

A Look at *Love v. Pullman*

With the federal court caseload continuing to grow at a rapid rate and appellate dockets lengthening even more rapidly than trial dockets,¹ the resulting pressure on the federal courts of appeals must inevitably result in an occasional lapse from the high standard of judicial craftsmanship which those courts are expected to maintain. Whether for that reason or some other, the Tenth Circuit appears to have been guilty of such a lapse in *Love v. Pullman Co.*,² a case arising under Title VII of the Civil Rights Act of 1964.³ The effect of the court's holding is to invalidate a procedure which the Equal Employment Opportunity Commission (EEOC) has utilized since its inception, thereby threatening to deprive thousands of potential plaintiffs of their federal remedy.⁴ That result is not dictated by the statute; nor is it supported either by prior case law or by the court's reasoning, as the following analysis will reveal. An understanding of the case must begin with an examination of the basic structure of Title VII and of the EEOC procedure at issue.

I. THE PROCEDURE

Title VII provides a federal source of administrative and judicial relief for persons subject to discriminatory employment practices occurring after July 2, 1965.⁵ While the Act does not reach discriminatory practices occurring before that date, it does forbid subsequent facially nondiscriminatory practices which perpetuate the effects of discriminatory practices abandoned prior to the effective date of Title VII.⁶ However, any complaint filed under the provisions of

¹ Chief Judge Brown of the Fifth Circuit estimates that the volume of federal appeals has increased more than 100% in the last six years while the backlog in the courts of appeals has increased 300%. Brown, *The Rat Race, the Human Race, and the Court-house Race*, REPORT OF THE ABA SECTION OF LABOR RELATIONS LAW 170, 183 (1968).

² 61 CCH Lab. Cas. ¶ 9324 (10th Cir. 1969).

³ 42 U.S.C. §§ 2000e to 2000e-15 (1964).

⁴ See text at note 16 *infra*.

⁵ The effective date of Title VII was contained in § 716 of the Act and appears as a note following 42 U.S.C. § 2000e (1964).

⁶ See, e.g., *Papermakers & Paperworkers, Local 189 v. United States*, 60 CCH Lab. Cas. ¶ 9289 (5th Cir. 1969). Judge Wisdom's opinion includes a careful examination of the prior cases considering this issue at 6694-6700.

Title VII must allege that a practice prohibited by the statute has occurred since that date.

The House version of H.R. 7152, the bill which became the Civil Rights Act of 1964, was subjected to major amendments in the Senate. One of the amendments to Title VII requires that individuals alleging discrimination in employment attempt to utilize the services of the state fair employment practice commissions before seeking relief under federal law.⁷ Thus, if the alleged unlawful employment practice occurred in a state which has a state agency properly empowered to grant or seek relief from the practice, the aggrieved party must first initiate proceedings with the state agency.⁸ He may not file a charge with the EEOC until sixty days after his filing with the state agency or until the state agency has terminated its proceedings.⁹ Congress was also concerned that charges not be allowed to grow stale, either because of complainant or state agency inertia, before being brought to the EEOC. Therefore, any charge filed with the EEOC is invalid unless filed within thirty days of termination of the state proceedings or within 210 days of the alleged unlawful employment practice, whichever is earlier.¹⁰ If the EEOC is unable to obtain voluntary compliance, it will so notify the aggrieved party who then may file an action in the federal district court within thirty days.¹¹

This brief summary does not set forth all the details of the administrative procedure, nor does the statute. One question which the statute leaves unanswered is what action the EEOC should take when it receives a complaint which must be considered by a state agency before it can be properly filed with the EEOC. In requiring that all employers subject to the Act post informational posters approved by

⁷ See Senator Humphrey's discussion of the amendment at 110 CONG. REC. 12724-5 (1964).

⁸ 42 U.S.C. § 2000e-5(b) (1964).

⁹ *Id.*

¹⁰ 42 U.S.C. § 2000e-5(d) (1964). In a state whose fair employment practice act includes a relatively long initial filing period, a conflict may arise between this provision and the requirement that the state agency be given sixty days to attempt to settle the case. For example, if a complainant files a charge with a state agency more than 150 days after an alleged discriminatory act in a state with a 180-day filing period, he cannot allow the state proceedings to continue for sixty days and also meet the requirement of filing with the EEOC within 210 days. The EEOC regulations construe the 210-day requirement as controlling in such cases. 29 C.F.R. § 1601.12(b)(1)(v) (1969). A Colorado district court has taken the opposite view, holding that the premature filing of a charge with the EEOC will toll the running of the 210-day period until the sixty-day state deferral period has lapsed. *Vigil v. American Tel. & Tel. Co.*, 61 CCH Lab. Cas. ¶ 9350 (D. Colo. 1969).

¹¹ 42 U.S.C. § 2000e-5(e) (1964).

the Commission,¹² Title VII assumed that many complaints falling within a state agency's jurisdiction would be filed initially with the EEOC. One alternative for handling premature complaints would be for the Commission to reject them outright. The complainant would then be left to find his own way to the state agency and back to the EEOC—thus bearing the risk of failing to comply with one of the time limitation periods. The Commission rejected that alternative from the beginning and adopted the policy of referring the charges to the state agencies on behalf of the individuals who filed them with the EEOC. Two deferral procedures were developed; one is described as follows:

Where a charge is filed with the Commission alleging the commission of an unlawful employment practice in a state or locality to whose FEP agency the Commission is required to defer, the Commission will refer that charge to the appropriate state or local agency. Sixty days after the commencement of such state or local proceedings . . . , the Commission will notify the charging party that the 60-day . . . period has expired and inquire whether or not he wishes the Commission to assert jurisdiction. If the charging party responds affirmatively, the Commission will proceed with its investigation.¹³

In practice the Commission would send a copy of the charge to the state agency, retaining the original. After the lapse of sixty days or termination of the state proceedings, the EEOC would send a letter to the charging party informing him that he was now entitled to seek relief from the federal agency. The letter would include a statement, which the charging party was instructed to sign and return if he still desired federal assistance, requesting the Commission to assume jurisdiction. If the form was returned, the Commission then regarded the date of receipt of the form as the official date of filing of the charge.

The second procedure, followed by the Commission in processing Love's complaint, provides for automatic assumption of jurisdiction by the EEOC after the state agency terminates its proceedings. As this procedure is now detailed in the Commission's regulations,¹⁴ the EEOC notifies the complainant that the case is being deferred to a local agency and informs him that the Commission will automatically assume jurisdiction after the lapse of sixty days or termination of

¹² 42 U.S.C. § 2000e-10 (1964).

¹³ CCH EMPLOYMENT PRACTICES GUIDE ¶ 1254.15 (citing EEOC General Counsel opinion letters of November 18, 1965, and December 2, 1965, and an EEOC decision of December 8, 1965).

¹⁴ 29 C.F.R. § 1601.12 (1969).

state proceedings unless requested not to do so.¹⁵ During the first three years of the Commission's operation, 4,271 complaints were deferred to state agencies under the Commission's state deferral procedures.¹⁶ If these procedures are invalid, all of those cases are improperly filed and none of those parties are entitled to seek relief either from the EEOC or in the federal courts.

II. THE FACTS

Earl Love worked as a porter for the Pullman Company for more than forty years, achieving the position of "porter in charge" in 1951. In 1963 Love filed a written complaint with the Colorado Civil Rights Commission alleging that porters in charge and conductors have essentially identical duties and responsibilities, but that conductors receive substantially higher wages. He further alleged that Negroes are restricted to the classification of porter while the classification of conductor is virtually all-white.¹⁷ Apparently Love was unable to obtain satisfactory relief from the state agency.¹⁸ Sometime in the summer of 1965 he returned to the Colorado agency and orally restated his complaint without filing a new written complaint. Both federal courts regarded the 1965 complaint as a request, in substantial compliance with Colorado law, to reopen the 1963 matter.¹⁹ The state commission again terminated its proceedings on July 30, 1965, and notified Love of that fact.²⁰

On May 23, 1966, Love sent a letter to the EEOC containing essentially the same allegations as his complaints to the Colorado commission. Following its standard procedure, the EEOC deferred the case to the Colorado commission in order that it could consider the charges before the EEOC assumed jurisdiction. Because the Colorado agency had already considered the issues involved in the charge, it sent a letter back to the EEOC declining to accept the sixty-day deferment period, waiving it, and requesting the Commission to proceed with its investigation. On May 3, 1968, the EEOC notified Love

¹⁵ 29 C.F.R. § 1601.12(b)(1)(iii), (iv), and (v) (1969).

¹⁶ 1 EEOC ANN. REP. 61 (1966); 2 EEOC ANN. REP. 52 (1967); 3 EEOC ANN. REP. 33 (1968). Figures are not yet available for fiscal 1969.

¹⁷ *Love v. Pullman*, 61 CCH Lab. Cas. ¶ 9324, at 6845 (10th Cir. 1969). Similar allegations have been extensively litigated in the Eighth Circuit involving the classifications of porter and brakeman. *See, e.g., Norman v. Missouri Pacific R.R.*, 414 F.2d 73 (8th Cir. 1969) and cases cited therein at 76.

¹⁸ *Love v. Pullman*, 60 CCH Lab. Cas. ¶ 9240, at 6518 (D. Colo. 1969).

¹⁹ *Id.*; 61 CCH Lab. Cas. ¶ 9324, at 6846.

²⁰ 61 CCH Lab. Cas. ¶ 9324, at 6846.

of its inability to achieve voluntary compliance and informed him of his right to bring suit in federal court within thirty days.²¹

Suit was filed by Love within thirty days and Pullman promptly moved to dismiss the action for lack of jurisdiction and because the action was moot.²² The district court treated the motion as one for summary judgment and granted it on the grounds that the case was moot and that Love's charge with the EEOC was not timely filed. The substance of the latter holding is contained in these two paragraphs:

The Civil Rights Commission of the State of Colorado terminated its proceeding on July 30, 1965, and so notified Mr. Love. No further contact was had by Mr. Love with the State Commission. He filed his complaint with the EEOC on May 23, 1966.

It is the court's opinion that the state proceedings were effectively terminated on July 30, 1965, and that the plaintiff's period within which to file a complaint with the EEOC commenced on July 31, 1965. As Mr. Love did not file with the EEOC until May 23, 1966, it is the court's conclusion that the charge and complaint before the EEOC was not filed within the time required by 42 USCA, § 2000e-5(d), and that the EEOC did not have jurisdiction to consider Mr. Love's charge. As Mr. Love's charge was not timely filed with that body, this court is also without jurisdiction to hear the complaint herein.²³

The court made no mention anywhere in its opinion of the EEOC deferral to the Colorado commission. Love appealed to the Tenth Circuit.

III. THE CASE ON APPEAL

The Tenth Circuit did not find it necessary to discuss the mootness issue: "We must affirm the trial court on the timeliness of filing issue, and to thereby give effect to the time limits expressed in the statute."²⁴ The reasoning of the court to support this conclusion reflects a misunderstanding both of the Title VII case law and the statute itself. Although the heart of the court's opinion is its conclusion that the

²¹ *Id.*

²² Love had resigned from his position in November 1968. 61 CCH Lab. Cas. ¶ 9324, at 6845.

²³ 60 CCH Lab. Cas. ¶ 9240, at 6518.

²⁴ 61 CCH Lab. Cas. ¶ 9324, at 6846.

EEOC deferral to the Colorado commission was ineffective, its discussion of the earlier Colorado proceedings also reflects this misunderstanding.

A. *The Relevance of the 1965 Colorado Proceedings*

The trial court found, and the record shows, that the Colorado commission terminated its proceedings on July 30, 1965, and so notified him. We also agree that this second period of consideration was an effective reopening of prior proceedings on the same complaint. Thus if appellant had filed his complaint with the EEOC within thirty days thereafter there would be no question as to its authority to act on such a complaint.²⁵

The last sentence quoted ignores several questions about the Commission's authority—arising from the effective date of the Act, the continuing nature of the alleged unlawful practice, the nature of the Colorado proceedings, and the content of Love's 1965 oral complaint. First, the EEOC can only process charges alleging discriminatory acts occurring subsequent to July 2, 1965.²⁶ If the practices considered by the Colorado commission were not alleged to have occurred after that date, the state agency would technically not have had an opportunity to consider the exact charges which would have to be made to the EEOC. Yet neither court's opinion reveals the content of Love's 1965 complaint—or even the date when it was made. Moreover, if the 1965 Colorado proceeding was a "reopening" of the 1963 case, as both courts interpreted it,²⁷ presumably the alleged discriminatory practices in the case actually occurred in 1963 or earlier—long before the effective date of Title VII.

Second, if the Colorado proceedings were based on practices alleged to have occurred in 1963 or earlier, a charge filed with the EEOC by Love in 1965 would be barred by the requirement that the charge be filed within 210 days of the alleged unlawful practice.²⁸ On the other hand, it could be argued that since the alleged practice is continuing in nature, the charge was filed within 210 days of the unlawful practice even though not filed within 210 days of the most recent date of occurrence alleged in the state complaint. If the intent of Congress were interpreted to require early filing with the EEOC to insure that the Commission could begin its investigation while evidence was still fresh

²⁵ *Id.* at 6846-7.

²⁶ See note 5 *supra*.

²⁷ 61 CCH Lab. Cas. ¶ 9342, at 6846; 60 CCH Lab. Cas. ¶ 9240, at 6518.

²⁸ 42 U.S.C. § 2000e-5(d) (1964).

and readily available, that rationale would not apply to continuing violation cases and would support a loose construction of the 210-day filing requirement in such cases. Although this question of interpretation is open at the moment and the problem was pointed out by the dissent in the case,²⁹ the majority did not even consider it.

The best argument in favor of the court's statement is that a charge need not be deferred to a state agency when the agency has already considered and rejected substantially the same charge. However, that argument would apply with equal force to Love's charge filed with the EEOC on May 23, 1966.³⁰ Since the court rejects the validity of that charge, this cannot be the argument the court relies on in stating that a charge could have been filed within thirty days of the Colorado termination.

The criticism above may seem only academic since Love did not file a charge with the EEOC within thirty days of the Colorado commission's decision. Unfortunately, however, the court's failure even to recognize the preliminary issues in the case reveals the misunderstanding of Title VII which the court brings to its discussion of the state deferral issue.

B. *The Validity of the EEOC State Deferral Procedure*

The court discusses extensively the proposition that state fair employment practice commissions cannot be bypassed by an individual seeking to have his case placed before the EEOC or a federal district court.³¹ Yet that issue is not in question, and a simple cite to the statute would have seemed sufficient to make the point:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated³²

²⁹ 61 CCH Lab. Cas. ¶ 9342, at 6848.

³⁰ The EEOC has now taken the position that a charge filed with the EEOC need not be deferred under these circumstances. See EEOC Decision 68-2-765E, April 16, 1969, CCH EMPLOYMENT PRACTICES GUIDE ¶ 8022.

³¹ 61 CCH Lab. Cas. ¶ 9324, at 6847-8.

³² 42 U.S.C. § 2000e-5(b) (1964).

The real issue is whether the individual must physically place the complaint in the hands of the state agency or whether the EEOC can convey the charge to the agency on his behalf. The Commission's answer, that it may act on behalf of the complainant, seems to be the correct one for two reasons. First, complainants proceeding through the maze of state and federal procedural prerequisites without the help of legal counsel would be subject to high risk of running afoul of one of the legal technicalities. As the courts have recognized, however, in refusing to apply technical common law pleading rules to charges filed with the Commission,³³ EEOC proceedings are intended to be lay-initiated. That this was a major consideration to the Commission in determining what policy to adopt is evidenced by the current EEOC regulations governing deferral to state agencies:

It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of the protection of the Act. Accordingly it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.³⁴

Second, too often the procedural hurdles standing between an aggrieved individual and his potential remedy have the appearance of being designed to prevent the individual from ever receiving any relief. Turned away from the EEOC with instructions to see the state agency and then come back, many complainants might well conclude that they were once more "being given the run-around." Each additional procedural rule requiring further individual initiative acts as a screen to filter out the doubtful and the discouraged. The state deferral procedure adopted by the EEOC is an effort to insure that both the timid and the belligerent will have access to the Commission.

1. *Initiation of state proceedings.* The only discussion by the court of who may file the complaint with the state agency is the following paragraph:

The Civil Rights Act of 1964 is precise in its requirement that the States with adequate statutes and machinery have the

³³ See, e.g., *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Marquez v. Ford Motor Co.*, 61 CCH Lab. Cas. ¶ 9332 (D. Neb. 1969); *Logan v. General Fireproofing Co.*, 61 CCH Lab. Cas. ¶ 9317 (W.D.N.C. 1969); *Antonopoulos v. Aerojet-General Corp.*, 295 F. Supp. 1390 (E.D. Cal. 1968); *Wheeler v. Bohn Aluminum & Brass Co.*, 58 CCH Lab. Cas. ¶ 9137 (W.D. Mich. 1968).

³⁴ 29 C.F.R. § 1601.12(a) (1969).

first opportunity to consider complaints. This first opportunity is a clear requirement in the sequences set out in the Act. This opportunity cannot come by an advice from the EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the State agency, gives it sixty days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure.³⁵

The first error in this analysis is that the Commission does not advise the state agency that a charge has already been filed with the EEOC. It cannot so advise the state agency because a charge cannot be filed with the EEOC until the state deferral provisions of the Act are complied with. Rather, the Commission advises the state agency that the complainant has attempted to file a charge with the EEOC, stating that the charge appears to fall within the agency's jurisdiction, and requesting the agency to proceed to investigate the case. Only after the state proceeding has been terminated or the sixty-day waiting period has lapsed does the Commission treat any charge as properly filed with it.

The court next asserts that the Commission procedure "seeks to channel complaints first to the EEOC."³⁶ What the procedure actually seeks to do is insure that the complainant does not lose the opportunity to have his case heard in a federal forum simply because he attempted to file his charge with the EEOC prematurely. The only way the Commission can do that is by taking steps to guarantee that the first agency to consider the case is the local commission. The express policy underlying the state deferral procedure is, as stated in the current regulations, to "encourage the maximum degree of effectiveness in the state and local agencies."³⁷ The current procedure succeeds in carrying that policy into effect; requiring the complainant personally to carry his case to the local agency and back would not.

The court concludes that the Commission's procedure is not contemplated by the statute. The relevant portion of the statute reads: "[N]o charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings *have been commenced under the State or local law*, unless such proceedings have been earlier terminated . . ."³⁸ The Act contains no wording which requires the state proceedings to have been "com-

³⁵ 61 CCH Lab. Cas. ¶ 9324 at 6847.

³⁶ *Id.*

³⁷ 29 C.F.R. § 1601.12(a) (1969).

³⁸ 42 U.S.C. § 2000e-5(b) (1964) (emphasis added).

menced" by the aggrieved individual personally rather than on his behalf by means of a charge referred to the agency by the EEOC. The established Commission procedure is in full accord with the statute.

2. *Date of filing.* The court has one further objection to the EEOC procedure:

Under the Act, when the appellant's letter to the EEOC was received it was thereby filed as the filing date cannot be manipulated by the commission. . . . Thus the charge here concerned was filed when received and at that time the EEOC had no authority over the matter because it had then not yet been presented to the Colorado commission.³⁹

The support for this conclusion is found in a statement by the EEOC and a provision in the Commission's regulations that an informal charge not containing all the elements required of a charge by EEOC regulations⁴⁰ is deemed filed as of the date of its receipt by the EEOC even though it is reduced to proper form at a later time.⁴¹ That policy and that regulation are inapplicable to this situation. They deal only with relation back for purposes of establishing whether a charge was filed within the applicable filing deadlines where the original charge contained minor imperfections. The regulation is entitled "Contents; amendment"⁴² and is concerned only with what information the charge must include and what effect later technical amendments have on the filing date. The informal charge must still meet all the other requirements of the Act in order to be a formally filed charge. It must have been filed within the applicable filing deadlines;⁴³ it must allege acts occurring after July 2, 1965;⁴⁴ it must be filed by a person claiming to be aggrieved;⁴⁵ and if the act occurred in a state which has a properly empowered state commission, the informal charge must have been filed more than sixty days after commencement of state proceedings or within thirty days of the termination of such proceedings.⁴⁶ If any of these requirements are not met, there is no filed charge. The Commission regulation cited by the court does not conflict with this because it deals only with relation back of amendments to correct technical defects and omissions.

³⁹ 61 CCH Lab. Cas. ¶ 9324, at 6847.

⁴⁰ See 29 C.F.R. § 1601.11(a) (1969).

⁴¹ The regulation cited by the court is 29 C.F.R. § 1601.11(b) (1969).

⁴² 29 C.F.R. § 1601.11 (1969).

⁴³ 42 U.S.C. § 2000e-5(d) (1964).

⁴⁴ See note 5 *supra*.

⁴⁵ 42 U.S.C. § 2000e-5(a) (1964).

⁴⁶ 42 U.S.C. § 2000e-5(b) (1964).

If the court had also read the current Commission regulation governing deferral to state agencies, it might have discovered its misinterpretation. In that regulation the Commission makes clear that mere physical receipt of a charge is distinct from a formal filing. The regulation refers throughout to all preliminary complaints simply as "documents." Only where it refers to "documents" after state proceedings have terminated or continued for more than sixty days does it call them "charges."⁴⁷

Aside from the technical argument whether the charge was filed on receipt by the EEOC, the court's denial of the power of the EEOC to "manipulate" the filing date seems to imply that the complainant must physically file a complaint after termination of state proceedings or lapse of the sixty-day waiting period. However, when the Commission already has at its disposal all the information it needs to process the case and the state deferral period is terminated, there is nothing to be accomplished by requiring the aggrieved party to recopy his old charge and remail it or carry it back down to the EEOC regional office. Nor is there anything to be accomplished by requiring even the filing of a request that the EEOC assume jurisdiction. The only reason for requiring a formal filing after state agency processing is to establish a clearly identifiable date of filing. The EEOC procedure provides for such a clearly identifiable date.⁴⁸ On the other hand, the requirement of a formal refiling by the complainant at this stage would have the negative effect of creating one more gap in the EEOC processing where a certain number of lay-complainants might give up in discouragement or lose their cases through ignorance of the law. The EEOC state deferral procedure conforms to the requirements of the statute and is the most efficient means of insuring that state commissions are utilized effectively.

3. *The prior case law.* Four cases are cited by the Tenth Circuit in its opinion: *EEOC v. Union Bank*,⁴⁹ *Edwards v. North American Rockwell*,⁵⁰ *IBEW, Local 5 v. EEOC*,⁵¹ and *Washington v. Aerojet-General Corp.*⁵² In neither of the first two cases was the state machinery activated either by the individual or by the EEOC; both courts correctly held that state proceedings must be commenced before a charge may be filed with the EEOC.⁵³ Love does not dispute the necessity of filing

⁴⁷ See 29 C.F.R. § 1601.12(b) (1969).

⁴⁸ See text at note 13 *supra* and 29 C.F.R. § 1601.12(b)(1)(iii), (iv), and (v) (1969).

⁴⁹ 408 F.2d 867 (9th Cir. 1969).

⁵⁰ 291 F. Supp. 199 (C.D. Cal. 1968).

⁵¹ 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

⁵² 282 F. Supp. 517 (C.D. Calif. 1968).

⁵³ 408 F.2d at 869: "It is undisputed that Miss Buckley had not availed herself of the

with the Colorado Civil Rights Commission, but argues that his complaint was effectively filed with the agency through the EEOC state deferral procedure.

In the *Local 5* case the charge was processed through the first deferral procedure set out above.⁵⁴ The Third Circuit upheld the procedure against numerous challenges by the union. The court in *Love* attempted to dispose of *Local 5* in this manner:

[T]he Third Circuit held that a charge when filed with the EEOC before the expiration of the State's sixty day period was not then valid. The same situation here prevails because appellant's charge was filed with the EEOC before Colorado had a chance to act on it. The court in *I.B.E.W.* however found a subsequent charge filed within the statutory time intervals and sequence was valid and within the two hundred ten day period.⁵⁵

The first sentence is correct—the *Local 5* court and the EEOC both concluded that the premature filing was invalid. Therefore, the Commission “forwarded Carl’s complaint to the Pennsylvania Department of Labor and Industry, Human Relations Commission (the Pennsylvania Commission),”⁵⁶ and the court sanctioned that procedure. The EEOC retained the original copy of Carl’s premature charge, and the “subsequent charge” referred to by the *Love* court was nothing more than the Commission’s form letter inquiring whether Carl desired the EEOC to assume jurisdiction.⁵⁷ The original premature charge was the only document in existence at that time which contained any statement of the facts of the case.

The only distinction between the procedures followed in *Local 5* and in *Love* is that the complainant in the former case received an “assumption of jurisdiction” letter while the Commission automatically

benefits afforded by Cal. Labor Code § 1197.5 at the time she filed her charge with the EEOC, nor is there any indication that she has done so since filing the charge.” 291 F. Supp. at 207: “Although plaintiff’s Charge to the EEOC indicates that the allegations contained in that Charge were previously filed with a state or local government agency, this assertion appears to be incorrect.”

⁵⁴ Text following note 13 *supra*.

⁵⁵ 61 CCH Lab. Cas. ¶ 9324, at 6847.

⁵⁶ 398 F.2d at 429.

⁵⁷ The union’s petition for certiorari is enlightening on this point: “In the meantime, the Federal Commission had written to Mr. Carl on December 16, 1965 requesting him to indicate on its letter by filling in the appropriate blank space whether Mr. Carl wanted the Federal Commission to assert jurisdiction. Mr. Carl indicated on the letter that he wished the Federal Commission to assert jurisdiction and returned the letter to the Federal Commission on December 27, 1965.” Petitioner’s Brief for Certiorari at 4, *IBEW, Local 5 v. EEOC*, 393 U.S. 1021 (1969).

assumed jurisdiction in the latter case. Since the Commission did not formalize a deferral procedure in its regulations until November 8, 1968,⁵⁸ the difference in handling by the EEOC is easily explained on the facts of the cases. In the *Local 5* case the Pennsylvania commission accepted the charge referred to it and continued its proceedings beyond the sixty-day mandatory delay period.⁵⁹ Therefore, the Commission wrote to the complainant to determine whether he desired the EEOC to assume jurisdiction. By contrast, the Colorado commission, within ten days of Love's premature filing, rejected the opportunity to process the charge and requested the EEOC to proceed with its investigation.⁶⁰ The Commission did so. The distinction between the two cases is a formal one at best and the deferral procedure should have been upheld in both cases. As pointed out above, both procedures conform to the requirements of the statute, and the procedure followed in *Love* is preferable on policy grounds.⁶¹

The *Washington*⁶² case is also distinguishable. After filing a premature charge with the EEOC, Washington personally filed a complaint with the California Fair Employment Practice Commission,⁶³ but then requested the EEOC to assume jurisdiction before sixty days had lapsed and before the California agency terminated its proceedings. He did not renew his request after the state proceedings were terminated.⁶⁴ Undeniably Washington's request was premature, as the court ruled. The court's reasoning, however, implies that the simple request to assume jurisdiction would have incorporated the information in the premature charge to constitute a valid charge if it had been filed eighteen days later.⁶⁵ The reasoning also suggests that the handling of the case by the EEOC may be determinative of when the charge is officially filed:

[T]his Court is aware of no authority, and none has been cited to it, which would permit the establishing of a filing date wholly by operation of law without reference to when the EEOC received a charge or some other document from plaintiff, or when the EEOC assigned a case file number to this matter⁶⁶

⁵⁸ See 33 Fed. Reg. 16408 (1968).

⁵⁹ 398 F.2d at 250.

⁶⁰ 61 CCH Lab. Cas. ¶ 9324, at 6846.

⁶¹ Text following note 47 *supra*.

⁶² 282 F. Supp. 517 (C.D. Cal. 1968).

⁶³ *Id.* at 518.

⁶⁴ *Id.* at 519.

⁶⁵ "Perhaps a new filing date can be established by a subsequent act of the plaintiff seeking to incorporate the initial complaint . . ." 282 F. Supp. at 521.

⁶⁶ *Id.* at 521-2.

If an incident as inconsequential and totally within the Commission's discretion as the assignment of a case file number may be determinative of date of filing, a procedure such as that now detailed in the Commission's regulations⁶⁷ should be equally effective.

Two cases not cited by the court in *Love* are also relevant.⁶⁸ *Jefferson v. Peerless Pumps Hydrodynamic*⁶⁹ may lend some support to the position taken by the Tenth Circuit. The *Jefferson* court held that the charge filed with the EEOC was not timely because the state agency complaint was not filed until sixteen days later. However, the case does not reveal whether the EEOC ever attempted to assume jurisdiction either automatically or at *Jefferson's* instigation. The precedent value of the case is also undercut by the court's other holdings which reflect a severely restrictive interpretation of the Act rejected by other courts. The *Jefferson* court's holding that the sixty-day period allotted the Commission to investigate and attempt conciliation⁷⁰ is mandatory rather than directory⁷¹ has been overruled by the Ninth Circuit⁷² and rejected elsewhere when the issue has arisen.⁷³ Likewise, the court's holding that "[t]he EEOC must exhaust its powers and perform its duties before relief in court may be sought"⁷⁴ conflicts with the numerous holdings that the EEOC need not attempt conciliation before the complainant can take his case to court.⁷⁵

The second case requiring mention is *Marquez v. Ford Motor Co.*⁷⁶ In reconsidering an earlier ruling dismissing the action, the court there directly upheld the Commission's state deferral procedure, stating

⁶⁷ See 29 C.F.R. § 1601.12(b)(1)(iii), (iv), and (v) (1969).

⁶⁸ A third case of some relevance is *Burney v. North American Rockwell Co.*, 302 F. Supp. 86 (C.D. Cal. 1969). It is clear from the court's statement of the case that *Burney's* charge was processed through the Commission's state deferral procedure, but no objection was raised by the defendant.

⁶⁹ 60 CCH Lab. Cas. ¶ 9278 (C.D. Cal. 1969).

⁷⁰ See 42 U.S.C. § 2000e-5(e) (1964).

⁷¹ See 60 CCH Lab. Cas. ¶ 9278, at 6648.

⁷² *Cunningham v. Litton Industries*, 413 F.2d 887 (9th Cir. 1969).

⁷³ See, e.g., *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968); *Everett v. Trans-World Airlines*, 298 F. Supp. 1099 (W.D. Mo. 1969); *EEOC v. Plumbers & Pipefitters, Local 189*, 61 CCH Lab. Cas. ¶ 9318 (S.D. Ohio 1969); *Fore v. Southern Bell Tel. & Tel. Co.*, 293 F. Supp. 587 (W.D.N.C. 1968).

⁷⁴ 60 CCH Lab. Cas. ¶ 9278, at 6648.

⁷⁵ See, e.g., *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Dent v. St. Louis-San Francisco R.R.*, 406 F.2d 399 (5th Cir. 1969); *Johnson v. Seaboard Air Line R.R.*, 405 F.2d 645 (4th Cir. 1968), cert. denied sub nom. *Pilot Freight Carriers v. Walker*, 394 U.S. 918 (1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968).

⁷⁶ 61 CCH Lab. Cas. ¶ 9332 (D. Neb. 1968).

[b]ecause the clear intent of Congress, according to 42 U.S.C.A. 2000e-12, is to vest with the EEOC the power to establish suitable procedures under which it may function and because the EEOC has established suitable procedures, as above stated to govern the situation here presented, where a party prematurely files a charge with the EEOC before properly registering a complaint with state authorities, this Court reverses its prior belief that the filing with the EEOC was premature and therefore prevented this Court from assuming jurisdiction.⁷⁷

The court's argument is well founded. The statutory provision cited not only specifically empowers the Commission to issue procedural regulations⁷⁸ but also implies the power to issue more informal interpretations of the Act's provisions.⁷⁹ Thus, the fact that the state deferral procedure was not spelled out in EEOC regulations at the time that the charges of Love and Marquez were processed⁸⁰ should be no hindrance to their federal court actions. As discussed above,⁸¹ the *Marquez* court was also correct in describing the deferral procedures as "suitable" under the Act.

IV. CONCLUSION

As other courts have noted in dealing with cases arising under Title VII, "the statute leaves much to be desired in clarity and precision."⁸² Thus, the question whether the EEOC may institute a deferral procedure simply is not answered by the Act. The *Local 5* and *Marquez* courts have supplied the correct answer. If other lower courts, the *Love* court on petition for rehearing, and the Supreme Court give careful consideration to the issue, they should see the merits of the state deferral procedure and uphold it against further attack.⁸³

⁷⁷ *Id.* at 6875. See also *Spell v. Stage Employees, Local 77*, 60 CCH Lab. Cas. ¶ 9285 (D.N.J. 1969), upholding the EEOC deferral procedure without discussion.

⁷⁸ 42 U.S.C. § 2000e-12(a) (1964).

⁷⁹ 42 U.S.C. § 2000e-12(b) (1964).

⁸⁰ The current version of 29 C.F.R. § 1601.12 was adopted November 8, 1968. 33 Fed. Reg. 16408 (1968).

⁸¹ Text at note 38 *supra* and following note 47 *supra*.

⁸² *Cunningham v. Litton Industries*, 413 F.2d 887, 889 (9th Cir. 1969).

⁸³ A more recent district court case from the Tenth Circuit has upheld the EEOC state deferral procedure by purporting to distinguish the *Love* case. *Vigil v. American Tel. & Tel. Co.*, 61 CCH Lab. Cas. ¶ 9350 (D. Colo. 1969).