WHO'S "IN CHARGE" AT THE EEOC?

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TABLE OF CONTENTS

I. INTRODUCTION

When pizza restaurant Noble Roman's learned that Sheryl Parker, one of its employees, had filed a charge of discrimination against it, it had every reason to believe that full-scale litigation could be avoided.[1] The Equal Employment Opportunity Commission (EEOC), which received Parker's charge, believed that, too.[2] On the same day it processed Parker's charge, the EEOC wrote Noble Roman's president and invited him to participate in a non-adversarial settlement conference.[3] According to the

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1. *See* Parker v. Noble Roman's, Inc., No. IP-96-65-C-D/F, 1996 WL 453572, at *1 (S.D. Ind. June 26, 1996) (holding 180 days need not pass between filing a charge with the EEOC and receiving a right-to-sue letter from the EEOC before the aggrieved party may lodge a claim in federal court).

2. *Id.* at 1.

3. *Id.*

agency's letter, Noble Roman's had ten days to reply to the invitation.[4] Parker, however, had no interest in settling the case.[5] One day after filing her charge, Parker's attorney wrote the EEOC asking for a right-to-sue letter, which allows charging parties to proceed to federal court.[6] Just days later, before Noble Roman's responded to the EEOC's invitation and four days before its deadline, the agency issued a right-to-sue letter to Parker.[7] Because the EEOC reneged on its invitation to settle the charge, Noble Roman's had no choice but to go to court.[8]

The *Noble Roman's* case demonstrates the fundamental problem with the EEOC's current practice of issuing a right-to-sue letter before (and instead of) investigating a discrimination charge:[9] charges that should be settled end up in court, and charging parties, rather than the EEOC, are placed in a position to make that determination.[10] Title VII of the Civil Rights Act of 1964 rules out exactly that type of precipitousness.[11] Under the statute, employees who believe they have experienced discrimination in the workplace cannot simply retain an attorney and show up in federal court.[12] They first must pass through the local branch of the Equal Employment Opportunity Commission (or a similar state agency), where they must file a charge of discrimination.[13] Under the statute, the EEOC has 180 days to investigate the charge and move the parties closer to conciliation, thereby easing the caseload burden on federal courts.[14] But as *Noble Roman's* illustrates, it does not always work that way. It may be just as likely that the EEOC will never fully investigate the charge and instead will issue a right-to-sue letter to the charging party without any consideration of the merits of her case.

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4. *Id.*
5. *Id.*
6. *Id.*; *see* 29 C.F.R. § 1601.28(a)(2) (2000). The regulation provides:

> When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent . . . the Commission may issue such notice . . . at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that [an EEOC official] has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

Id.

7. Parker v. Noble Roman's, Inc., No. IP-96-65-C-D/F, 1996 WL 453572, at *1 (S.D. Ind. June 26, 1996).
8. *Id.*
9. *See infra* Part II.
10. *See* Parker v. Noble Roman's, Inc., 1996 WL 453572, at *2 (discussing that the EEOC sent mixed signals by mailing a letter to Noble Roman's president inviting him to participate in a settlement discussion while issuing a right-to-sue letter before Noble Roman's could respond).
11. *See* 42 U.S.C. § 2000e-5(a)-(k) (1994 & Supp. 1999) (granting power to the EEOC to prevent unlawful employment practices by requiring the Commission to investigate the validity of claims).
12. *See id.* (describing the process in which a claim is filed).
13. *Id.*
14. *Id.*

Capitalizing on the agency's backlog of cases, charging parties are opting for court over conciliation with greater frequency, even though litigation comes with its own kind of delays. Left out of the picture entirely are the respondents—the employers—who have no similar authority under either the statute or the EEOC's regulations to: (1) insist upon a full investigation of the charge against it before the charging party is allowed to sue in federal court; (2) insist that an investigation started by the EEOC be completed before the agency issues a right-to-sue letter; (3) ask the EEOC, as the charging party can, to stop its investigation and all of its attempts to conciliate the charge.[15]

This Article is divided into five main sections. Part II provides a background of the statutes, regulations, and legislative history which lie at the heart of the early right-to-sue issue. Part III discusses the current split in the federal circuit courts of appeals over the authority of the EEOC to issue an early right-to-sue letter before completing, and sometimes before even initiating, an investigation of the charge. Part IV presents a survey of cases in which the EEOC has issued right-to-sue letters before the 180-day investigatory period under Title VII has expired. Part V discusses the implications of the EEOC's current practice of issuing early right-to-sue letters and argues against it. In particular, this section of the Article makes the case that the practice of issuing early right-to-sue letters unfairly stacks the deck against respondents (employers), especially those who participate in EEOC investigations only to have charging parties cut them short. The EEOC, with more cases than investigators, is only too happy to grant requests for right-to-sue letters, but a system in which one side can both initiate a case and determine whether and for how long it will be investigated before going to court is unfair and a distortion of the EEOC's processes. Finally, Part VI proposes a fix to the current imbalance of power between charging parties and respondents during the charge investigation stage. It seeks to level a playing field that presently can only be described as tilted toward litigation and away from informal dispute resolution.

II. BACKGROUND

In enacting the Civil Rights Act of 1964 (Title VII), Congress also created the Equal Employment Opportunity Commission "empowered . . . to prevent any person from engaging in any unlawful employment practice."[16] Eight years later, eager to create an integrated, multi-step enforcement procedure with respect to discrimination charges, Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972.[17] Congress gave the Commission ten days to serve notice of a charge of discrimination on an employer, and further determined that the Commission "shall make

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15. *See id.* (providing the charging party the choice to proceed or negotiate, but leaving respondent without options); 29 C.F.R. § 1601.28 (allowing the Commission to issue a right-to-sue letter before 180 days expires if it does not believe it can complete its investigation in that time, leaving the respondent's opportunity to conciliate at the mercy of the EEOC's schedule and the charging party's preference).

16. 42 U.S.C. § 2000e-5(a).

17. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

an investigation" with respect to each charge.[18] Congress did not provide much detail when it came to how the Commission should investigate charges, but the statute suggests that the agency's efforts would result in one of two possibilities:

> If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.[19]

Nor does the amended statute dictate the length of the EEOC's investigation.[20] Instead, it allows a charging party to take control of her case—and file suit in federal court—if the Commission has not conciliated the charge or filed suit itself within 180 days of the filing of the charge:

> If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.[21]

In *Occidental Life Insurance Co. v. EEOC*,[22] the Supreme Court held that the statute did not limit the EEOC's powers either to conciliate or litigate after the 180-day period had expired.[23] Rather, the 180-day period was an acknowledgment that some charging parties would be better off going it alone than waiting on the EEOC:

> Rather than limiting action by the EEOC, the provision seems clearly addressed to an alternative enforcement procedure: If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court. The 180-day limitation provides only that this private right of action does not arise until 180 days after a charge has been filed. Nothing in 706(f)(1) indicates that EEOC enforcement powers cease if the

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18. 42 U.S.C. § 2000e-5(b).
19. *Id.*
20. *See id.*
21. *Id.* § 2000e-5(f)(1).
22. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977).
23. *Id.* at 372 (quoting Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706(F)(1), 86 Stat. 103).

> complainant decides to leave the case in the hands of the EEOC rather than to pursue a private action.[24]

The general consensus in Congress at the time was that the 180-day period was a safeguard for charging parties.[25] Prior to 1972, a charging party could initiate a private suit only after EEOC notification that conciliation had not been successful, an open-ended period of time that literally could swallow up years.[26] As explained in the House Committee Report accompanying the 1972 bill:

> In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted. This situation leads the committee to believe that the private right of action, both under the present Act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.[27]

The Supreme Court noted that both houses of Congress shared a concern over the EEOC's open-ended investigatory period:

> As in the House, both the original and substitute Senate bills authorized complainants dissatisfied with the pace of EEOC proceedings to bring individual lawsuits after 180 days. And, as in the House, the Senate Committee explained that such a provision was necessary because the heavy caseload of the EEOC could result in delays unacceptable to aggrieved persons.[28]

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24. *Id.* at 361. A number of Supreme Court decisions, in dicta, support the proposition that the 180-day timeline under § 2000e-5(f)(1) is a jurisdictional waiting period in which the EEOC has exclusive jurisdiction, but undoubtedly the language in the opinions was not written with this exact issue in mind. *See id.* at 361 ("[A] natural reading of § 706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so."); *see also* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 104 n.12 (1979) (noting a complainant must allow the EEOC a full 180 days to negotiate a settlement); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 458 (1975) (observing that the claimant may demand a right-to-sue letter and institute the Title VII action himself after 180 days). Nevertheless, at least one federal court has placed great emphasis on *Occidental Life*'s construction of § 2000e-5(f)(1). *See* Spencer v. Banco Real, 87 F.R.D. 739, 744 (S.D.N.Y. 1980) ("Significantly, in describing that procedure [allowing charging parties to sue after 180 days], the [Supreme] Court noted that the right to sue would not arise until after 180 days had expired.").

25. Occidental Life Ins. Co. v. EEOC, 432 U.S. at 371 n.30.

26. *Id.* at 359.

27. H.R. REP. NO. 92-238, at 12 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, *quoted in Occidental Life*, 432 U.S. at 362-63.

28. 432 U.S. at 363-64; *see* H.R. REP. NO. 92-238, at 54-55 (1971) (providing the aggrieved person the option of withdrawing the case from EEOC to escape the administrative quagmire); S. REP. NO. 92-415, at 23 (1971) ("Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill

Shortly after the Supreme Court answered one question (whether the EEOC can retain jurisdiction after the 180 days expired), the Commission asked another: whether it could *relinquish* jurisdiction *before* the 180 days had run.[29] It answered the question itself: yes. In October 1977, the agency issued a regulation allowing charging parties to receive right-to-sue notices upon request, that is, before the 180 days had elapsed, "provided . . . it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect."[30] Until recently, the regulation had not been successfully challenged in a federal appeals court.[31] That changed when the United States Court of Appeals for the District of Columbia struck it down.[32] The only other circuit to decide the issue since has not followed suit.[33]

III. THE CIRCUIT COURTS OF APPEALS IN CONFLICT[34]

A. *The D.C. Circuit Invalidates the Regulation*

Elizabeth Martini, a debt manager at the Federal National Mortgage Association (Fannie Mae), earned $71,000 a year before an odd twist to a harassment case ended her career: the coworker who had harassed her was promoted to supervise her and promptly

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provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission.").

29. *See* 29 C.F.R. § 1601.28(a)(2)-(3) (2001) (terminating further investigation by the EEOC upon issuance of a right-to-sue notice).

30. *Id.*

31. *See infra* Part III.

32. *See* Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1347 (D.C. Cir. 1999) (holding Title VII complainants must wait 180 days after filing charges with the EEOC before they may sue in federal court).

33. *See* Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1275 (10th Cir. 2001) (holding that, under the circumstances, EEOC regulation authorizing early right-to-sue letter was a reasonable interpretation of the law).

34. Other circuit courts of appeals have issued less than definitive rulings as to the validity of early right-to-sue letters. *See* EEOC v. Hearst, Co., 103 F.3d 462, 468 (5th Cir. 1997) (urging that the 180-day limitation has become no limitation); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1228 (10th Cir. 1997) (stating that the EEOC's allegedly premature issuance of right-to-sue letter was, at most, an affirmative defense); Moteles v. Univ. of Penn., 730 F.2d 913, 917 (3d Cir. 1984) (discouraging premature resort to the district court as contrary to congressional intent); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975). The *Weise* case involved special circumstances: while the EEOC issued a right-to-sue letter only three days after receiving the discrimination charge, "there was a prior charge against the same employer that had been pending for more than the required time." *Id.* at 412. The court ruled that holding on to the second charge for 180 days would have served no purpose and been contrary to Title VII's policy of handling claims expeditiously. *Id.* A similar circumstance arose years later in *Hall v. Flightsafety International, Inc.*, 106 F. Supp. 2d 1171 (D. Kan. 2000). There, the plaintiff received a right-to-sue letter only twelve days after filing his second discrimination charge against his employer. Indeed, by then the plaintiff's lawsuit was already pending in federal court. *Id.* The court did not make the plaintiff wait 180 days to amend his complaint because it would only have delayed resolution of his claims. *Id.* at 1182.

eliminated her job.[35] Martini sued for sex discrimination and retaliation under both Title VII and the District of Columbia Human Rights Act.[36] A jury awarded her nearly $7 million in damages.[37] Fannie Mae's main argument on appeal rested on a technicality: that the EEOC had never investigated Martini's charge and violated Title VII by issuing a right-to-sue letter within 180 days of her charge.[38]

The court of appeals first tackled Fannie Mae's contention that the 180 days specified in 42 U.S.C. § 2000e-5(f)(1) is a magic number.[39] Fannie Mae invoked the maxim *expressio unius est exclusio alterius* to argue that if suits are allowed after 180 days, it follows they must not be allowed before.[40] But the court thought otherwise, specifically noting that the *expressio unius* maxim is often overused, if not misused.[41] Nothing in the statute ruled out Martini's view that 180 days was simply the longest a complainant should have to wait before filing suit, meaning the waiting period could be considerably shorter under the statute.[42]

Fannie Mae also argued that the 180 days constituted a mandatory "cooling off" period under the statute.[43] During that period, the parties would be free to explore the type of conciliation specifically contemplated by Congress in its establishment of the EEOC.[44] But the court noted that nothing in the statute prevented the EEOC from completing its investigation within 180 days and then either dismissing the charge, issuing a right-to-sue letter, or filing suit against the respondent in its own right.[45] The court noted that if Congress had intended a cooling off period, it would not have allowed any litigation—including the EEOC's investigation—to be brought during that time.[46] Though Fannie Mae tried to invoke legislative history on its behalf, the court of appeals noted that, if anything, the history of § 2000e-5(f)(1) only begged the same question posed by the statute: did Congress intend 180 days to mark the longest period a charging party should wait before filing suit, or a minimum waiting period?[47] The court quoted language from a Congressional Conference Committee Report (drafted after the

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35. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1338-39.

36. *Id.* at 1339; *see* D.C. STAT. 1981 § 1-2501 (1994) (current version at D.C. CODE ANN. § 2-1401.1 (2000)).

37. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1338-39.

38. *Id.* at 1340.

39. *Id.*

40. *Id.* at 1342. *Expressio unius est exclusio alterius* means "the [m]ention of one thing implies exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

41. *Id.* at 1342-43.

42. *Id.* at 1344.

43. *Id.*

44. *Id.*; *see* 42 U.S.C. § 2000e-5(b) (1994 & Supp. 1999) ("[T]he Commission shall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

45. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1346 (citing 42 U.S.C. § 2000e-5(f)(1) (stating that the EEOC must notify the complainant of the status of the case within 180 days)).

46. *Id.*

47. *Id.*

House and Senate passed the 1972 amendments) that appeared to favor Martini's version of what Congress had in mind:

> [The 180-day provision] is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the [180-day provision] allow[s] the person aggrieved to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.[48]

The court of appeals then noted that it would have agreed with the Ninth and Eleventh Circuits (upholding the practice of issuing early right-to-sue letters) if its "inquiry were to end here."[49] But it decided to push forward, claiming that it had no choice under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[50] The appeals court stated that *Chevron* required it to conduct an "independent examination"[51] of a statute before validating it, which should involve an examination not only of "the particular statutory language at issue," but also "the language and design of the statute as a whole."[52] The court then turned to a provision, and language, in Title VII not even relied upon by Fannie Mae in its appeal—namely, that "the Commission 'shall' investigate every charge and 'shall' make a reasonable cause determination"[53] after having done so.

There was no question that the EEOC had not completed—and perhaps had not even started—its investigation of Martini's charge.[54] Twenty-one days after filing her sexual harassment and retaliation charge, Martini asked the EEOC to issue a right-to-sue letter, and the Commission promptly obliged.[55] Martini did not argue that the Commission completed its investigation after literally only three weeks on the job, and apparently conceded at oral argument that the Commission had terminated—meaning

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48. *Id.* (quoting 118 CONG. REC. S7168 (1972)).

49. *Id.*; *see, e.g.*, Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984) (upholding the practice of issuing early right-to-sue letters); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061 (11th Cir. 1994) (upholding the practice of issuing early right-to-sue letters). *But see* Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975) (prior to issuance of § 1601.28(a)(2), allowing EEOC to issue early right-to-sue letter "in the circumstances of this case").

50. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1345 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

51. *Id.* (citing N.Y. Shipping Ass'n v. Fed. Mar. Comm'n, 854 F.2d 1338, 1355 (D.C. Cir. 1988)).

52. *Id.* (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)); *see also* United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1850)).

53. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1346, quoting 42 U.S.C. § 2000e-5(b).

54. *See id.*

55. *Id.* at 1339.

truncated—its investigation.[56] For the court, that concession doomed her chances on appeal: "We cannot square this early termination of the process or the regulation authorizing it with 2000e-5(b)'s express direction to the Commission that it investigate all charges."[57]

Both Martini and the EEOC argued that it is futile to make a complainant wait 180 days for a right-to-sue letter when the Commission knows well in advance that it could never complete its investigation in that time.[58] Wrong, said the court, after pointing to the language in § 1601.28(a)(2) that "allows the Commission to authorize private suit when it 'has determined that it is *probable* that [it] will be unable to complete its administrative processing of the charge within 180 days.'"[59] The court concluded that the EEOC's own regulation allows a private suit even if there remains a chance — indeed, up to a forty-nine percent chance if "probable" is interpreted as "more likely than not" — that the Commission would be able to complete its investigation within 180 days.[60] To make matters worse, the EEOC "made that probability determination only twenty-one days after Martini filed her charge,"[61] a circumstance that revealed its decision to be a "speculative prediction of futility."[62]

And what if the EEOC said with certainty that it could not have processed Martini's charge within the 180-day time frame? Same answer, the court concluded in noting Congress must have understood that the agency it established enjoyed limited staff and funding.[63] "Congress well understood . . . the EEOC's limited resources . . . but nevertheless 'hoped that recourse to the private lawsuit will be the exception and not the rule.'"[64] According to the court, early right-to-sue letters make such a vision more like a fantasy.[65] Of course, invalidating early right-to-sue letters results in more work for the EEOC. The court appeared to welcome that result.[66] Without any authority to allow early suits, the Commission would face pressure from both complainants and lawmakers to improve its investigations[67] (for example, "by streamlining its procedures for handling

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56. *Id.* at 1346.
57. *Id.* (citation omitted).
58. *Id.*
59. *Id.* (alteration in original) (quoting 29 C.F.R. § 1601.28(a)(2) (1977)).
60. *Id.* at 1346.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* (quoting 118 CONG. REC. S7168 (1972)).
65. *Id.*
66. *Id.* at 1347.
67. The *Martini* court was not the first to make this prediction; for instance, in *Spencer v. Banco Real*, 87 F.R.D. 739 (S.D.N.Y. 1980), the court noted:

> If complainants are required to remain before the agency for 180 days, the primary role of the agency in handling such claims is emphasized and assured. Complainants faced with such a rule will naturally press the agency for action, rather than for early right-to-sue letters. The agency, in turn, will be spurred by that pressure and work to improve its efficiency. . . . Pressure and incentive to improve efficiency would no doubt diminish if the Commission could simply shift a large part of its workload to the federal courts.

charges, by setting higher case clearance goals, by improving training, or by reallocating staff and other resources among regions or between national and regional offices"),[68] and, if such efforts failed, it would be forced to turn to Congress for additional funds. Though already firmly planted in the public policy arena, at that point the court stepped back. Content that it had placed the agency in an uncomfortable position, it decided to leave to Congress "[w]hether authorizing early private suits is preferable to enlarging the Commission's budget."[69]

Ultimately, however, the *Martini* court grounded its decision in text—that of the statute, not the EEOC's regulation.[70] The power to allow early suits "inevitably and impermissibly" compelled the EEOC to relax—if not abandon—its efforts to comply with its chief statutory duty. That duty, the court concluded, is to investigate every charge filed.[71] The court noted that it was not so insistent simply (though not unimportantly) in order to adhere to the statute's terms.[72] Rather, it held out hope that a charge such as Martini's might find resolution—with the assistance of the EEOC—as late as the 180th day.[73] Indeed, in finding Martini's suit untimely, it held out exactly that hope in the case before it: "Because the EEOC stopped processing her charge twenty-one days after she filed it, Martini may file a new complaint in district court only after the Commission has attempted to resolve her charge for an additional 159 days."[74]

B. *The Tenth Circuit Disagrees*

Tonya Walker worked for United Parcel Service, Inc. (UPS) for seven years before filing a charge of sex discrimination against the delivery company on August 25,

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Id. at 746. However, the court in *Commodari v. Long Island University*, 89 F. Supp. 2d 353, 382 (E.D.N.Y. 2000), disagreed with the *Martini* court, stating that the notion that "invalidating early right to sue letters will spur the EEOC to action ignores the realities of the EEOC's caseload and the level to which it has been funded in recent years. . . . The EEOC cannot be cajoled into doing what it does not have the capacity to do." Further, the district court in *Commodari* did not believe that the *Martini* approach would do anything but prompt the EEOC to "run out the clock" during investigations. *Id.* at 382-83. The district court stated:

> [I]n jurisdictions adhering to the *Martini* court's approach, the EEOC will simply adopt a practice of holding charges for the requisite 180 days, taking no action during that time, and then issuing a right to sue letter at the expiration of the period. The practical result will only be to delay the commencement of litigation that is inevitable.

Id.

68. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1347. There appears to be some consensus that the EEOC is not funded appropriately. *See, e.g.*, Commodari v. Long Island Univ., 89 F. Supp. 2d at 382 (refusing to invalidate early right-to-sue letter and noting, "Congress has simply not funded the EEOC at a level necessary for it to pursue conciliation efforts on the extraordinary and ever-growing number of charges filed with it").

69. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1347.

70. *Id.*

71. *Id.*

72. *Id.* at 1347.

73. *Id.*

74. *Id.* at 1348.

1997.[75] Less than six weeks later, on October 3, she asked the EEOC's local office to issue her a right-to-sue letter.[76] It did so, but contrary to its regulation authorizing such letters, it failed to attach a certificate attesting to the fact that the agency would be unable to complete its administrative review of her charge within 180 days.[77] The district court seized upon that deficiency and dismissed Walker's Title VII claim without prejudice.[78] The Tenth Circuit Court of Appeals treated that dismissal as one with prejudice, not without, on the grounds that by then Walker had run out of time to fix the EEOC's error.[79] More than 300 days had passed since the alleged incidents of sex discrimination, and, perhaps more importantly, more than ninety days had passed since the agency issued its initial right-to-sue letter.[80] In "real world terms," Walker's case had been dismissed without any chance that she could refile, meaning the court of appeals had jurisdiction because the district court's dismissal was in all practicality a final order.[81]

The court wasted little time reversing the district court's dismissal.[82] It found that any defect in her filing lay with the EEOC and that Walker should not be "denied her day in court because of [the] EEOC's negligence."[83] The court also rejected UPS' argument that Walker's request for a right-to-sue letter just six weeks after she had filed her charge constituted interference with the EEOC's duty to explore conciliation with respect to every charge filed.[84] The EEOC had the power, the court concluded, to deny Walker's request without explanation, making the agency—not Walker—the one in control.[85] In reaching its conclusion, the court brushed aside UPS' argument that both Walker and the EEOC proceeded down a path of litigation without any knowledge of the company's interest in resolving the dispute short of trial.[86] The company's assertion had a "disingenuous ring," the court noted, considering it had known of Walker's discrimination charges since November 1997, when Walker filed her suit. (In fact, the company had known of her charges three months earlier, in August, as the statute requires the EEOC to serve a respondent with a copy of a discrimination charge within ten days of the agency's receipt.)[87]

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75. Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1270-71 (10th Cir. 2001).
76. *Id.* at 1271.
77. *Id.*; *see* 29 C.F.R. § 1601.28(a)(2) (2001).
78. *Id.* at 1270.
79. *Id.* at 1271.
80. *Id.* Once the EEOC issues its right-to-sue letter, charging parties have ninety days to sue their employers in federal court. 42 U.S.C. § 2000e-5(f)(1) (1994 & Supp. 1999).
81. Walker v. United Parcel Serv., Inc., 240 F.3d at 1272.
82. *See id.*
83. *Id.* at 1273.
84. *Id.*
85. *Id.*; *accord* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999) ("Significantly, an individual may not, in an effort to effectuate her own interests, take away the enforcement authority of the EEOC even if she wishes to withdraw her charge of discrimination.").
86. Walker v. United Parcel Serv., Inc., 240 F.3d at 1273 n.2.
87. *Id.*

Having lost its argument that the EEOC's incomplete right-to-sue letter doomed Walker's suit, UPS argued in the alternative that the letter was void because it was issued before 180 days had passed since she had filed her charge.[88] The court of appeals spent little time wrestling over the circuit split concerning the validity of the EEOC's early right-to-sue regulation.[89] It noted that both the Eleventh and Ninth Circuits had upheld the regulation, while the D.C. Circuit had not.[90] Undetained by this division of authority, the court noted that under *Chevron* its job was twofold:[91] first, determine whether the underlying statute (here Title VII) was unambiguous on the issue of early right-to-sue letters. If it was, then the Court's job was to "give effect to the unambiguously expressed intent of Congress."[92] If not, then it was on to the second issue—whether the EEOC's regulation is a reasonable interpretation of the statute Congress drafted.[93]

The court determined that § 2000e-5(f)(1) is ambiguous because it does not expressly prohibit the issuance of early right-to-sue notices.[94] "Even *Martini* agrees" with this assertion, the court noted, meaning that the reasonableness of the EEOC's regulation was not at issue.[95] It quickly noted that the purpose of the 180-day rule in § 2000e-5(f)(1) is "to protect aggrieved parties from lengthy delays occasioned by administrative backlog."[96] The rule provided assurance that administrative delay would not prevent a complainant from prosecuting her case in court.[97] If the agency in charge of investigating complaints of discrimination determined that more than 180 days would be needed to complete an investigation—an amount of time not allowed under the statute—what purpose would be served by keeping the case and in effect running out the clock?[98] None, the court answered, again noting that early right-to-sue letters furthered the statute's purpose "by allowing aggrieved parties to file suit even earlier if EEOC itself determined that it could not investigate the party's charge within 180 days."[99]

What remained was the issue raised for the first time by the *Martini* court: how can the early right-to-sue regulation be reconciled with the statute's prescription that

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88. Walker v. United Parcel Serv., Inc., 240 F.3d at 1273-74.
89. *Id.*
90. *Id.* at 1274 (citing Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1340-48 (D.C. Cir. 1999) (refusing to uphold the regulation); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061-63 (11th Cir. 1994) (upholding the regulation); Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984) (upholding the regulation)).
91. Walker v. United Parcel Serv., 240 F.3d at 1274.
92. *Id.* (quoting Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See Id.* at 1274 (citing 42 U.S.C. § 2000e-5(f)(1) (2000)).
98. *Id.*
99. *Id.* (citing Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061-63 (11th Cir. 1994); Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984)).

every charge be investigated by the EEOC?[100] On this point, the Tenth Circuit appeared to suggest that Congress knew exactly what it was doing in 1972 when it amended Title VII (and its "investigate every charge" language) by, in effect, ending investigations after 180 days.[101] In so doing, "Congress acknowledged that EEOC's inability to complete its performance of that duty [to investigate each charge] should not deprive a private charging party of the right to institute a court action and thus terminate EEOC's jurisdiction."[102] The EEOC's 1977 regulation authorizing early right-to-sue letters simply used the same reasoning to shorten the 180-day time frame even further.[103] The court quoted from the legislative history behind the 180-day limitation to demonstrate that in 1972 Congress—like the EEOC in 1977—was being "realistic" in its assessment that investigations would not be completed and fair in its conclusion that charging parties should not be detained.[104]

The court then expressed what appears to be a lingering, though passing, worry that, however good the Commission's intentions, its regulation conflicts with its statutory duty of investigation.[105] For the court, it was a worry based "on an overly strict and technical reading of a statute susceptible to more than one reasonable interpretation."[106] Besides, the court noted, it was not as if a charging party could cut the EEOC out of the picture completely.[107] The EEOC "still has a duty to review and consider" every charge, and it could deny a request for an early right-to-sue letter if it determined that the parties' interests would be better served by continuing its investigation.[108] But the court also made it clear that it was the interests of the charging party which were foremost in its mind:

> [This] procedure, under which the EEOC has and exercises the power to determine whether or not an early right-to-sue letter is warranted, directly furthers Congress' original purpose in adopting Section 2000e-5(f)(1): protecting aggrieved individuals from undue delay by releasing them from the "administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process."[109]

Finally, the court concluded that Congress implicitly winked at the EEOC when it amended Title VII to include the 180-day time line, then looked the other way when it amended the statute again in 1991 without taking issue with the

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100. Walker v. United Parcel Serv., Inc., 240 F.3d at 1274 (citing Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1347 (D.C. Cir. 1999)).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1277.
107. *Id.* at 1275.
108. *Id.*
109. *Id.* at 1276 (quoting H.R. REP. NO. 92-238 (1971)).

agency's early right-to-sue regulation.[110] Citing the "familiar wisdom" that Congress sometimes speaks by remaining silent, the court concluded that the EEOC's regulation had been "implicitly accepted by Congress for over 23 years," the amount of time that had elapsed since the agency issued it.[111] The court then reversed the district court's determination that the EEOC's regulation was invalid and remanded Walker's case for further proceedings on the merits.[112]

IV. A LAW REVIEW: HOW THE COURTS REACT TO EARLY RIGHT-TO-SUE LETTERS

Martini and *Walker* highlight the present disuniformity in the federal courts concerning early right-to-sue letters.[113] The courts are without agreement on nearly every aspect of the issue: whether the 180-day period is a mandatory waiting period; how much of an investigation the EEOC must perform; whether the EEOC has the authority not to investigate, and so on. The following table is representative of the courts' inconsistency at the same time it underscores the need for a more consistent—and balanced—approach. It also demonstrates that there is no apparent correlation between the length of the EEOC's investigation—if *any* is initiated—and a court's decision whether to remand the case back to the EEOC.[114]

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Slaughter v. Catholic Health Initiatives Iowa Corp.[116]	126	Yes	"[T]he Court agrees with the reasoning of the Ninth and Eleventh Circuits . . . that there is no point in making claimants wait around if the EEOC knows it is not going to be able to do anything with their claim."[117]

110. *Id.* at 1276.

111. *Id.* at 1276-77.

112. *Id.* at 1279.

113. *See* Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1279 (10th Cir. 2001) (upholding early right-to-sue notice issued before 180 days had elapsed); Martini v. Federal Nat'l Mortgage Ass'n., 178 F.3d 1336, 1348 (D.C. Cir. 1999) (striking down a regulation allowing charging parties to ask for right-to-sue notices before 180 days had elapsed).

114. The cases included in this table are those most often cited by courts when ruling on the early right-to-sue issue. A table that included every case tackling the early right-to-sue issue would not be possible (let alone up-to-date), as many district court decisions are not reported and not available on Westlaw or LEXIS.

115. Number of days is calculated by the number of days elapsed between the filing of the charge and the issuance of the right-to-sue letter by the EEOC.

116. Slaughter v. Catholic Health Initiatives Iowa Corp., No. 4-99-CV-9047, 2001 WL 740197, *1, *1 (S.D. Iowa Mar. 1, 2001). In an unusual twist, the plaintiff—apparently concerned that the Eighth Circuit might rule against him on appeal and force him to retry the case—did not resist the defendant's efforts to have the case remanded to the EEOC. *Id.* He asked only that the case be dismissed without prejudice. *Id.* The court obliged and remanded the case for the remainder of the 180 days. *Id.* at *2.

117. *Id.* at *1.

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Commodari v. Long Island University[118]	6	No	"If the EEOC will not, or cannot because of insufficient staffing or funding, undertake the investigation and conciliation efforts contemplated by Congress, the aggrieved employee and his employer should not be forced to undergo the needless delay in what will inevitably [be] a judicial resolution of their dispute."[119]
Shepherd v. United States Olympic Committee[120]	48	Yes	"Because the EEOC stopped processing Shepherd's charge 48 days after he filed it, he may file a new action including such claims only after the EEOC has attempted to resolve his charge for an additional 132 days."[121]
Simler v. Harrison County Hospital[122]	15	Yes	"Neither the [early right-to-sue] letter nor any other part of the record indicates that *any* investigation of the charge was undertaken by the EEOC. The facts indicate that the EEOC issued the right-to-sue letter as a matter of administrative convenience."[123]
King v. Dunn Memorial Hospital[124]	10	No	"The *Martini* analysis goes beyond statutory interpretation and instead intrudes into the agency's responsibility for balancing its limited resources with expanding responsibilities."[125]

118. Commodari v. Long Island Univ., 89 F. Supp. 2d 353 (E.D.N.Y. 2000). The court concluded the EEOC's investigation was not a jurisdictional prerequisite to bringing suit in federal court. *Id.* at 383. The court asserted "the invalidity of a right-to-sue letter does not necessarily deprive a district court of jurisdiction to hear a Title VII claim. . . . [R]ather, like a statute of limitations, [the 180-day investigation period] is a condition precedent to bringing suit that may be excused when doing so is warranted by relevant equitable considerations." *Id.* The court noted that equity in the case weighed in the plaintiff's favor, as there was no evidence that Commodari (a university professor dismissed by his school) had asked the EEOC to issue the early right-to-sue letter, or any evidence that the defendant (Long Island University) had been prejudiced by the EEOC's failure to undertake conciliatory efforts. *Id.* The court's holding appears to suggest that it would look with disfavor on charging parties who *request* early right-to-sue letters. *See id.* Its conclusion that Long Island University had not been prejudiced is grounded in a determination that the university would not have been "amenable to conciliation efforts by the EEOC." *Id.* The facts of the case suggest otherwise: the university had discussed settlement with Commodari and had made an "alleged settlement offer of one-year's salary." *Id.*

119. *Id.*

120. Shepherd v. United States Olympic Comm., 94 F. Supp. 2d 1136, 1144 (D. Colo. 2000). The district court dismissed the portion of the complaint relating to the EEOC charge on the grounds that the plaintiff failed to exhaust his administrative remedies. *Id.* The court called the 180-day statutory timeline a "waiting period under §§ 2000e-5(b) and 2000e-5(f)(1)." *Id.* at 1145.

121. *Id.*

122. Simler v. Harrison County Hosp., 110 F. Supp. 2d 886, 888 (S.D. Ind. 2000). The court held the EEOC must investigate every charge, which need not take 180 days. *Id.* at 891. Early right-to-sue letters have "practical appeal," but ultimately contradict the statutory scheme established by Congress. *Id.*

123. *Id.* at 890.

124. King v. Dunn Mem'l Hosp., 120 F. Supp. 2d 752 (S.D. Ind. 2000). There was no doubt the EEOC conducted no investigation whatsoever of the charge before issuing a right-to-sue letter. *Id.* at 754. "Indeed, by informing [the defendant] that no employer response was necessary on the day it received the charge, the EEOC effectively foreclosed the possibility of any meaningful investigation." *Id.*

125. *Id.* at 758.

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Valardi v. Yellow Page Publishers, Inc.[126]	3	No	"As a matter of practicality . . . , plaintiffs will eventually be issued right-to-sue letters. . . . To dismiss without prejudice and have plaintiffs refile this lawsuit at a future date seems contrary to the purposes of Title VII and common sense."[127]
Parker v. Metropolitan Transportation Authority[128]	130	No	"[It is a] well-known fact that the EEOC and state administrative agencies are so overwhelmed with charges that they could not possibly investigate more than a small fraction of them within 180 days."[129]
Seybert v. West Chester University[130]	55	No	"The question is not whether the EEOC's view is correct, or whether another view, such as *Martini*'s, is incorrect, but given the alternatives, whether the regulation is a plausible interpretation of § 2000e-5(f)(1)."[131]
Hussein v. Pierre Hotel[132]	Less than 60	No	"[T]he reasoning of [those cases upholding early right-to-sue letters is] more persuasive both in terms of statutory interpretation and on policy grounds."[133]
Maple v. Publications International, Ltd.[134]	Less than 60	No	"This is not a case where a claimant's failure to cooperate with an agency deprived the agency of the opportunity to pass on the claim prior to bringing suit. Maple appears to have complied with every request made by the EEOC."[135]

126. Valardi v. Yellow Page Publishers, Inc., No. 00-1370, 2000 WL 1897355, *1, *2 (D. Minn. Nov. 3, 2000). Clearly, the EEOC did no investigation at all and issued the right-to-sue letter only as a matter of convenience. *Id.* at *3.

127. *Id.* at *2. The court is correct only if one believes that EEOC investigations are empty exercises and are incapable of ending litigation—either by settling charges or convincing charging parties their claims are unlikely to succeed. *Id.*

128. Parker v. Metro. Transp. Auth., 97 F. Supp. 2d 437, 443 (S.D.N.Y. 2000). Parker's claims were under the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994), and the Age Discrimination in Employment Act, 29 U.S.C. § 621. *Id.* at 444. However, the EEOC has exclusive jurisdiction to investigate charges brought under both statutes. *Id.*

129. *Id.* at 445.

130. Seybert v. W. Chester Univ., 83 F. Supp. 2d 547, 548 (E.D. Pa. 2000).

131. *Id.* at 552.

132. Hussein v. Pierre Hotel, No. 99 Civ. 2715 DC, 2000 WL 776920, *1, *1 n.1 (S.D.N.Y. June 14, 2000).

133. *Id.* at *5.

134. Maple v. Publ'ns Int'l, Ltd., No. 99-C-6936, 2000 WL 85951, *1, *1 (N.D. Ill. Jan. 19, 2000). The EEOC issued the right-to-sue letter after the parties agreed to mediate their claims but before mediation actually occurred. *Id.* at *1. It is unclear in this case whether Maple, the charging party, asked for the right-to-sue letter or whether the EEOC issued it *sua sponte*, in effect stopping the mediation process on its own.

135. *Id.*

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Stetz v. Reeher Enterprises[136]	14 and 22	Yes	"[T]he issuance of a right-to-sue letter before the EEOC is permitted to investigate a plaintiff's allegation and attempt conciliation would result in an emasculation of the clear statutory language of Title VII and the Congressional policy underlying Title VII, which is aimed at having the EEOC, rather than the courts, resolving disputes involving unlawful employment practices."[137]
Rodriguez v. Connection Technology, Inc.[138]	39	Yes	"The record does not indicate what activities, if any, the EEOC performed during the 39 day period with regard to an investigation or a possible conciliation. . . . Credit will be given for the 39 days during which the charges were pending before the EEOC."[139]
Horne v. Schult Homes Corp.[140]	51	No	"Determinations such as when to dismiss charges, when an investigation ends, when conciliation efforts are futile, are within the province of the EEOC, not ordinarily to be disturbed by a court."[141]
Palumbo v. Lufthansa German Airlines[142]	11	No	"[T]he EEOC's issuance of an early right to sue letter does not deprive this Court of subject matter jurisdiction."[143]

136. Stetz v. Reeher Enters., 70 F. Supp. 2d 119 (N.D.N.Y. 1999). Four plaintiffs sued the defendant for sexual harassment. *Id.* at 120. Three of the plaintiffs waited twenty-two days before receiving right-to-sue letters from the EEOC; the remaining plaintiff waited only fourteen days to receive hers. *Id.* at 125. In fact, the remaining plaintiff's attorney requested a right-to-sue letter seven days *before* she had even filed her charge of discrimination. *Id.* at 125. The court cited this timing as "further indication that no investigation or attempt at conciliation [by the EEOC] was effectuated." *Id.* at 125.

137. *Id.* at 123 (citations omitted).

138. Rodriguez v. Connection Tech., Inc., 65 F. Supp. 2d 107, 109 (E.D.N.Y. 1999). Even before the EEOC issued its 1977 regulation allowing for the issuance of early right-to-sue letters, the Second Circuit did not interpret the 180-day investigation period as a rigid requirement. *Id.* at 109, 111-12; *see* Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975) (rejecting arguments that the EEOC acted prematurely in issuing a right-to-sue letter only three days after the filing of a charge). But district courts, including the *Rodriguez* court, distinguish *Weise v. Syracuse University* on the grounds that the EEOC had already investigated a prior charge brought by the same complainant against the same respondent. *Id.* at 112; *see* Stetz v. Reeher Enters. Inc., 70 F. Supp. 2d at 124-25 (noting *Weise* held "a second 180-day period 'would not have advanced the conciliation purposes of [Title VII]'"); State *ex rel.* Abrams v. Holiday Inns, Inc., 656 F. Supp. 675, 680 (W.D.N.Y. 1984) (noting plaintiff's reliance on *Weise* was misplaced because "[i]n *Weise*, the EEOC had issued a Notice of Right to Sue only three days after filing of *additional* charges"). Even the *Weise* court recognized the special circumstances of the case before it:

> [I]n this case there was a prior charge against the same employer that had been pending for more than the required time, and it was clear that no conciliation was likely. There was thus little reason to think that the second charge—alleging a continuing course of discrimination—would have ended in conciliation.

Weise v. Syracuse Univ., 522 F.2d at 412.

139. Rodriguez v. Connection Tech., Inc., 65 F. Supp. 2d at 112.

140. Horne v. Schult Homes Corp., No. 3:99-CV-0321RM, 1999 WL 1953131, *1, *2 (N.D. Ind. Sept. 10, 1999).

141. *Id.* at *6 (citations omitted).

142. Palumbo v. Lufthansa German Airlines, No. 98 Civ. 5005(HB), 1999 WL 540446, *1, *3 (S.D.N.Y. July 26, 1999). As the right-to-sue letter was issued "*only* eleven days after the charge was filed.

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Rosario v. Copacabana Night Club, Inc.[144]	14	No	"[T]he EEOC may indeed be overburdened. It may be attempting through early right to sue notices to shift its burden of cases to the courts contrary to Congress' directive to review complaints for at least 180 days."[145]
Robinson v. Red Rose Communications, Inc.[146]	129	Yes	"The EEOC's precipitate action [of issuing the right-to-sue letter before the expiration of the 180-day period] triggered the filing of this case before the remedies provided by the statute were exhausted. This emasculates Congressional intent by short circuiting the twin objectives of investigation and conciliation."[147]
Parker v. Noble Roman's, Inc.[148]	7	No	"We have little to add to the debate."[149]
Figueira v. Black Entertainment Television, Inc.[150]	15	No	"[T]he [EEOC's] regulation, and the issuance of early notices, is not precluded by the language or purpose of Title VII."[151]
Montoya v. Valencia County[152]	Less than 180	Yes	"The Court is not unsympathetic to the difficulties the EEOC faces in executing its mandate. However, the EEOC may not excuse itself from carrying out its duties by administrative fiat. The Commission must look to Congress to amend the statute or otherwise ease its regulatory burden."[153]

. . [t]he Court ordered the parties to brief the issue of whether [it] had jurisdiction to consider [Palumbo's] Title VII claim." *Id.* at *1.

143. *Id.* at *2.

144. Rosario v. Copocabana Night Club, Inc., No. 97 Civ. 2052(KTD), 1998 WL 273110, *1, *3 (S.D.N.Y. May 28, 1998). The court implied it might have remanded or suspended the case had a motion to do so been "made within the 180-day time-frame," but it was not. *Id.* at *7. The court noted that under "the facts of this case," a decision to dismiss the claim for lack of subject matter of jurisdiction would have required it either to allow Rosario to refile her case or find that her claims were "now barred by the statute of limitations set forth" in Title VII, namely the ninety-day period in which plaintiffs must file after receiving a right-to-sue letter. *Id.* at *7 n.9.

145. *Id.* at *7.

146. Robinson v. Red Rose Communications, Inc., No. 97-CV-6497, 1998 WL 221028, *1 (E.D. Pa. May 5, 1998). According to the court, the EEOC gave no explanation for closing the administrative case other than its standard boilerplate that "it is unlikely that the [EEOC] will be able to complete its administrative processing within 180 days from the filing of the charge." *Id.* at *3 n.2. The court rejected plaintiff's alternative argument that the 180-day investigation period had become irrelevant to the case since 252 days had passed since he filed his charge of discrimination. *Id.* at *3 n.3. In fact, plaintiffs might abuse a system in which they could file premature complaints of discrimination (before the EEOC had spent 180 days investigating the underlying charges) with the expectation that by the time the district court ruled on a motion to dismiss the 180-day period would have passed. *Id.* The court dismissed plaintiff's case without prejudice, thereby allowing him to refile it with the EEOC and "thereafter with this court, if necessary, following completion of the administrative process." *Id.*

147. *Id.* at *3 (citation omitted).

148. Parker v. Noble Roman's, Inc., No. IP-96-65-C-D/F, 1996 WL 453572, *1, *1 (S.D. Ind. June 26, 1996). The EEOC issued the right-to-sue letter even though it had invited Noble Roman's president to participate in a settlement discussion. *Id.* at *1; *see* text accompanying notes 2-7.

149. *Id.* at *2.

150. Figueira v. Black Entm't Television, Inc., 944 F. Supp. 299, 300 (S.D.N.Y. 1996).

151. *Id.* at 304.

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Sims v. Trus Joist MacMillan[154]	11	No	"It seems illogical to us that a complainant who receives a right to sue letter from the EEOC stating that it is unable to investigate the complainant's charge within the prescribed time must sit idly by until the 180-day period expires."[155]
Henschke v. New York Hospital-Cornell Medical Center[156]	31	Yes	"Title VII claims can only be filed after a dismissal of the charges by the EEOC or the lapsing of 180 days without action by the EEOC."[157]
True v. New York State Department of Correctional Services[158]	28	Yes	"[T]he language of section 2000e-5(f)(1) is clear in requiring either the dismissal of the charges or the passage of the stated time period as a condition precedent to the filing of a Title VII cause of action in a federal district court."[159]
Holden v. Burlington Northern, Inc.[160]	36	No	"The rationale for requiring that a complainant wait 180 days prior to filing suit is to encourage conciliation rather than litigation. . . . Requiring [plaintiff] to wait would be of little or no value in the present case."[161]
State ex rel. Abrams v. Holiday Inns, Inc.[162]	98	Yes	"In view of the congressional mandate of a 180-day period of exclusive EEOC jurisdiction, I find this Court lacks jurisdiction over plaintiffs' Title VII claims."[163]

152. Montoya v. Valencia County, 872 F. Supp. 904, 905 (D.N.M. 1994).

153. *Id.* The court elaborated that the EEOC was probably correct in determining that it could not completely investigate all charges of discrimination. *Id.* But the statute, in particular § 2000e-5(f)(1), "makes no allowance for excusing compliance on grounds of administrative infeasibility." *Id.*

154. Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994). Incredibly, the plaintiff asked for a right-to-sue letter one day *before* the EEOC date-stamped his charge (though three weeks after he signed it). *Id.* at 1060.

155. *Id.* at 1063.

156. Henschke v. N.Y. Hosp.-Cornell Med. Ctr., 821 F. Supp. 166 (S.D.N.Y. 1993). The plaintiff, Claudia Henschke, requested a right-to-sue letter "[a]t the time of the EEOC filing." *Id.* at 168. In other words, Henschke made absolutely no effort to conciliate her claims. *Id.* The court "suspended" plaintiff's claims "for a period long enough so plaintiff's charge will actually have been before the agency for the requisite 180-day period." *Id.* at 171. In so doing, the court acknowledged that in some cases the 180-day period will not move the parties any closer to settlement—in other words, they "will find themselves in the exact same position they find themselves in today." *Id.*

157. *Id.*

158. True v. N.Y. State Dep't of Corr. Servs., 613 F. Supp. 27 (W.D.N.Y. 1984). The plaintiff actually sued before receiving her right-to-sue letter from the EEOC. *Id.* at 29. In remanding to the EEOC for further investigation, the district court credited the plaintiff with twenty-eight days out of the 180-day investigation period. *Id.* at 30. According to the court, twenty-eight days elapsed between the filing of the plaintiff's EEOC charge and the filing of her suit in federal court. *Id.*

159. *Id.*

160. Holden v. Burlington N., Inc., No. CIV.A.3-81-994, 1984 WL 1045, *1, *1 (D. Minn. June 15, 1984). One of the plaintiffs, Joleen McIlravy, filed her charge of discrimination just five months before the court ruled on the defendant's motion to dismiss. *Id.* at *1-*2. The court noted that a decision granting the defendants' motion to dismiss would at most result in McIlravy having "to wait approximately five weeks [until the 180-day period had elapsed] before proceeding with her claim." *Id.* at *2.

161. *Id.* (citation omitted).

162. State *ex rel.* Abrams v. Holiday Inns, Inc., 656 F. Supp. 675 (W.D.N.Y. 1984). The district court credited ninety-eight days toward the 180-day investigation period under Title VII. *Id.* at 680 n.6.

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Saulsbury v. Wismer & Becker, Inc.[164]	18	No	"Whether the EEOC has actually attempted to conciliate or investigate the case is irrelevant."[165]
Cattell v. Bob Frensley Ford, Inc.[166]	Less than 90	No	"Fundamentally, requiring the plaintiff . . . to sit twiddling her thumbs and 'flattening her time' by watching the days drift by until there finally appeared the time when a remedy was available would just not make sense."[167]
Spencer v. Banco Real[168]	100 and 5	Yes	"The 180-day period is not purposeless, merely because the agency claims it seems unlikely to take final action during that time."[169]
Hiduchenko v. Minneapolis Medical & Diagnostic Center[170]	11	Yes	"[T]his result is dictated not only by the express conditional language of the statute itself, but also by the legislative history surrounding Title VII."[171]

163. *Id.* (citations omitted). The court was not unaware of other decisions rejecting the notion that plaintiffs should have to "mark time" at the administrative level simply to fulfill the 180-day requirement. *Id.* at 679-80. While the futility argument was "initially appealing," it could not compete with the "unambiguous language of [§] 2000e-5(f)(1)." *Id.* at 680.

164. Saulsbury v. Wismer & Becker, Inc., 644 F.2d 1251, 1253 (9th Cir. 1980).

165. *Id.* The Ninth Circuit relied upon its prior decision in *Bryant v. California Brewers Ass'n.*, 585 F.2d 421, 425 (9th Cir. 1978), *vacated and remanded on other grounds*, 444 U.S. 598 (1980). In *Bryant*, where the suit was filed 168 days after the filing of the charge, the court stated "it would be a travesty to require the EEOC and Bryant to mark time until 180 days were counted off." *Id.*

166. Cattell v. Bob Frensley Ford, Inc., 505 F. Supp. 617 (M.D. Tenn. 1980). Cattell filed her charge of discrimination on March 25, 1980. *Id.* On April 17, 1980, the EEOC scheduled a fact-finding conference for May 30, 1980, but the conference "failed to materialize." *Id.*

167. *Id.* at 622 (footnote omitted). The court described the concept of "flattening one's time" as "prison jargon used to describe the long and arduous process of marking off the days until the prisoner's release." *Id.* at 622 n.3. The court also noted that as of the date of its decision more than 180 days had passed since the plaintiff filed her discrimination charge, thereby arguably satisfying the statutory requirement. *Id.* at 622 n.5. But it determined not to use that fact as "[a]n additional basis for finding jurisdiction." *Id.* at 622. Other courts have done so. *See, e.g.*, Maple v. Publ'ns Int'l, No. 99-C6936, 2000 WL 85951, at *1, *3 n.1 (N.D. Ill. Jan. 19, 2000) ("Defendants' motion [to dismiss] must also be denied because 180 days have passed since the filing of Maple's charge . . . .") (citing Rolark v. Univ. of Chi. Hosps., 688 F. Supp. 401, 404 (N.D. Ill. 1988)).

168. Spencer v. Banco Real, 87 F.R.D. 739 (S.D.N.Y. 1980). The plaintiff filed three charges in all against her employer; the first was a discrimination charge and the others alleged retaliation in response to plaintiff's original charge. *Id.* at 740-41. The court suspended, rather than dismissed, plaintiff's charges, noting that the Supreme Court had made clear in similar circumstances that "[s]uspension of proceedings is preferable to dismissal with leave to refile." *Id.* at 747 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 n.13 (1979)). In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), a plaintiff sued in federal court under the Age Discrimination in Employment Act without filing a state complaint. *Id.* at 750. The Court held that resort to state administrative remedies was mandatory, but it chose to suspend the complaint rather than dismiss it. *Id.* at 758, 764-65, 765 n.13. "Suspension of proceedings is preferable to dismissal with leave to refile." *Id.* When claims are dismissed (even without prejudice) rather than suspended, the plaintiff runs the risk of failing to re-file in a timely fashion. Spencer v. Banco Real, 87 F.R.D. at 748. "That result would be too harsh a remedy." *Id.*

169. Spencer v. Banco Real, 87 F.R.D. at 746.

170. Hiduchenko v. Minneapolis Med. & Diag. Ctr., 467 F. Supp. 103, 107 (D. Minn. 1979).

Case	Number of Days EEOC Devoted to Charge[115]	Case Dismissed/ Suspended by Court?	Court's Comment
Loney v. Carr-Lowrey Glass Co.[172]	Less than 180	Yes	"The court finds that [s]ection 1601.28(a)(2) . . . is '. . . inconsistent with an obvious congressional intent. . . . ,' and that the Notices of Right to Sue issued to [the] plaintiffs were defective because [they were] issued prior to the expiration of the 180-day period."[173]

V. WHY THE EARLY "RIGHT"-TO-SUE LETTER IS WRONG

At the most fundamental level, the EEOC's practice of issuing early right-to-sue letters undermines Congress' direction that the agency devote itself to the conciliation and investigation of discrimination charges. On its own—without the approval of Congress—the EEOC has determined that it is simply more convenient for it not to live up to Congress' expectations, in other words, not to do its job in every case.[174] Both parties lose when the EEOC decides to issue right-to-sue letters just six days after receiving the charge,[175] or twenty-one days.[176] Or, in the case of *Noble Roman's*, a few days after proposing settlement discussions.[177] In those cases, which are becoming less and less the exception, the employee is free to go to court even though the charge was never conciliated, mediated, or investigated.

When Congress established the EEOC, it determined that charges should not be fast-tracked to the courtroom before the agency made any efforts toward investigating and conciliating each charge. But that is precisely what has occurred[178]—the early right-to-sue letter undercuts the statute's 180-day period, intended (indeed, stated) to be a

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171. *Id.*

172. Loney v. Carr-Lowrey Glass Co., 458 F. Supp. 1080, 1081 (D. Md. 1978). The district court remanded the plaintiff's case to the EEOC. *Id.* In an odd twist, it gave the plaintiff credit for the time that elapsed *after* the EEOC issued a right-to-sue letter until the plaintiff filed suit in court. *Id.* Apparently it was under the impression that the EEOC might not have "actually ceased processing of the complaint" even though it had issued a right-to-sue letter. *Id.*

173. *Id.* (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973)).

174. Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980). The Supreme Court has stated that courts should "reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress." *Id.*

175. Commodari v. Long Island Univ., 89 F. Supp. 2d 353, 381-83 (E.D.N.Y. 2000) (holding early right-to-sue regulation valid and plaintiff need not delay litigation); *see also* Parker v. Noble Roman's Inc., No. IP-96-65-C-D/F, 1996 WL 453572, *1 (S.D. Ind. June 26, 1996) (holding early right-to-sue valid even when suit is filed within a few days after proposing settlement discussions).

176. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1347 (D.C. Cir. 1999) (holding that plaintiff must wait 180 days after filing charges with the EEOC before they may sue in federal court).

177. *See supra* text accompanying notes 1-6.

178. *See, e.g.*, Commodari v. Long Island Univ., 89 F. Supp. 2d at 353 (noting that EEOC reviewed the case for only six days); Shepherd v. United States Olympic Comm., 94 F. Supp. 2d 1136 (D. Colo. 2000) (noting that EEOC reviewed the case for only forty-eight days).

period where charges could be resolved and cases closed.[179] The employer may well prefer investigation and conciliation over litigation. It risks damage to its reputation if the employee's charge turns into an actual lawsuit which is reported in the community. It risks damage to its employee relations if the charge—and the bad feelings associated with it—lingers in the workplace, especially if the charging party remains an employee throughout this process. It loses the opportunity to resolve the charge before battle lines are drawn and before both sides, with the assistance of their attorneys, become entrenched in legal positions. Indeed, once an investigation is closed at the request of the employee, the opportunity for a quick and negotiated resolution disappears and is replaced by the prospect of continuing bad feelings and expense.

But aside from being an abrogation of the EEOC's statutory duties, the early right-to-sue letter violates the plain language of Title VII. The "enforcement provisions" in Title VII specify exactly what the purpose of the EEOC's investigation is: to determine whether "reasonable cause" exists that the charge is true.[180] Under the statute, charges are to be dismissed "[i]f the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true."[181] An entirely different set of responsibilities (notably, "conference, conciliation, and persuasion") arise "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true."[182] Moreover, "so far as practicable," the Commission has only 120 days to make its reasonable cause determination after the charge has been filed.[183]

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179. *See, e.g.*, Figueira v. Black Entm't. Television, Inc., 944 F. Supp. 299, 307 (S.D.N.Y. 1996) (noting that the 180-day period "is intended to promote efficiency" in that it is intended to promote the resolution of claims before the litigation stage); Commodori v. Long Island Univ., 89 F. Supp. 2d at 353 (discussing an early right-to-sue case that reached the district court in only six days).

180. 42 U.S.C. § 2000e-5(b) (1994).

181. *Id.*

182. *Id.* "Reasonable cause to believe" is a common standard used in federal laws. *See, e.g.*, 8 U.S.C. § 1324b(d)(1) (2000) (providing under the Unfair Immigration-Related Employment Practices Act the Department of Justice may, on reasonable cause to believe, initiate administrative proceedings of employment discrimination based on citizenship status); 12 U.S.C. § 4003(c)(1) (1994) (providing under the Expedited Funds Availability Act, a bank need not expedite availability of certain funds if reasonable cause to believe a check is not collectible from originating bank); 42 U.S.C. § 1973k (1994) (providing, under the Enforcement of Voting Rights Act, listing procedures shall be terminated when, inter alia, "no longer reasonable cause to believe that persons will be . . . denied the right to vote on account of race or color"); *Id.* § 1997a(a) (providing that, under the Civil Rights of Institutionalized Persons Act, the Attorney General may initiate civil action when reasonable cause exists that the State is engaging in pattern and practice of depriving such persons of constitutional or federal rights); *Id.* § 3610(g)(1) (providing that, under the Fair Housing Act, the Secretary must determine "whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur" upon the completion of the Department's investigation); *Id.* § 12188(b)(1)(B) (1994 & Supp. 1999) (providing under the Equal Opportunities for Individuals with Disabilities Act, the Attorney General will initiate civil action if reasonable cause to believe there is a pattern and practice of violating the Act). Though Congress often uses the "reasonable cause to believe" standard, it has defined it only once. *See* 12 U.S.C. § 4003(c)(1) (1994) (specifying that reasonable cause under the Expedited Funds Availability Act "requires the existence of facts which would cause a well-grounded belief in the mind of a reasonable person").

183. 42 U.S.C. § 2000e-5(b).

But whatever the EEOC's decision, reasonable or not, it is clear that Congress directed it to do more than the charging parties and the courts are demanding.[184] Therefore, the EEOC's regulation authorizing it to issue early right-to-sue letters deprives the parties of more than just an investigation into the truth of the charge. It also deprives the parties of the results of that investigation.

Both the charging party and respondent-employer lose when the EEOC issues an early right-to-sue letter without even investigating the merits of the charge. Without a realistic assessment of the case by a neutral fact-finder (here, the EEOC), the charging party may well sue the employer even though little or no evidence exists in support of suit.[185] Whatever the legal importance of the EEOC's reasonable cause determination (courts generally do not consider it as evidence), a finding against the charging party (i.e., "no reasonable cause") amounts to a vote of "no confidence." Charging parties who receive such determinations are forced either to find the evidence that was not provided to the EEOC or drop the case. Only a charging party unconcerned with the likelihood of success in court would go to court with the same case essentially rejected by the Commission. What results from the EEOC's early right-to-sue letter is clearly an inefficiency: those cases which would have been dropped after negative determinations by the EEOC remain alive even though they are legally dead.[186] Worse, the plaintiffs behind those claims may learn for the first time in court—months or perhaps even years later—just how weak their cases are.[187] Some of these plaintiffs, if not most, lose out because a simple "thumbs down" from the EEOC might have saved them from further investing (both financially and otherwise) in cases that will survive only until dispositive motions are filed.[188] Even a charging party who receives a "thumbs up" from the EEOC might be better off with the opportunity to resolve the charge at the administrative level.

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184. *See* 42 U.S.C. § 2000e-5(a) (stating that the Commission is empowered "to prevent any person from engaging in any unlawful employment practice").

185. Of course, the charging party may sue *in spite of* such a realistic assessment. See, *e.g.*, Tesfaye v. Carr Park, Inc., 85 F. Supp. 2d 37, 38 (D.D.C. 2000) (suit brought after EEOC dismissed charge "apparently" because it "lacked merit").

186. *See* Nathan C. Sprague, 39 WASHBURN L.J. 572, 584, *Is the Honeymoon Over? The Fate of the EEOC and the Early Right-to-Sue Letter* (2000) ("Clearly . . . Congress' primary focus was to preserve an aggrieved person's opportunity to obtain relief in a prompt, efficient, and effective manner."); *see also* Michele E. Williams, *Getting the Fox out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions*, 27-50-320 ARMY LAW 13 (1999) ("Having agencies 'reconsider' and issue decisions on cases already heard by [administrative judges] not only looks bad, but is also duplicative, inefficient, and costly.").

187. *See* Lemke v. Int'l Total Servs, Inc., 56 F. Supp. 2d 472 (D.N.J. 1999), *aff'd*, 225 F.3d 649 (3rd Cir. 2000) (Table), *cert. denied*, 531 U.S. 1152 (2001). Kristy Lemke is a perfect example of such a plaintiff. After filing a charge of discrimination with the EEOC, she waited exactly 14 days before requesting a right-to-sue, which the agency issued only six days later. *Id.* at 476. Lemke acknowledged that she was ignoring the EEOC because she wanted to "file a lawsuit in this manner as quickly as possible." *Id.* at 478. Ultimately, her race to court was futile, but the end did not come quickly. Nearly two years after she received her early right-to-sue from the EEOC, the district court granted summary judgment against her on her discrimination claim. *Id.* at 488.

188. *See id.*

With a reasonable cause determination in hand and the EEOC's efforts behind her, the charging party may well extract a more favorable (if not more creative) settlement through conciliation than litigation.

And yet there can be no doubt the early right-to-sue letter leaves the employer particularly disadvantaged. Once it is filed, the charge of discrimination is more than a distraction. It is a source of injustice if no evidence supports it.[189] For employers faced with meritless charges, the investigation and reasonable cause determination is a source of vindication, if not relief. It does not necessarily signal the end of the process (as charging parties can sue whatever the EEOC's conclusion),[190] but it convinces many that the process itself is fair and not unnecessarily stacked against the accused. Without the reasonable cause determination, respondents who are not legally liable must be resigned to a long-term state of ambiguity.[191] Those who are legally liable are deprived of the EEOC's "informal" efforts to settle the charge through conciliation and persuasion.[192] They, too, are resigned to a long-term outlook, even in less significant cases that easily could be settled with the assistance of a third party.[193] Congress intended (indeed, directed) the EEOC to fill that third party role, and nothing in the statute entitles the agency to determine it will not.[194]

Perhaps the most practical argument against the early right-to-sue letters is that, at least in theory, it allows the charging party to spearhead the investigation. In some cases, the charging party will choose to request a right-to-sue letter after the respondent has submitted its position statement in response to the charge. It may be good lawyering to wait until the position statement is filed before requesting a right-to-sue letter (in a sense it is an example of free discovery for the plaintiff), but it is bad policy. Many respondents invest substantially—in both time and expense (if they hire attorneys)—in preparing and submitting their statements of position. Once submitted, they are entitled to a complete investigation by the EEOC, as well as that agency's efforts in conciliation and persuasion. To allow the charging party to pull the plug on the investigation once

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189. *FMLA Suit Precludes ADA Claim Based on Same Incidents*, EEO UPDATE (EEOC), July 22, 1999, at 6 (recognizing "the unfairness of subjecting the employer to consecutive actions with multiple motions for attorney's fees, if found liable—and heightened fees and defense *regardless of the outcome*" (emphasis added)).

190. *See* 29 C.F.R. § 1601.28(e)(1) (1995) (recognizing an employee retains the right-to-sue within ninety days after the EEOC determines that no reasonable cause exists or decides not to file suit).

191. *See* Lemke v. Int'l Total Servs., 56 F. Supp. 2d at 481-82. Lemke's employer waited over a year and a half for the district court to determine that Lemke's case—rushed by her from the offices of the EEOC to the courthouse—failed on the merits. *Id.*

192. *See* 42 U.S.C. § 2000e-5(b) (1994 & Supp. 1999) ("[T]he Commission shall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

193. The EEOC's assistance might have made the difference in *Commodari*. *See* 89 F. Supp. 2d 353. But the agency did not attempt conciliation in the case involving a terminated professor, even though there was evidence his university was interested in settling the case. Indeed, the court noted the university had made an "alleged settlement offer of one-year's salary" to the ex-professor over *one year* prior to his filing a charge of discrimination against the school. *Id.*

194. *See* Sprague, *supra* note 186, at 584.

the respondent has "briefed" the case unfairly stacks the deck in the charging party's favor. That is exactly what happens each time the EEOC issues an early right-to-sue letter after the employer's position statement has been filed.[195]

There can also be little doubt that by issuing an early right-to-sue letter the EEOC makes protracted litigation more—not less—likely.[196] Once one party—especially the charging party—hires an attorney, any demand made of the respondent will now include attorneys' fees and almost certainly be inflated. The window for settlement nearly closes until perhaps the case is slated for trial and a federal judge determines that it should have been settled long ago.[197] The result is that the early right-to-sue letter lengthens rather than shortens the entire dispute resolution process by making it more adversarial and less conciliatory. At its most fundamental level, then, it is an approach inconsistent with the EEOC's stated mission and purpose. It literally cheats a respondent out of its best chance (pre-trial) to resolve a charge for a settlement amount that fairly approximates, rather than exaggerates, the extent of the charging party's injuries.[198]

In the end, the EEOC has interpreted a statute in a way that leans to one side. It is not an efficient approach. Frivolous cases should die at the investigatory stage. Charging parties in those cases should be told by the EEOC not only that there is no reasonable cause to believe the charge, but that they are wasting their time if they pursue it in court. In cases where reasonable cause exists, those same considerations would allow the respondent to remedy the claims short of spending years answering for them in

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195. *See supra* Part IV.

196. Spencer v. Banco Real, 87 F.R.D. 739, 746 (1980). "[T]he Commission argues, defendants are in no way prejudiced by early notice; if the EEOC cannot assist the parties during 180 days due to its workload, they will have been deprived of nothing if suit is filed earlier." *Id.* The court squarely rejected that argument. While it conceded that some employers will prefer litigation, the *Spencer* court recognized that some do not:

> Other employers, however, may very much want to attempt conciliation—as the defendant in this case claims to desire. Once commenced, a federal case is costly to litigate and is likely to cost more for an employer to settle than at the agency level. Employers are not all equally able to finance litigation, and even if an employer believes it will prevail, it must realize that it will seldom recoup the costs of litigation, however meritless. Thus the 180-day period will be particularly important to some employers, and early notices in such cases will reduce the likelihood and frequency of settlement.

Id. at 747.

197. At least one federal court believes that it is as equipped as the EEOC to conciliate and settle charges. *See* King v. Dunn Mem'l Hosp., 120 F. Supp. 2d 752, 759 (S.D. Ind. 2000) ("[F]or employees and employers who actually wish to seek informal resolution of their disputes, the filing of an 'early' lawsuit should not be an obstacle. In this court and virtually any other federal court, alternative dispute resolution is a subject that comes up at the earliest stage of the case.").

198. On the other hand, as a case lingers at the investigative level, witnesses' memories fade, and witnesses themselves disappear. Charging parties become re-employed and perhaps less likely to seek redress for claims that become ancient history. And perhaps under those circumstances the respondent gains too much by the delay. But the EEOC's early right-to-sue regulation poses even more significant problems. In an effort to lighten its workload, it tips the balance unfairly in favor of the charging party, who can stop an investigation in its tracks, or before it gets started, simply by asking for the right-to-sue.

court. It is hard to see how the charging party is disadvantaged in either case. It is equally hard to see how the present system of allowing early right-to-sue letters assists the charging party. They are not told when charges have no basis in either fact or law, and they are not spared the expense (both financial and emotional) of protracted litigation when charges have merit and the respondent is willing to settle.[199] In either case—both where charges have merit and where they do not—the respondent loses the most. It is ignored by a government agency that should be working hard to free an employer from false or frivolous claims, or working with it to redress an employment practice which rises to the level of a viable claim.

Whatever information we lose about the charge, the early right-to-sue letter tells us a great deal about the EEOC. It is an agency that charging parties—many of whom are represented by attorneys—seek to avoid. Why? Is it the simple fact that the agency takes too long to investigate the charges? Or is it that more money can be collected from the respondent during litigation than investigation? Whatever the answer, the strange result is that in many cases respondents appear more willing to work with the agency than do charging parties, who seek to truncate investigations or prevent them from even being started. The 180-day scheme that Congress established is junked in favor of a "drive-thru" approach where charging parties can decide on their own exactly when they are better off not delaying an extra minute at the agency level. The system is inefficient because frivolous charges are not dismissed and meritorious charges are not remedied. It is unfair because respondents, both those with something to worry about and those without, are entirely ignored in the process. But, as Part VI discusses, the system can be fixed.

VI. THE FIX

Martini was correct in its conclusion that the statute requires the EEOC to investigate each charge of discrimination received by the agency.[200] But—like other cases before it—it failed to recognize that the respondent-employer is entitled to the benefit of the EEOC's procedures just as the charging party is.[201] The EEOC's early right-to-sue letters not only run counter to the statute's language, they also effectively relegate respondent-employers to the sidelines while charging parties determine whether (and for how long) their charges will be investigated. What follows are three possible fixes to the present imbalance in power between charging parties and respondents during

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199. Just ten days after the Court of Appeals for the District of Columbia decided the *Martini* case, the District of Columbia office of the EEOC dismissed a charge of discrimination and issued a right-to-sue letter, but only after fully investigating the charge and concluding it lacked merit. Tesfaye v. Carr Park, Inc., 85 F. Supp. 2d 37, 39 (D.D.C. 2000). The court considered the prospect that the EEOC's letter was cleverly drafted to skirt the *Martini* ruling or even test its limits, but that appears unlikely. *Id.* It is more likely that the EEOC simply determined the plaintiff had no case, which in this instance did not stop him from suing anyway. *Id.*

200. *See* Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1346 (D.C. Cir. 1999).

201. *See supra* Part II.

the EEOC investigatory phase. Each comes with its own tradeoffs, but one emerges as the most practical—and evenhanded—approach.

A. *Alternative I: Bilateralism (Early Right-to-Sue Letters Only by Agreement)*

The fix to this one-sidedness requires a simple change in EEOC policy: *both* a charging party and a respondent should give consent before early right-to-sue letters are issued. In other words, the decision to truncate the agency's investigation should be consensual rather than the product of one party's strategy or preference. If the charging party requests a right-to-sue letter before the 180-day investigatory period ends, the respondent-employer should be free to object and insist that the agency complete the job assigned to it by Congress. The respondent who objects would be entitled—as would the charging party—to a reasonable cause determination either favorable or unfavorable to it. This, after all, is also demanded by the statute, which not only requires the EEOC to investigate every charge, but also to determine whether reasonable cause exists to believe that discrimination actually occurred.[202]

This suggested alternative to the present system is simply a reflection that the current system is not working the way Congress intended. Currently, a respondent who does not wish to cooperate with an EEOC investigation has little choice and may be fined under the statute for that refusal.[203] Respondents who would rather litigate than conciliate nevertheless must work through the EEOC's procedures if the charging party does not seek a right-to-sue letter. But charging parties who would rather litigate than submit to an EEOC investigation have nearly free rein to truncate investigations and proceed to court.[204] The playing field can be leveled by making investigations—and decisions to stop them—consensual, so that both parties must agree before the case is sent to court. After all, one of the purposes of the statutory scheme was to establish an agency—the EEOC—that would save the courts from an inundation of lawsuits more properly resolved at the administrative (and conciliatory) stage.

Importantly, making early right-to-sue letters subject to bilateral agreement is entirely consistent with other aspects of the EEOC's current procedures. The agency's new mediation program—which the agency touts as an unqualified success[205]—is entirely voluntary, which means both parties must consent to it before charges are

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202. *See supra* Part III.

203. *See* 42 U.S.C. § 2000e-5 (1994 & Supp. 1999).

204. *See supra* Parts IV, V.

205. *Participant's Happy with EEOC Voluntary Mediation Program*, PERS. MANAGER'S LEGAL LETTER, Nov. 1, 2000, at 3-5 (stating that nine of ten participants in the EEOC national voluntary mediation program would be willing to mediate again, should another dispute arise); *see* EEOC ACCOMPLISHMENTS REPORT FOR FISCAL YEAR 1999, *available at* http://www.eeoc.gov/accomplishments-99.html (last modified Jan. 18, 1999) ("The [national mediation] program has won endorsement of a broad range of agency stake holders, including business and labor advocates, civil rights groups, and representatives of the employer and plaintiff bar"); *see also EEOC's Year-End Report Touts Mediation Program*, DISP. RESOL. J., Feb. 2000, at 4 (commenting that the EEOC year-end report noted the "success of the Commission's national mediation program").

mediated. A charging party may choose not to participate in mediation because it is unwilling to delay the agency's investigation into the merits of the charge. A respondent may choose not to participate because it is unwilling to settle a case (in particular according to financial terms) that it believes is without merit and unlikely to succeed in court. It may also be reluctant to send a message to other employees that it is willing to settle cases so quickly after they are filed. Whatever the parties' motivations, it makes little sense to require agreement on the decision to mediate but not require them to agree on a decision to forego an investigation into the charge. In other words, the EEOC has established a system wherein both parties must agree to delay the investigation (through mediation), but the charging party on her own may determine to skip the investigation altogether and proceed straight to court.

B. *Alternative II: Unilateralism (Allow Respondents to "Opt out" of the EEOC's Investigatory Process, Too)*

If the EEOC is unwilling to investigate every charge (as *Martini* instructs it to do), and equally unwilling to adopt a procedure whereby respondents must be asked to consent before the agency issues early right-to-sue letters, then only one alternative remains that would come close to leveling the playing field between charging parties and respondents. In this approach, the EEOC would allow respondents to "opt out" of the investigatory process altogether, in effect provoking the issuance of an early right-to-sue letter. The request for the early right-to-sue letter presently gives charging parties an election whereby they may opt out of the agency's investigatory procedures. A similar right on the side of respondents would level the playing field.

The respondent might decide to opt out for several reasons. It might believe that the charge is unlikely to settle (or be conciliated) at the agency level. It makes little sense to invest in a process unlikely to prevent the parties from ending up in court. Or, the respondent might believe that an investigation would likely result in a reasonable cause determination against it. If settlement were unlikely, then it makes little sense to delay the inevitable: a court battle.

The benefit of this second alternative is that only charges that were serious candidates for conciliation and settlement would remain at the agency level. Where either party believed that they were better off taking their chances in court, they would be free to opt out of the EEOC's investigation just as the charging party currently does by requesting an early right-to-sue letter. Under this approach, either party may unilaterally short-circuit the EEOC's investigation. It makes full EEOC investigations (and reasonable cause determinations) less likely to occur than would bilateralism (the first alternative), in which both parties must agree before the EEOC issues an early right-to-sue letter. In that sense, in comparison to bilateralism, it is certainly less reflective of Congress's intent to conciliate and settle as many charges as possible at the agency level. It does, however, more fairly balance the rights of charging parties and respondents than is accomplished by the EEOC's current investigatory scheme.

C. *Alternative III: No Party Rights (Investigation in All Cases)*

A third alternative fix to the current state of unevenness would see the EEOC abandon its practice of issuing early right-to-sue letters in all cases. In its favor, this alternative is perhaps closest to the statutory scheme in that every charge would be investigated *and* would result in a reasonable cause determination. (The *Martini* court required the former but did not discuss the latter.) But the approach does not address the EEOC's position that it issues early right-to-sue letters in large part because it is administratively overloaded and cannot investigate every charge within 120 days.[206] If the agency could not allow early suits, it is unlikely that all the charges filed would be fully investigated. But more would, and perhaps that is the point.

In evaluating each of the three alternatives, the goal should be to avoid cases such as *Noble Roman's*, in which a charging party requested a right-to-sue letter immediately after filing her charge of discrimination.[207] In those cases, she is plainly taking advantage of the agency's workload and its more-than-happy approach to free itself of a few charges.[208] *Martini* was correct in concluding—as Justice Clarence Thomas believed when he headed the EEOC—that the statute required all charges to be investigated, no matter what special burdens that result imposed on the agency.[209] But the EEOC's current approach results in less-than-full enforcement of the statute's investigatory scheme. It makes little sense to assume that the EEOC's investigators are incompetent or dilatory when it comes to investigating the charges, and it makes less sense to assume that Congress will come to the agency's rescue by approving funds for an army of new government employees to help the agency do its job. So *Martini*—

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206. *See* Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 277-78 (1995) (arguing that the EEOC's investigatory duty is too cumbersome and the agency should not be required to handle all complaints it receives). The EEOC consistently has maintained that it *does* have too much to do. In *Spencer*, the district court noted the EEOC defended its early right-to-sue letters (one of which was issued only five days after the plaintiff filed her charge) on the grounds that as of the date of the letter "there were approximately 700 matters pending ahead of the case at bar" and "it was unlikely that the local EEOC office could reasonably expect to complete processing of the instant case within the statutory waiting period of 180 days from the filing of the compliant." Spencer v. Banco Real, 87 F.R.D. 739, 741 (S.D.N.Y. 1980). On the other hand, the agency apparently has endless resources for some charges. *See* EEOC v. Hearst Corp., 103 F.3d 462, 463 (5th Cir. 1997) (holding the EEOC, contrary to its wishes, may not *continue* to investigate a charge once the agency has issued a right-to-sue letter and the charging party has initiated litigation based on the charge).

207. *See, e.g.*, Parker v. Noble Roman's, Inc., No. IP-96-65-C-D/F, 1996 WL 453572, at *1 (S.D. Ind. June 26, 1996) (unpublished opinion).

208. *Id.* at *2.

209. *See* Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1337 (D.C. Cir. 1999) (holding "the EEOC's power to authorize private suits within 180 days undermines its express statutory duty to investigate every charge filed"); *see* E. Patrick McDermott et al., *An Evaluation of the EEOC Mediation Program* (EEOC) Sept. 20, 2000, *available at* http://www.eeoc.gov/mediate/report (last modified Oct. 2, 2000) (noting Justice Thomas "believed that every person who filed a charge with the EEOC was entitled to a full investigation").

though statutorily correct (and unquestionably solid judicial decision-making)—is simply unrealistic.

Accordingly, either bilateralism or unilateralism is the answer. The playing field should be evened so the respondent has the same strategic powers as the charging party. But of the three alternatives, unilateralism is farthest from the statute's purpose—and Congress' intention—to establish a statutory scheme whereby more, not fewer, charges of discrimination are investigated before they become subjects of litigation. Unilateralism gives the parties a strategic game to play: either one can wonder whether (and when) the other will opt out of the investigation and instead take its chances in court. The EEOC is relegated to the sidelines (and perhaps can be used as a pawn in the game) while the parties posture and threaten to pull the plug on the Commission's efforts to conciliate charges. Indeed, unilateralism is the appropriate solution only if it is impossible to retract the charging party's current strategic advantage enjoyed through the issuance of early right-to-sue letters. Like the arms race, if a party cannot convince the other side to voluntarily disarm, then it has no choice but to arm itself.

Bilateralism is the answer. In allowing the respondent to, in effect, veto the charging party's request for an early right-to-sue notice, more (but not all) charges remain at the agency level. Consistent with the statute and Congress' intent, more charges will be investigated and, indeed, conciliated and settled without the need for outright litigation. Most importantly, bilateralism includes rather than excludes the respondent in the charge-handling process. It avoids the prospect of cases such as *Noble Roman's*, where a charging party receives a right-to-sue letter before the respondent can even respond to the EEOC's request to participate in a settlement conference. It gives a respondent a better reason to participate with an EEOC investigation once it understands that unless both sides agree, the agency will complete its investigation before issuing its right-to-sue determination. And even if more charges are not settled through conciliation, more surely will be dropped altogether by charging parties who are forced to see through the EEOC's investigation, which may result in a "no reasonable cause" determination. In some cases, that unfavorable determination will convince the charging party (and prospective plaintiffs' attorneys) that the charge is without merit or is unlikely to succeed in court.

Finally, bilateralism allows both parties to bypass the agency's procedures—and head straight to court—if *both* agree that their interests would be better served by doing so. Charging parties may not wish to delay while the EEOC investigates (especially given its powerlessness to remedy any charges), and respondents may find advantage in speeding the adversarial process along to a judge or jury with real powers both to decide and dismiss cases. Stepping out of the way of these parties makes sense as they are less likely to settle their cases at the administrative level no matter how long they are forced to linger there.

VII. CONCLUSION

The current system does not work. It effectively allows charging parties to determine which charges will be investigated and which will be litigated. The EEOC, by its account overloaded with charges, has become only too willing to step out of the way of a charging party who would rather be in court. As a result, respondents' rights—and the one-sidedness of this process—are ignored, and those employers who would rather conciliate are forced to litigate. A system that requires a defendant to litigate even though it is willing to settle is nonsense. A system that allows a charging party—before a single piece of evidence is presented in support of her charge—to unilaterally bypass an administrative scheme over the objections of a respondent is fundamentally flawed.

Martini was correct in its holding that the statute requires the EEOC to investigate every charge.[210] Actually, as discussed above, it requires more than that. It expects the EEOC not only to investigate the charges, but to issue a "reasonable cause" determination with respect to each charge. If this result remains an impossibility (as charging parties, the EEOC, and some courts insist it does) then only a system by which rights are shared should result. Bilateralism levels the playing field between charging parties and respondents at the same time it gives a nod to this reality: perhaps *all* charges cannot be investigated by the EEOC to completion, and some will remain unresolved. But charging parties should not be *in charge*; they should not be able to decide which ones are investigated and which ones are not. They can do just that under the present EEOC approach to charge processing, making the early "right" to sue decidedly wrong.

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210. Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d at 1347.