer requested that the U.S. Court of Appeals for the Second Circuit examine whether the 30-day limitation period set forth in Section 706 applies to Section 707 allegations. In support of the employer’s motion, it “notes that both Magistrate Judge McCarthy and this Court acknowledged a split of authority on the issues in question. [The employer] asserts further that the course of this litigation could change dramatically and could lead to a significantly longer or shorter trial depending on how the Second Circuit resolves these issues.” *EEOC v. Sterling Jewelers, Inc.*, 2010 WL 812055 (W.D.N.Y. Feb. 26, 2010). The court denied the employer’s motion. *Id.*
have held that the charge-filing period in Section 706 does not apply to Section 707. However, the EEOC does not address the fact that the cases it relies on were decided years ago, or that all recent courts to address the issue have applied the 300-day limitations period to Section 707 cases.

V. RESOLVING THE CONFLICT BY APPLYING SECTION 706’S 300-DAY LIMITATION PERIOD TO SECTION 707’S PATTERN OR PRACTICE CLAIMS

The discussion above attempts to demonstrate the divide among the EEOC and employers as to whether 706’s charge-filing period applies to Section 707 claims. For an appellate court to weigh in on the issue, a litigant must file a timely appeal from the district court’s ruling. As of January 1, 2013, no appellate court has had the opportunity to consider this issue. There are two possible reasons why. Both


explanations relate to timing.

First, a losing party cannot file an appeal until the district court issues a final ruling on all of the issues. In some cases, courts dismissed portions of the EEOC’s claims as time-barred, but other portions of the EEOC’s claims survived the statute of limitations ruling because segments of the alleged discrimination occurred within the 300-day charge-filing period. In such a situation, the EEOC may only appeal the district court’s ruling on the time-barred claims after a final judgment is entered, e.g., the judge grants a motion to dismiss the remaining issues, kicking the case out entirely, or grants a motion for summary judgment. If the parties settle, the agreement will prevent an appeal.

Alternatively, the EEOC may recognize that the tides have turned; courts now consistently apply the 300-day limitations period to Section 707 claims. The EEOC has only appealed from a district court’s refusal to apply the 300-day charge-filing period to Section 707 claims in one case – *EEOC v. Kaplan Higher Education Corp.*\(^{181}\) The EEOC may have strategically avoided appealing the issue in other cases out of fear of an unfavorable ruling.\(^{182}\) If a higher court applies the 300-day rule

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\(^{182}\) The suggestion that the EEOC is strategically avoiding appealing this issue is further supported by the fact that it has not filed an interlocutory appeal in any of the cases that barred portions of its claims as stale under the 300-day limitations period. In rare circumstances, a judge may grant permission for a party to seek an interlocutory appeal. Courts only grant interlocutory appeals in extraordinary circumstances that would prevent the case from being
To a Section 707 claim, without a doubt, such precedent would hinder the EEOC’s approach to its all-in litigation mantra.

Although no circuit court has had the opportunity to weigh in directly on the issue – it is time.\(^\text{183}\) This section predicts that when the next Title VII procedural question is presented to an appellate court, and then the Supreme Court, they will hold that Section 706(e)(1) applies to pattern or practice claims brought by the EEOC under Section 707. There is ample support for such a decision.

First, the plain language of Section 707 explicitly states that EEOC pattern or practice suits “shall be conducted in accordance with the procedures set forth in [Section 706].”\(^\text{184}\) When the words of a statute are unambiguous, as here, “this first canon is also the last: ‘judicial inquiry is complete.’”\(^\text{185}\)

properly decided if the appeal was not heard. With the district court’s permission, the EEOC could ask the court of appeals to review the narrow issue of whether Section 706’s charge-filing period applies to Section 707 claims.

\(^\text{183}\) But see Supra note 5 discussing the EEOC’s argument that the in Serrano v. Cintas Corp., the Sixth Circuit held that a 300-day statute of limitations is inapplicable to both Sections 706 and 707.

\(^\text{184}\) Section 707(e) provides that “[a]ll such actions” under Section 707 “shall be conducted in accordance with the procedures set forth in [Section 707] of Title VII.” 42 U.S.C. § 2000e-6(e); see, e.g., EEOC v. Dillard’s Inc., 2011 LEXIS 7602, at *29-30 (the 300-day period “protect[s] employers from the burden of defending claims arising from employment decisions that are long past.”); EEOC v. Freeman, 2010 LEXIS 41336, at *7-8 (Courts “need not look any farther than the plain language” of the timing provision of Section 706, which is applicable by cross reference to Section 707).

\(^\text{185}\) Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992); Boyle v. United States, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”).
Thus, the EEOC “cannot pick and choose which portions of Section 706 and Section 707 are most advantageous to it” and courts are well off to apply the plain language of Section 707.\textsuperscript{186}

Second, the legislative history of the Civil Rights Act of 1964 reveals that Congress intended to encourage \textit{prompt} resolution of employment discrimination claims. When Congress first enacted Title VII, it deliberately implemented “obviously quite short deadlines” to protect employers from a possibly overzealous EEOC.\textsuperscript{187} The 1972 Amendments to Title VII also reveal Congress’ interest in protecting employers from litigating stale claims. If Congress intended to permit the EEOC to revive stale claims under Section 707, it would have said so.\textsuperscript{188}

Third, the modern trend among district courts restrains the EEOC with respect to claims not promptly pursued. A realistic reading of the rulings within the past thirteen years leads to the conclusion that courts are giving considerable weight to the

\textsuperscript{186} \textit{EEOC v. Bass Pro}, Def. Mem. Of Law In Support Of Its Motion To Dismiss (Jan 5, 2012), available at WL 1506097.

\textsuperscript{187} \textit{Mohasco Corp. v. Silver}, 447 U.S. 807, 825 (1980); \textit{see EEOC v. Shell Oil Co.}, 466 U.S. 54 (1984) (quoting 100 CONG. REC. 7214 (1864)) (citations omitted). Explaining, the purpose of Title VII’s charge-filing requirement:

\hspace{1cm} It is important to note that the Commission’s power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect, the Commission’s investigatory power is significantly narrower than that of the Federal Trade Commission or of the Wage and Hour Administrator, who are authorized to conduct investigations . . . whether or not there has been any complaint of wrongdoing.

\textsuperscript{188} \textit{EEOC v. Freeman}, 2010 LEXIS 41336, at *12.
300-day limitations period in Section 707. To date, “[t]he decided tide of decisions addressing this issue flows in favor of employers and reinforces the 300-day statute of limitations in Section 707. Employers can confidently argue that Title VII’s language implicates and requires that Section 707 allegations comply with Section 706’s 300-day limitations period.”

If the appellate courts are not given the opportunity to clarify and simplify Title VII, then Congress should. Congress should amend Section 706(e)(1) of Title VII of the Civil Rights Act of 1964 to codify the trial courts’ standard of applying the limitations period to pattern or practice claims. Such an amendment would encourage efficient litigation and prevent the EEOC from pursuing stale claims. The last sentence of Section 707(e) currently reads:

All such actions, shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

This article proposes that Congress amend that sentence in Section 707(e) by adding the following, bold-faced text to read:

All such actions, shall be conducted in accordance with the procedures set forth in section 2000e-5 (a) – (f) of this title.

This simple amendment to Section 707 would explicitly incorporate all procedures set forth in Section 706 to Section 707 — specifically including the charge-filing period articulated in Section 706(e)(1). An amendment to Section 707 specifying Section 706’s 300-day limitations period applies to Section 707

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actions would cause little if any disruption to the existing relationship between the EEOC, complainants, and their employers. The agency already operates within the parameters of the 300-day rule and explicitly requiring the Commission to continue to do so will prevent future uncertainty.

VI. CONCLUSION—"SECTIONS 706 AND 707 CLEARLY OVERLAP"\textsuperscript{190}

To facilitate uniform treatment of pattern or practice claims in a manner that complies with both the plain language and the underlying intent of the statute, litigants either need an appellate court interpretation or, alternatively, legislative action. An amendment to Title VII would provide a clear time limitation for claimants, including the EEOC, to follow. This approach honors the remedial intent of the Civil Rights Act of 1964. It would also safeguard the rights of private enforcement and provide adequate protection to employers from stale claims.