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Out of Balance: Excluding EEOC Determinations under Federal Rule of Evidence 403

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OUT OF BALANCE: EXCLUDING EEOC DETERMINATIONS UNDER FEDERAL RULE OF EVIDENCE 403

I. INTRODUCTION

Recently, the Eleventh Circuit Court of Appeals revived the debate surrounding whether trial judges have discretion to exclude from juries Equal Employment Opportunity Commission (EEOC or the Commission)[1] determinations on reasonable cause[2] in employment discrimination cases. In *Barfield v. Orange County*,[3] the Eleventh Circuit held that the decision to exclude an EEOC reasonable cause determination is best left "in the sound discretion of the district court."[4] The court expressly rejected[5] the view of the Fifth and Ninth Circuits that EEOC determinations are per se admissible in jury trials.[6] The First, Third and Eighth

1. The EEOC was created in title VII of the Civil Rights Act of 1964 (Title VII). *See* 42 U.S.C. § 2000e-4(a) (1988). The EEOC is composed of five members, appointed by the President with the Senate's approval, for a term of five years. *Id.* § 2000e-4(a). The Act delegated to the EEOC "the primary responsibility for preventing and eliminating unlawful employment practices as defined in [Title VII]." H.R. REP. No. 914, 88th Cong., 1st Sess. 26, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2401. See *infra* notes 146-75 for a discussion of the EEOC's role in the processing of employment discrimination charges.

2. *See* 42 U.S.C. § 2000e-5(b) (1988). This section of Title VII directs the EEOC to investigate a charge of employment discrimination filed pursuant to the Act. *Id.* The investigation shall yield a finding of reasonable cause, or no reasonable cause, to believe the charge of employment discrimination is true. *Id.* The EEOC's standard for finding reasonable cause is:

> A determination of reasonable cause is a determination that it is more likely than not that the charging party and/or members of a class were discriminated against because of a basis prohibited by the statutes enforced by [the] EEOC. The likelihood that discrimination occurred is assessed based upon evidence that establishes, under the appropriate legal theory, a *prima facie* case, and if the respondent has provided a viable defense, whether there is evidence of pretext.

Issuance of Cause Determinations, [1 Compliance Procedures], EEOC Compl. Man. (CCH) ¶ 1061 (Mar. 1988).

Findings made by the local offices of the EEOC are called "determinations," whereas findings made by EEOC headquarters are referred to as "decisions." *Agency Proceedings*, 9 Empl. Coordinator (Research Inst. Am.) 92,536 (Nov. 19, 1990). The terms "determination" and "decision" may be used interchangeably as their effect on the charging party and respondent is the same. *Id.* For the purposes of this Comment, findings of both cause and no cause shall be referred to as "EEOC determinations," "cause determinations," "reasonable cause determinations," or "determinations on cause." See *infra* notes 146-61 and accompanying text for a discussion of the EEOC's investigatory process.

3. 911 F.2d 644 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990).

4. *Id.* at 650.

5. *Id.*

6. *See, e.g.*, McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985); Plummer v. Western Int'l Hotels Co., 656 F.2d 502 (9th Cir. 1981). See *infra* notes 321-41 and

Circuits are in accord with the Eleventh Circuit's rejection of the per se view.[7] The United States Supreme Court has yet to review this divisive issue.[8]

EEOC determinations on reasonable cause are generally considered admissible evidence under Federal Rule of Evidence 803(8)(C),[9] the public records exception to the hearsay rule.[10] Likewise, there is little dispute that EEOC determinations may be excluded for untrustworthiness, as Rule 803(8)(C) expressly so provides.[11] Rather, the conflict in the federal courts centers on whether judges have the discretion to exclude EEOC determinations based on the "balancing test"[12] of Federal Rule of Evidence 403.[13] This balancing test requires trial judges to weigh the

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accompanying text for a discussion of the Fifth Circuit rule, and see *infra* notes 304-20 and accompanying text for a discussion of the Ninth Circuit rule.

7. *See* Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106, 1113 (1st Cir.), *cert. denied,* 110 S. Ct. 406 (1989); Briseno v. Central Technical Community College Area, 739 F.2d 344, 347 (8th Cir. 1984); Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309-10 (8th Cir.), *cert. denied,* 469 U.S. 1041 (1984); Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977).

8. *See* Smith v. Massachusetts Inst. of Tech., 110 S. Ct. 406 (1989) (denying certiorari); Johnson v. Yellow Freight Sys., 469 U.S. 1041 (1984) (denying certiorari). Petition for certiorari was recently filed in *Barfield. See supra* note 3.

9. FED. R. EVID. 803(8)(C). Rule 803(8)(C) provides for the admission of "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies . . . in civil actions and proceedings . . . [and] factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." *Id.*

10. Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976); *McClure,* 750 F.2d at 399; *Johnson,* 734 F.2d at 1309.

11. FED. R. EVID. 803(8)(C). But see *infra* note 201, which discusses the question of whether the Ninth Circuit actually recognizes the untrustworthiness exception. See *infra* notes 201-52 and accompanying text for a discussion of how a public record may be excluded from evidence on the ground of untrustworthiness.

12. Rule 403 of the Federal Rules of Evidence, FED. R. EVID. 403, which requires courts to weigh the costs and benefits of admitting proffered evidence, is commonly referred to as the balancing test. *See* Sherrod v. Berry, 856 F.2d 802, 814 (7th Cir. 1988) (Flaum, J., dissenting); Jones v. Board of Police Comm'rs, 844 F.2d 500, 505 (8th Cir. 1988), *cert. denied,* 490 U.S. 1092 (1989); United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983). But see Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence,* 18 U.C. DAVIS L. REV. 59, 87-88 (1984), where the author comments that,

> The metaphor of the scales suggests that the court is to compare levels of prejudice and probative value[;] . . . [h]owever, usually the court must focus not only on the effect of these inferences on accuracy, but also on the probability the jury will draw one or both of those inferences. Making that probability judgment is not a matter of balancing.

13. FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

probative value[14] of proffered evidence against the dangers of unfair prejudice to litigants, undue trial delay and misleading or confusing the jury.[15] If the probative value is substantially outweighed by one of these "dangers," judges have discretion to exclude the evidence.[16] An evidentiary objection based on Rule 803(8)(C) is distinct from a Rule 403 objection.[17]

A majority of the circuits that have considered the issue, exemplified by the *Barfield* decision, accord trial judges discretion to apply the balancing test on a case-by-case basis.[18] In contrast, the Fifth and Ninth Circuits maintain that none of the Rule 403 "dangers" can outweigh the probative value of EEOC determinations.[19] Hence, these two circuits have held that, absent untrustworthiness, EEOC determinations are per se admissible evidence.[20]

The per se admissibility approach adopted by the Fifth and Ninth Circuits should be rejected for several reasons. First, although an objec-

14. Probative value has been defined as "a measure of the extent to which evidence may contribute to a more accurate factual determination." Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 315 (1989).

15. FED. R. EVID. 403.

16. *Id.*

17. Ledford v. Rapid-American Corp., 47 Fair Empl. Prac. Cas. (BNA) 312, 313 (S.D.N.Y. 1988) ("Rule 803(8)(C) . . . relates to hearsay exceptions and has nothing at all to do with Rules 402 and 403.").

18. *See infra* note 295 and accompanying text.

19. *See infra* note 293 and accompanying text. A disturbing trend in the federal district courts has been adoption of the Fifth and Ninth Circuits' per se approach without a probing analysis of why this approach is preferable. *See, e.g.*, Abrams v. Lightolier, Inc., 702 F. Supp. 509 (D.N.J. 1988) (EEOC determination admissible but court agreed to give limiting instruction due to "lingering potential for prejudice"); Strickland v. American Can Co., 575 F. Supp. 1111 (N.D. Ga. 1983) (EEOC determination admissible with limiting jury instruction); Harris v. Birmingham Bd. of Educ., 537 F. Supp. 716 (N.D. Ala. 1982) (EEOC determination admissible but given no weight because it was issued in contemplation of litigation), *aff'd in part and reversed in part*, 712 F.2d 1377 (11th Cir. 1983). Note, however, these district courts' apparent uneasiness with the introduction of EEOC determinations—evidenced by the limiting instructions given to the juries. *But see Ledford*, 47 Fair Empl. Prac. Cas. at 313 (EEOC determination inadmissible on Rule 403 grounds).

20. Although neither the Fifth nor Ninth Circuit decisions label their refusal to exclude EEOC determinations under Rule 403 as a per se rule, other courts and commentators have so described the analysis. *See, e.g., Barfield*, 911 F.2d at 649; Tulloss v. Near N. Montessori School, 776 F.2d 150, 153 (7th Cir. 1985); *Johnson*, 734 F.2d at 1309; *Court Proceedings*, 9A Empl. Coordinator, *supra* note 2, at 98,453 (Mar. 21, 1988). Generally, denoting an evidentiary rule as per se means that "the court's function is simply to determine whether the party has offered a particular type of evidence for a particular purpose. If so, the rule applies to exclude or admit the evidence without regard to the specific context of the case." Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 14 n.71 (1986).

tion to the introduction of an EEOC determination may be raised on the ground of untrustworthiness,[21] this objection is often not made[22] and is seldom successful.[23] When analyzing the trustworthiness of a public document, trial judges are guided by the Federal Rules of Evidence to focus on whether the findings were compiled in a timely fashion by skilled and unbiased investigators, and whether the litigants had an opportunity to request a review of the findings.[24] Courts tend to refrain from a rigorous analysis of these factors, deferring instead to the EEOC's administrative expertise.[25] Given the judicial reluctance to exclude EEOC determinations for untrustworthiness, a Rule 403 objection takes on increased importance to the party opposed to introduction of the evidence. Denying a judge discretion to apply the balancing test, then, constitutes an outright rejection of the objecting party's last chance for excluding an EEOC determination.

Second, the legitimacy of the American legal system depends largely on the public's belief that the dual interests of "truth and justice" are being served.[26] Proper application by judges of the Federal Rules of Evidence, especially Rule 403, enhances public confidence in the system by allowing the exclusion of evidence which may prompt inaccurate decision-making.[27] Thus, when a trial judge is constrained by a per se rule from excluding evidence which may cause unfair prejudice to the parties,

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21. *See, e.g., Barfield*, 911 F.2d at 650; *Tulloss*, 776 F.2d at 153; *Abrams*, 702 F. Supp. at 512.

22. In all of the following cases an objection to introduction of the EEOC determination was raised on the ground of unfair prejudice, but not untrustworthiness: *McClure*, 750 F.2d at 400; *Johnson*, 734 F.2d at 1308-09; *Plummer*, 656 F.2d at 504; *Angelo*, 555 F.2d at 1176.

23. *See, e.g., Barfield*, 911 F.2d at 651 (no evidence presented of determination's untrustworthiness); *Tulloss*, 776 F.2d at 154 (determination excluded on ground of prejudice, not untrustworthiness); *Abrams*, 702 F. Supp. at 512 (no showing of untrustworthiness of EEOC determination).

24. FED. R. EVID. 803(8)(C) advisory committee's note; *see* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 n.11 (1988) (these four not necessarily an exclusive list of factors to consider on issue of public document's trustworthiness).

25. *See Plummer*, 656 F.2d at 505 (EEOC determinations, "prepared by professional investigators on behalf of an impartial agency," are highly probative); Blizard v. Fielding, 572 F.2d 13, 16 (1st Cir. 1978) ("findings by the EEOC are entitled to great deference by the district court"); EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974) (Congress did not intend courts to test factual basis for EEOC action), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

26. Lewis, *supra* note 14, at 290.

27. *Barfield*, 911 F.2d at 651; Lewis, *supra* note 14, at 290-91. The Honorable Henry J. Friendly, while espousing a narrow view of the application of judicial discretion under the Federal Rules of Evidence, nevertheless characterized the discretion principle as "entirely appropriate" in the context of Rule 403. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 782 (1982).

the truth-seeking process is undermined.[28]

Additionally, the directive of Rule 403, giving trial judges discretion to exclude prejudicial evidence when warranted by the circumstances,[29] is flouted when appellate courts remove this discretion by imposing a per se rule. As one commentator explained:

> Rule 403 bestows upon courts the discretion to exclude evidence even when the other rules of evidence suggest admissibility. Implicit in the creation of this discretionary power is the assumption that truth and justice cannot be captured by mere language, but require the intervention of human sensibilities. On a more mundane level, Rule 403 recognizes that definite rules based on past situations sometimes do not work in new and unexpected contexts. The purpose of Rule 403 is thus to advance accuracy and fairness through judicial flexibility.[30]

A per se rule of admissibility mandates an inflexible evidentiary result, thereby failing to take into account any concerns posed by the specific circumstances of the case at hand.[31] Moreover, parties desiring to exclude an EEOC determination may believe that a per se rule denies them an opportunity to be heard on an issue which may be crucial in jury decision-making.[32]

Third, uniform application of the Rule 403 balancing test to EEOC determinations might better serve Congress' goal of achieving equal employment opportunity.[33] The EEOC is given broad authority, under title VII of the Civil Rights Act of 1964[34] (Title VII), to investigate charges of

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28. Gold, *supra* note 12, at 67; Leonard, *supra* note 20, at 12.

29. S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 160 (5th ed. 1990).

30. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 499 (1983).

31. Leonard, *supra* note 20, at 47.

32. *Id.* at 39.

33. Title VII is the cornerstone of federal civil rights legislation and has, as its goal, the elimination of employment discrimination. Rose, *Going Too Far or Just Doing Their Job: The Double Bind Facing EEO and AA Officers*, 6 LAB. LAW. 439, 443 (1990). During the legislative debates concerning passage of Title VII it was contended that:

> In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.
>
> The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 26, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2513.

34. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

employment discrimination.[35] The Commission's failure to conduct a minimally adequate investigation not only compromises its statutory duty to the charging employee, but may also jeopardize that person's employment security.[36] Nevertheless, courts have noted that EEOC findings are, at times, self-serving,[37] untruthful or only partially truthful,[38] conclusory,[39] or potentially prejudicial.[40] Making EEOC cause determinations uniformly subject to exclusion on balancing test grounds may prompt the EEOC to conduct more consistent investigations and produce less conclusory findings.

This Comment examines the evidentiary question of whether trial judges should have discretion to exclude from jury consideration an EEOC cause determination based on the Rule 403 balancing test. The Comment begins by setting forth the federal statutes employees generally use when filing claims of employment discrimination.[41] Next, the Comment explains the EEOC's method of investigating an employment discrimination charge,[42] the means used to issue a determination on cause,[43] and how a litigant may seek to introduce or exclude an EEOC determination in federal court.[44] The Comment then analyzes the two approaches—the per se view and the discretion view—currently taken by federal courts on whether EEOC determinations may be excluded from jury consideration.[45] The Comment concludes by advocating uniform adoption of the view which accords trial judges discretion under the Rule 403 balancing test to exclude EEOC determinations from jury

35. *Id.* § 2000e-8(a).

36. *Confidentiality of Complainant or Aggrieved Person in a Third Party Charge*, EEOC Compl. Man., *supra* note 2, ¶ 811 (Feb. 1988).

37. *Smith*, 877 F.2d at 1113.

38. Hilton v. Wyman-Gordon Co., 624 F.2d 379, 383 (1st Cir. 1980).

39. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105 (8th Cir. 1988).

40. *Barfield*, 911 F.2d at 650-51.

41. *See infra* notes 47-139 and accompanying text. By filing suit based on an alleged violation of Title VII, an employee is entitled to a federal court trial based on federal question jurisdiction. *See* 28 U.S.C. § 1331 (1988).

42. *See infra* notes 140-72 and accompanying text.

43. *See infra* notes 173-80 and accompanying text.

44. *See infra* notes 181-291 and accompanying text.

45. *See infra* notes 292-381 and accompanying text. This Comment focuses on employment discrimination cases tried before juries. The question of whether EEOC determinations are admissible evidence also arises in bench trials. *See, e.g.*, Nieves v. Metropolitan Dade County, 598 F. Supp. 955, 964 (S.D. Fla. 1984) (EEOC determinations generally admissible but court has "discretion to give them as much or as little weight as it deems appropriate under the circumstances"); *Harris*, 537 F. Supp. at 721-22 (judge admitted EEOC determination but refused to give it any weight). However, the Rule 403 undue prejudice analysis is more pertinent in jury trials because jurors are less aware than judges of the "limits and vagaries of administrative determinations." *Barfield*, 911 F.2d at 651.

consideration.[46]

II. FILING AN EMPLOYMENT DISCRIMINATION CLAIM IN FEDERAL COURT

Employees with an employment discrimination claim may seek relief under a variety of statutes. By far the most commonly pled cause of action[47] is violation of Title VII.[48] Some of the other federal statutes upon which claims of employment discrimination are based include sections 1981[49] and 1983[50] of title 42 of the United States Code (sections 1981 and 1983, respectively), and the Age Discrimination in Employment Act[51] (ADEA). These are each distinct statutory remedies.

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46. *See infra* notes 382-431 and accompanying text.

47. W. CONNOLLY, JR., A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY: LAW, PRINCIPLES AND PRACTICES 8 (1975).

48. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

49. *Id.* § 1981. This statute was originally enacted as the Civil Rights Act of 1866, pursuant to the thirteenth amendment. Ch. 31, § 1, 14 Stat. 27, 27 (1866). After ratification of the fourteenth amendment the statute was reenacted, in 1870, to confirm Congress' constitutional authority to pass the legislation. Ch. 114, § 18, 16 Stat. 140, 144 (1870). Consequently, the statute may be referred to as the Civil Rights Act of 1866 or 1870, or as section 1981. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983). See *infra* notes 94-139 and accompanying text for a discussion of section 1981.

50. 42 U.S.C. § 1983 (1988). This statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Although section 1983 does not specifically address employment discrimination, it does provide a cause of action for enforcing constitutional rights under the equal protection clause and the due process clause of the fourteenth amendment, *see* U.S. CONST. amend. XIV, § 1. S. SHULMAN & C. ABERNATHY, THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY § 12.02[2], [2][a] (1990). A section 1983 claim is only cognizable when the employer's involvement with the state is sufficient to satisfy the "state action" requirement. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 678. This essentially means the state is involved in the challenged practice. *Id.* This requirement has been deemed satisfied in employment discrimination suits involving police and fire departments, public schools, colleges and universities, public hospitals and state agencies. *Id.* at 678-79. As long as the state action requirement is met, section 1983 covers discrimination based on race, color, sex, religion or national origin. *Id.* at 684-85.

The remedies available under section 1983 include compensatory and punitive damages, as well as back pay and injunctive relief. S. SHULMAN & C. ABERNATHY, *supra*, § 12.02[1]. Consequently, section 1983 is primarily used in the employment discrimination area when legal damages are sought, or when the plaintiff has failed to comply with Title VII's procedural requirements. *Id.* When seeking damages under section 1983, the employee has a seventh amendment right to a jury trial, *see* U.S. CONST. amend. VII. S. SHULMAN & C. ABERNATHY, *supra*, § 12.02[1].

51. 29 U.S.C. §§ 621-634 (1988). The purpose of the Age Discrimination in Employment Act (ADEA) is "to promote employment of older persons based on their ability rather than

Under Title VII there is no seventh amendment[52] right to a jury trial, for the act provides only equitable remedies.[53] Thus, it is when Title VII is pled together with another statute affording the right to a jury trial that the evidentiary balancing test issue becomes crucial.[54] Title VII is, in fact, routinely pled in conjunction with other federal causes of action allowing a jury trial,[55] so the issue of excluding an EEOC finding is pertinent to many employment discrimination suits. To explain the mechanics of filing a claim and the context in which the evidentiary issue is raised, this Comment focuses on claims in which both Title VII

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age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b). The ADEA protects only those individuals forty years of age or older. *Id.* § 631(a). Prior to commencing a civil action, an aggrieved employee must file a charge alleging unlawful discrimination with the EEOC. *Id.* § 626(d). The EEOC will investigate the charge, and attempt conciliation. *Id.* § 626(a), (b). After sixty days, the employee may also file a federal civil action. *Id.* § 626(c)(1). The employee is entitled to a jury trial in the civil action. *Id.* § 626(c)(2). For an excellent discussion of the ADEA, see S. SHULMAN & C. ABERNATHY, *supra* note 50, § 14.

52. U.S. CONST. amend. VII. The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.*

53. Lehman v. Nakshian, 453 U.S. 156, 167 (1981); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979); *see* 42 U.S.C. § 2000e-5(g). The Civil Rights Act of 1990 would have given Title VII plaintiffs seeking compensatory or punitive damages the right to demand a jury trial. *See* H.R. 4000, 101st Cong., 2d Sess. § 8 (1990). Congress is currently considering similar civil rights legislation. *See* H.R. 1, 102d Cong., 2d Sess. (1991); *see also infra* notes 133-39 and accompanying text. If the right to a jury trial is extended to Title VII plaintiffs, the controversy over whether judges have discretion under Federal Rule of Evidence 403 to exclude EEOC determinations from juries becomes all the more important to resolve.

54. Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990).

55. W. CONNOLLY, JR., *supra* note 47, at 8; *see, e.g.*, Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) (Title VII and section 1981 claims); McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985) (Title VII and section 1983 claims); Briseno v. Central Technical Community College Area, 739 F.2d 344 (8th Cir. 1984) (Title VII, section 1981 and section 1983 claims); Plummer v. Western Int'l Hotels Co., 656 F.2d 502 (9th Cir. 1981) (Title VII and section 1981 claims); Abrams v. Lightolier, Inc., 702 F. Supp. 509 (D.N.J. 1988) (ADEA claim). But see Gilchrist v. Jim Slemons Imports, 803 F.2d 1488 (9th Cir. 1986), which distinguished an EEOC letter of violation introduced in an ADEA proceeding from an EEOC cause determination in a Title VII action. In *Gilchrist* the court held that, unlike a cause determination, a letter of violation may be excluded if its probative value is outweighed by its potentially prejudicial effect on a jury. *Id.* at 1500. The court's rationale for making this distinction is that a letter of violation constitutes an EEOC conclusion that a violation of the ADEA *has* occurred, whereas in a cause determination the EEOC has only found probable cause to conclude a violation of Title VII has occurred. *Id.* The *Gilchrist* court contended that there is a higher degree of risk that a jury will be prejudiced by an EEOC conclusion than by a "preliminary" finding and, consequently, EEOC letters of violation do not warrant admission on a per se basis. *Id.*

and section 1981 causes of action are pled.[56]

A. Title VII of the Civil Rights Act of 1964

Congress enacted title VII of the Civil Rights Act of 1964[57] to address discrimination in employment relations.[58] Its purpose is to assure equality of employment opportunities[59] by making it unlawful for employers to discriminate in hiring, discharge, setting compensation or other terms, imposing conditions or granting privileges of employment on the basis of race, color, religion, sex or national origin.[60] The vast majority of employment discrimination claims are brought under Title VII,[61] although claims may also be filed pursuant to other applicable state[62] and federal statutes.[63]

To achieve Title VII's goal of equality of employment opportunities, Congress enacted an elaborate administrative scheme which favors coop-

56. Section 1981 was selected as an illustrative counterpart to Title VII because the vast majority of employment discrimination claims allege racial discrimination. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 290 (eighty percent of all employment discrimination claims allege racial discrimination, according to 1980 statistics). Additionally, Title VII and section 1981 were the causes of action relied upon in several of the leading cases addressing the evidentiary issue which is the focus of this Comment. *See Barfield*, 911 F.2d at 645; *Briseno*, 739 F.2d at 346; Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1306 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984); *Plummer*, 656 F.2d at 503; Hilton v. Wyman-Gordon Co., 624 F.2d 379, 380 (1st Cir. 1980); Walton v. Eaton Corp., 563 F.2d 66, 68 (3d Cir. 1977).

57. Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)).

58. 42 U.S.C. § 2000e-2(a) (1988).

59. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to . . . eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

60. 42 U.S.C. § 2000e-2(a). That section provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

61. W. CONNOLLY, JR., *supra* note 47, at 8.

62. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 741. In federal court, state claims may be brought if they survive the test of pendant jurisdiction: the state claim must arise out of the same common nucleus of operative fact as the federal claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

63. *Alexander*, 415 U.S. at 48-49 ("The clear inference [from the legislative history] is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

eration and voluntary compliance over litigation.[64] The EEOC is the linchpin for facilitating this scheme.[65] Prior to filing a Title VII claim in federal court, an employee must file a charge of employment discrimination with the EEOC and receive notice of the right to sue.[66] This procedure was created to enable the EEOC to oversee the initiation of private lawsuits and to subject the parties to attempts at conciliation.[67]

Title VII has been interpreted to create two types of discrimination claims: disparate treatment and disparate impact.[68] If an employer took a challenged action because of an employee's race, color, religion, sex or national origin, the case is one of disparate treatment.[69] Proving an employer's intent to discriminate is critical to a successful disparate treatment claim.[70] A disparate impact claim, in contrast, focuses on the discriminatory effect of an employer's conduct.[71] Although an employer's conduct may appear neutral, a Title VII claim will lie if the employment practice is discriminatory in application.[72]

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64. *Id.* at 44; *see also* H.R. REP. NO. 914, 88th Cong., 1st Sess. 28-29, *reprinted in* 1964 U.S. CODE CONG. ADMIN. NEWS 2355, 2404 ("Commission must endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

65. *See* 42 U.S.C. § 2000e-4(a) (1988).

66. *Id.* § 2000e-5(f).

67. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 1.04[1]. Given the backlog of employment discrimination charges it has been suggested that the EEOC's procedures serve more as a waiting period than a means to achieve conciliation. *Id.*

68. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

69. *Id.* (Court defined disparate treatment as when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."); *see* B. SCHLEI & P. GROSSMAN, *supra* note 49, at 13 ("The essence of disparate treatment is different treatment: that blacks are treated differently than whites, women differently than men. It does not matter whether the treatment is better or worse, only that it is different."); S. SHULMAN & C. ABERNATHY, *supra* note 50, § 1.01[1].

70. *Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."). To prove intent, the plaintiff is required to show that the employer's conduct was taken because of, not in spite of, its discriminatory effect. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979), *aff'd*, 445 U.S. 901 (1980).

71. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 1.01[1]. The *Teamsters* Court defined disparate impact claims as involving "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory." 431 U.S. at 335 n.15. The disparate impact theory has been successfully used to force employers to abandon certain discriminatory practices, such as the use of height and weight restrictions, and the use of aptitude tests which have only a slight correlation to job performance. Shanor & Marcosson, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 LAB. LAW. 145, 150 n.25 (1990).

72. *Teamsters*, 431 U.S. at 335 n.15.

1. Disparate treatment

An employee claiming discrimination based on disparate treatment shoulders the ultimate burden of proving that the employer's conduct was intentionally discriminatory.[73] Establishing the prima facie case, however, is not an onerous burden.[74] It is during this initial stage in the litigation that the employee may seek to introduce an EEOC cause determination as evidence to bolster the prima facie case.[75] If the employee carries this initial burden by a preponderance of the evidence, an inference that the employer discriminated arises.[76]

The employer must then be given the opportunity to explain that the conduct stemmed from a legitimate, nondiscriminatory purpose.[77] The employer's explanation of its legitimate reason "must be clear and reasonably specific"[78] so as to deter fictitious excuses.[79] If both legitimate and illegitimate factors motivated the employer's action, and the plaintiff has shown that an unlawful motive was a substantial factor, then the employer is required to prove by a preponderance of the evidence that it would have reached the same decision absent the discriminatory purpose.[80]

Finally, the employee retains the burden of persuading the fact finder that the employer's proffered reasons are pretextual.[81] As evidence, the employee may introduce the employer's general policy and practice regarding employment of a protected group,[82] statistics concerning the employer's general pattern of discrimination,[83] specific evidence of the employer's treatment of the employee,[84] or comparative evidence showing the employer treated members of a protected group less favora-

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73. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

74. *Id.* at 253. For example, the initial burden of establishing a prima facie case of racial discrimination may be accomplished by showing that: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a job the employer was seeking to fill; (3) the plaintiff was rejected; and (4) the employer continued to seek applicants with plaintiff's qualifications for the position. *McDonnell Douglas*, 411 U.S. at 802.

75. *Burdine*, 450 U.S. at 258; Sumner v. San Diego Urban League, 681 F.2d 1140, 1143 (9th Cir. 1982) (EEOC reasonable cause determination, among other things, considered "ample evidence" that plaintiff proved prima facie case of employment discrimination).

76. *Burdine*, 450 U.S. at 254.

77. *McDonnell Douglas*, 411 U.S. at 802.

78. *Burdine*, 450 U.S. at 258.

79. *Id.*

80. Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989); Shanor & Marcosson, *supra* note 71, at 147.

81. *Burdine*, 450 U.S. at 256.

82. *McDonnell Douglas*, 411 U.S. at 804-05.

83. *Id.* at 805.

84. *Id.* at 804.

bly than similarly situated majority group members.[85]

2. Disparate impact

Claims of employment discrimination may also be based on a disparate impact theory. The rationale supporting disparate impact claims is that Title VII was enacted to remove discriminatory barriers to equal employment opportunity and, consequently, even neutral practices which have the effect of subverting this goal must be eliminated.[86] Thus, this basis for an employer's liability focuses on "practices that are fair in form, but discriminatory in operation."[87]

As with disparate treatment claims, the burden of proving discrimination remains with the employee at all times.[88] To establish the prima facie case, an employee must show that "each challenged practice has a significantly disparate impact on employment opportunities" for persons protected by Title VII.[89] Employees may rely solely on statistical evidence to satisfy this initial burden.[90]

Once the prima facie case is met, the employer must produce evidence that the employment practice was motivated by a legitimate business justification.[91] To carry this burden of production, the employer need only present evidence sufficient to create a triable issue of fact.[92] Even if the employer's rebuttal is successful, the plaintiff may still prevail. The challenged practice will be regarded as a pretext for discrimination if the employer refused to implement less discriminatory alternatives that would serve its business goals equally well.[93]

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85. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 15.

86. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

87. *Id.* at 431.

88. Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989). Prior to the Supreme Court's decision in *Ward's Cove Packing Co.*, the burden of persuasion shifted to the defendant after the plaintiff proved a prima facie case of employment discrimination. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 432. The Civil Rights Act of 1990 would have overruled *Ward's Cove Packing Co.* and returned the law to the *Griggs* burden of persuasion rule. H.R. 4000, 101st Cong., 2d Sess. § 4 (1990).

89. *Ward's Cove Packing Co.*, 490 U.S. at 657.

90. *Id.* at 650 (The proper statistical inquiry is a comparison "between the racial composition of the labor market and the persons holding at-issue jobs.").

91. *Id.* at 660. ("[T]o the extent that [our earlier decisions] speak of an employers' 'burden of proof' with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production—but not persuasion—burden.").

92. Shanor & Marcosson, *supra* note 71, at 158-59.

93. *Ward's Cove Packing Co.*, 490 U.S. at 661. Courts may assess cost and other burdens to determine whether a proposed alternative would be an equally effective employment practice. *Id.*

B. *The Civil Rights Act of 1866: Section 1981*

Congress enacted the Civil Rights Act of 1866[94] to give victims of racial discrimination, especially former slaves, a federal remedy.[95] Yet it took until 1975 for the United States Supreme Court to proclaim definitively that section 1981 applies in the employment context.[96] Since that time, section 1981 has been a popular and effective remedy for employment discrimination based on race.[97] Unlike Title VII, section 1981 offers the advantages of exemption from administrative procedural requirements,[98] the seventh amendment right to a jury trial when legal

94. Ch. 31, § 1, 14 Stat. 27, 27 (1866), *reenacted by* ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. § 1981 (1988)). Section 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988). The statute was enacted as part of a comprehensive package of civil rights legislation to enforce the newly ratified thirteenth, fourteenth and fifteenth amendments, *see* U.S. CONST. amends. XIII, XIV, XV. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01.

95. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01. Section 1981 remedies for racial discrimination are not limited to black persons. W. CONNOLLY, JR., *supra* note 47, at 3. For purposes of section 1981, the term "race" denotes a characteristic understood by the Congress of 1866 as ancestral or ethnic. St. Francis College v. Al-Khazraji, 481 U.S. 604, 611-12 (1987) (Arab may bring section 1981 claim).

Section 1981 was construed for over a century to prohibit only governmental acts of discrimination. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01. Its reach, however, was eventually extended to include acts of private discrimination. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968). While the *Jones* Court held that section 1982 bars private discrimination, the decision was considered to indicate that section 1981 also prohibits private racial discrimination because the language of both sections is traceable to the Civil Rights Act of 1866. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2383 (1989) (Brennan, J., dissenting); S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01.

96. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975).

97. Player, *What Hath* Patterson *Wrought? A Study in the Failure to Understand the Employment Contract*, 6 LAB. LAW. 183, 184 (1990).

98. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01[1][a].

remedies are sought,[99] and the potential for punitive damages.[100] Section 1981, however, requires proof of intent to discriminate[101] and so excludes claims based on disparate impact recognized by Title VII.[102]

1. Establishing an employment discrimination claim based on section 1981

The United States Supreme Court has set forth a specific framework for establishing an employment discrimination claim under section 1981.[103] This framework essentially parallels the scheme for Title VII claims.[104] The plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.[105] Once this burden is satisfied, an inference that the employer discriminated arises.[106] The employer then has the opportunity to rebut the inference by showing that the conduct stemmed from a legitimate, nondiscriminatory purpose.[107] The employee retains the burden to persuade the jury that the employer's proffered reasons are pretextual.[108] The employee is not limited to a certain means of persuasion.[109] For example, an applicant for a

99. *Id.* § 12.01[1][b]. The right to a jury trial attaches when an employee seeks compensatory or punitive damages pursuant to section 1981. *Id.* The courts are split on the issue of whether a section 1981 award of back pay constitutes legal or equitable relief for seventh amendment purposes. *Id. Compare* Skinner v. Total Petroleum, 859 F.2d 1439, 1444 (10th Cir. 1988) (back pay is equitable or legal depending on whether plaintiff characterizes it as part of reinstatement or as contract damages) *and* Setser v. Novack Inv. Co., 638 F.2d 1137, 1142 (8th Cir.) (back pay constitutes legal remedy because calculation of damages for hours of lost work is easily ascertainable), *vacated on other grounds*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981) *with* Lynch v. Pan Am. World Airways, 475 F.2d 764, 765 (5th Cir. 1973) (back pay part of equitable remedy of reinstatement) *and* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.) (back pay similar to equitable remedy of restitution), *cert. dismissed*, 404 U.S. 1006 (1971).

In contrast, Title VII remedies have been deemed solely equitable, thereby foreclosing the seventh amendment right to a jury trial. Lehman v. Nakshian, 453 U.S. 156, 167 (1981); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979). In fact, even an award of back pay is considered a central part of Title VII's statutory equitable remedy rather than legal damages. Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 & n.21 (1976).

100. *Patterson*, 109 S. Ct. at 2375 n.4. The section 1981 remedies potentially available include an award of back pay, compensatory and punitive damages, reinstatement and injunctive relief. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01[1][b].

101. *Patterson*, 109 S. Ct. at 2376-77.

102. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01[2][c].

103. *Patterson*, 109 S. Ct. at 2377.

104. *Id.*

105. *Id.* at 2378. See *supra* note 74 for an example of the elements needed to satisfy a prima facie case of employment discrimination based on disparate treatment.

106. *Patterson*, 109 S. Ct. at 2378.

107. *Id.*

108. *Id.*

109. *Id.*

job or promotion may demonstrate the person selected was less qualified, or may present evidence of past treatment by the employer.[110]

2. Scope of section 1981 in the employment context

In *Patterson v. McLean Credit Union*,[111] the United States Supreme Court confined the availability of section 1981 remedies to discrimination in the formation of an employment contract,[112] and to discrimination which "infects the legal process in ways that prevent one from enforcing [employment] contract rights."[113] The Court focused on the "plain terms"[114] of the statute to justify foreclosing claims based on post-contractual conditions of employment.[115] Additionally, the Court decided against a broad reading of section 1981 for employment grievances given the expansive reach of Title VII.[116] Indeed, the Court maintained that the integrity of Title VII's procedural requirements depends upon a limited reading of section 1981.[117]

The plaintiff in *Patterson*, a credit union teller and file coordinator, filed claims for racial harassment and failure to promote pursuant to section 1981.[118] In its findings, the Court first concluded that racial harassment is outside the scope of section 1981 because it pertains to the conditions of employment rather than the formation or enforcement of an employment contract.[119] Then, on the promotion claim, the Court held that "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under [section] 1981."[120] In keeping with its literal interpretation of section 1981, the Court suggested that a finding

110. *Id.* (employee may present instances of employer's racial harassment or failure to train her for promotions).

111. 109 S. Ct. 2363 (1989).

112. *Id.* at 2372.

113. *Id.* at 2373.

114. *Id.* at 2372.

115. *Id.* at 2374.

116. *Id.* at 2374-75.

117. *Id.* at 2375.

118. *Id.* at 2369.

119. *Id.* at 2374.

120. *Id.* at 2377. The Court noted, as an example of a "new and distinct relation," the refusal of a law firm to accept an associate into partnership. *Id.* Another example of such a promotion might be moving from an hourly to a salaried position. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.01. One commentator, however, has suggested that it is practically impossible to envision a promotion which fails to satisfy the "new and distinct relation" test because "by definition a promotion entails new duties, responsibilities, and loyalties, not to mention a different, presumably higher, compensation." Player, *supra* note 97, at 194. The only example of a promotion not meeting this test, the commentator notes, would be when an employee receives automatic salary increases. *Id.*

of a "new and distinct relation" requires the kind of promotion involving the formation of a new employment contract.[121] The Court remanded the question of whether the credit union's failure to promote the plaintiff to the position of intermediate accounting clerk satisfied this standard.[122]

In a forceful dissent, Justice Brennan lambasted the majority's "supposedly literal reading of [section] 1981."[123] He argued that the legislative history of section 1981,[124] and Supreme Court decisions construing the statute outside of the employment context,[125] support interpreting section 1981 as a broad remedy for discrimination in contractual situations. Justice Brennan warned that limiting the reach of section 1981 in the employment context may "have the effect of restricting the availability of [section] 1981 as a remedy for discrimination in a host of contractual situations to which Title VII does not extend."[126]

Several lower courts have broadly interpreted *Patterson* to restrict the remedial scope of section 1981.[127] Despite these setbacks, however, section 1981 remains important in the litigation of employment discrimination claims. For example, still within the ambit of section 1981 are all racially premised hiring decisions[128] and most racially premised promotion decisions.[129] Additionally, discharges motivated by a discriminatory

121. *Patterson*, 109 S. Ct. at 2377.

122. *Id.*

123. *Id.* at 2390 (Brennan, J., dissenting).

124. *Id.* at 2388 (Brennan, J., dissenting) ("it is clear that in granting the freedmen the 'same right . . . to make and enforce contracts' as white citizens, Congress meant to encompass post-contractual conduct").

125. *Id.* at 2390 (Brennan, J., dissenting).

126. *Id.* at 2391 (Brennan, J., dissenting); *see* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 3.2, at 329 (2d ed. 1988) ("[T]he focus of the majority's concern in *Patterson* . . . seems to be on the potential intrusion of an expansionist interpretation of [section] 1981 on uniquely private associational or contractual relationships. [It] therefore implicates a sphere of conduct far broader than employment discrimination.").

127. *See, e.g.*, Overby v. Chevron, USA, 884 F.2d 470, 472-73 (9th Cir. 1989) (retaliatory discharge for employee's filing of EEOC charge not covered by section 1981); Snowden v. Millinocket Regional Hosp., 727 F. Supp. 701, 706-07 (D. Me. 1990) (plaintiff may not sue under section 1981 for breach of promise plaintiff relied upon in agreeing to form employment contract); Greggs v. Hillman Distrib. Co., 719 F. Supp. 552, 554 (S.D. Tex. 1989) (section 1981 not applicable remedy for denial of promotion from sales manager to district manager); Williams v. National R.R. Passenger Corp., 716 F. Supp. 49, 51-52 (D.D.C. 1989) (section 1981 does not cover retaliatory demotion claim even though filing of claim threatened employee's ability to enforce employment contract rights); *see also* Player, *supra* note 97, at 190 ("[M]any lower courts seem to view section 1981 as protecting nothing more than discriminatory hiring. These decisions are marked by surprisingly little analysis of either section 1981 or *Patterson*.").

128. *Patterson*, 109 S. Ct. at 2372; Player, *supra* note 97, at 192-93.

129. *Patterson*, 109 S. Ct. at 2377; Player, *supra* note 97, at 194.

purpose may continue to receive section 1981 protection.[130] Constructive discharge claims, where hostile working conditions motivated by racial animus force an employee to resign, should also remain valid under section 1981.[131] Finally, employers who retaliate against employees who file charges of discrimination with the EEOC may still face a section 1981 complaint.[132]

Congress attempted, in passing the Civil Rights Act of 1990,[133] to reverse the Supreme Court's narrow reading of section 1981.[134] Included in the Act was a revision of section 1981 which stated that "the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[135] President Bush vetoed the Act, however, claiming it was a "quota

130. Player, *supra* note 97, at 195-96; *cf.* Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 1336 n.3 (1990) (O'Connor, J., concurring) (whether discriminatory discharge and retaliation remain actionable under section 1981 is an open question); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2709-10 (1989) (court assumed, without deciding, that discharge motivated by racial discrimination remained cognizable under section 1981 after *Patterson*). *Compare* Hicks v. Brown Group, Inc., 902 F.2d 630, 638 (8th Cir. 1990) (discriminatory discharge remains actionable under section 1981) *and* Padilla v. United Airlines, 716 F. Supp. 485, 490 (D. Colo. 1989) ("discriminatory termination directly affects the right to make a contract" so is actionable under section 1981) *with* Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990) (discharge is post formation "breach of contract" conduct not protected by section 1981) *and* Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 808 (5th Cir. 1990) (discharge amounts to post formation conduct and so is not actionable under section 1981).

131. Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1540 (11th Cir. 1989) ("The right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivations of such contracts."); Player, *supra* note 97, at 201-05. *But see* Carroll v. General Accident Ins. Co. of Am., 891 F.2d 1174, 1177 (5th Cir. 1990) (claim of constructive discharge involves terms and conditions of employment which are not cognizable under section 1981).

132. Jordan v. United States W. Direct Co., 716 F. Supp. 1366, 1368-69 (D. Colo. 1989) (demotion because employee instigated investigation of discrimination charge states section 1981 claim); Player, *supra* note 97, at 208-09. *But see Overby*, 884 F.2d at 472-73 (retaliatory discharge for employee's filing of EEOC charge not covered by section 1981); *Williams*, 716 F. Supp. at 51-52 (section 1981 not applicable to retaliatory demotion claim even though employee argued this impeded her ability to enforce her employment contract rights).

133. H.R. 4000, 101st Cong., 2d Sess. (1990).

134. *Id.* § 2(b). Section 2(b) of the Civil Rights Act of 1990 stated:

> The purposes of this Act are—
>
> (1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
>
> (2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

Id.

135. *Id.* § 12.

bill."[136] The President's veto, which was politically controversial,[137] has not deterred a renewed effort for civil rights legislation.[138] As the newly proposed legislation makes clear that adoption of quotas is neither required nor encouraged, there is some optimism that the President will sign the legislation this second time around.[139]

III. USE OF AN EEOC REASONABLE CAUSE DETERMINATION IN FEDERAL COURT LITIGATION

Charges of employment discrimination filed with the EEOC are subject to investigation so that the agency may determine whether there is reasonable cause to believe the charge is true.[140] Despite fairly comprehensive guidelines on how to conduct an investigation,[141] the EEOC's review of the charge may not always be completely thorough[142] or may result in a conclusory finding.[143] Nevertheless, parties litigating in federal court may attempt to introduce into evidence an EEOC cause determination to enhance their respective positions. Employees use a determination of reasonable cause to support the prima facie case of discrimination,[144] and employers use a finding of no reasonable cause in their defense against the charge.[145]

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136. *Crying "Quotas" Is Crying Wolf*, N.Y. Times, Dec. 29, 1990, § 1, at 22, col. 1.

137. House Judiciary Committee Chairman Jack Brooks (D-Tex.) described the President's veto as "a shocking affront to our nation's longstanding bipartisan commitment to equal opportunity." 4 Daily Lab. Rep. (BNA) A-2 (Jan. 7, 1991).

138. *See* H.R. 1, 102d Cong., 2d Sess. (1991). The newly introduced bill "largely returns to an earlier version of the proposed Civil Rights Act of 1990, eliminating some of the last-minute compromises—such as a cap on damages—that supporters incorporated in an unsuccessful attempt to obtain President Bush's signature last year." 4 Daily Lab. Rep. (BNA) A-2 (Jan. 7, 1991). In his State of the Union address, delivered January 29, 1991, President Bush stated that: "Civil rights are . . . crucial to protecting equal opportunity. Every one of us has a responsibility to speak out against racism, bigotry and hate. We will continue our vigorous enforcement of existing statutes, and I will once again press the Congress to strengthen the laws against employment discrimination without resorting to the use of unfair preferences." *The State of the Union*, L.A. Times, Jan. 30, 1991, at A1, col. 1.

139. 4 Daily Lab. Rep. (BNA) A-2 (Jan. 7, 1991).

140. 42 U.S.C. § 2000e-5(b) (1988).

141. *See* 29 C.F.R. § 1601.15(a) (1990); *Investigations*, EEOC Compl. Man., *supra* note 2, ¶¶ 821-996 (Mar. 1988). See *infra* notes 146-61 and accompanying text for a description of the EEOC's investigatory process.

142. EEOC v. Keco Indus., 748 F.2d 1097, 1099 (6th Cir. 1984); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977).

143. Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984).

144. *See, e.g.*, Summer v. San Diego Urban League, 681 F.2d 1140, 1143 (9th Cir. 1982) (EEOC reasonable cause determination considered part of "ample evidence" that plaintiff proved prima facie case of employment discrimination).

145. *See, e.g.*, Barfield v. Orange County, 911 F.2d 644, 649 (11th Cir.) (employer allowed

The following sections describe the EEOC's process of investigation, its method of determining whether reasonable cause exists and the means a federal court litigant may use to have the cause determination admitted to or excluded from evidence.

A. The EEOC Investigation

An employee who files a charge of employment discrimination with the EEOC initiates a multi-step process designed to investigate and, hopefully, resolve the claim.[146] First, the charge is evaluated to determine if it contains the necessary elements.[147] Second, an Equal Opportunity Specialist (EOS) is assigned to the charge and arranges for either an

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to introduce EEOC finding of no reasonable cause as part of defense against claim of racial discrimination), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990); Briseno v. Central Technical Community College Area, 739 F.2d 344, 347 (8th Cir. 1984) (employer sought to introduce EEOC finding of no reasonable cause in its defense, but district court excluded it). To the employee's chagrin, in Bell v. Bolger, 708 F.2d 1312 (8th Cir. 1983), the employer used an EEOC finding of cause to its advantage. The determination included a statement by the EEOC investigator that the person ultimately hired by the employer was more knowledgeable than the applicant who was passed over and who subsequently sued under Title VII and section 1981. *Id.* at 1321. Based on this evidence, the court agreed with the employer that it had a legitimate, nondiscriminatory reason for its hiring decision. *Id.*

146. EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984). The purpose of filing a charge is to "place the EEOC on notice that someone . . . believes that an employer has violated the title." *Id.* at 68. The parameters of the investigation are as follows:

> The investigation of a charge shall be made by the Commission, its investigators, or any other representative designated by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies. As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.

29 C.F.R. § 1601.15(a). See *Interviews*, EEOC Compl. Man., *supra* note 2, ¶¶ 821-832 (Mar. 1988) for EEOC investigation and interviewing techniques; *Subpoenas, id.* ¶¶ 851-863 (Mar. 1988) for the means used by the EEOC to obtain evidence by subpoena; and *Investigator's Memorandum and Case Activity Documentation, id.* ¶¶ 991-996 (Mar. 1989) for discussions of how an EEOC supervisor should review the investigation plan.

147. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 939. Title VII requires that charges "be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (1988). The EEOC refined this directive by mandating that charges contain: (1) the full name, address and telephone number of the charging party; (2) the full name, address and telephone number of the party charged; (3) a clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices; (4) the number of employees working for the employer; and (5) whether a state or local proceeding has been initiated on the same charge. 29 C.F.R. § 1601.12(a) (1990). The EEOC allows technical deficiencies in the charge to be amended. *Id.* § 1601.12(b).

office or telephone interview with the employee.[148] The interview is intended to establish the nature and scope of the charge[149] and to dismiss charges which fail to warrant further investigation.[150] Next, a fact-finding conference may be held, attended by the employee, the employer and the EOS.[151] This conference is primarily conducted to elicit all facts, to discuss the issues thoroughly and to pursue the possibility of settlement.[152] Based on this conference, the EOS has discretion to facilitate a settlement or recommend a cause or a no cause determination.[153] Finally, unresolved charges requiring further review are scheduled for investigation.[154]

The EEOC has authority to conduct a comprehensive investigation.[155] The scope of the investigation is only confined to discovering evidence "relevant to the charge under investigation."[156] The relevance threshold is not difficult to meet, for it is interpreted to allow the EEOC access to "virtually any material that might cast light on the allegations against the employer."[157] To facilitate the investigation, Title VII allows

148. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 939.

149. *Id.*

150. *Id.* at 940.

151. *Id.* at 948. EEOC regulations provide:

> The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for a negotiated settlement of the charge.

29 C.F.R. § 1601.15(c).

152. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 948.

153. *Id.*

154. *Id.* at 948-49.

155. 42 U.S.C. § 2000e-8(a) (1988). The EEOC is considered best able to determine the viability of an employment discrimination charge given its access to general statistics on employment patterns. *Shell Oil Co.*, 466 U.S. at 69.

Title VII also authorizes the EEOC to enter into written agreements with certain qualified state and local agencies so as to avoid duplicating charge processing efforts. 42 U.S.C. § 2000e-8(b). These contracts are known as work sharing agreements. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 942. A work sharing agreement specifies which agency is to handle the investigation of a charge. *Id.* If a state or local agency is assigned to investigate, the EEOC is directed by Title VII to "accord substantial weight to [its] final findings" when making its own determination on cause. 42 U.S.C. § 2000e-5 (1988). Depending on the capability of the agency assigned to handle the charge, this mandated deference to state and local agency investigations may detract from the probative value of an EEOC cause determination. At the very least, it underscores the importance of applying the Rule 403 balancing test on a case-by-case basis. For a further discussion of the scope and use of work sharing agreements, see B. SCHLEI & P. GROSSMAN, *supra* note 49, at 942 n.79 and *Relationship with State Fair Employment Practices Agencies*, EEOC Compl. Man., *supra* note 2, ¶¶ 281-288 (Feb. 1988).

156. 42 U.S.C. § 2000e-8(a).

157. *Shell Oil Co.*, 466 U.S. at 68-69.

the EEOC to examine and copy evidence in the employer's possession[158] and to subpoena evidence and witnesses.[159] The EEOC may also send out questionnaires as a means of information-gathering.[160] Generally, however, on-site investigations are not conducted.[161]

Despite this broad investigative power, the EEOC does not always conduct a thorough review of the charge prior to issuing a determination on cause.[162] Yet it seems evident that if an investigation is inadequate, a determination based on that investigation lacks credence. As one court noted, "EEOC determinations are not homogenous products; they vary greatly in quality and factual detail."[163] Determinations may be highly conclusory,[164] and they may not even reflect the investigator's true assessment of the validity of the charge.[165]

The EEOC is seldom rebuked for inadequacies in its investigatory process, for the scope of an investigation is considered within the discre-

158. 42 U.S.C. § 2000e-8(a).

159. *Id.* § 2000e-9. The EEOC authorizes subpoenas to require the attendance and testimony of witnesses, the production of evidence including books, records, correspondence or other documents, and access to evidence for examination and reproduction. 29 C.F.R. § 1601.16(a)(1), (2), (3) (1990); *see also* EEOC v. Michael Constr. Co., 706 F.2d 244, 251 (8th Cir. 1983) ("EEOC may issue an administrative subpoena for information relevant and necessary to a determination of reasonable cause even though the subpoena may also provide additional incentive for the respondent to settle the charge."), *cert. denied*, 464 U.S. 1038 (1984).

160. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 961.

161. *On Site Investigation*, EEOC Compl. Man., *supra* note 2, ¶¶ 901-907 (Mar. 1988).

162. The EEOC initiated a procedure for reviewing no cause determinations because it grew concerned that some investigations were perceived as inadequately conducted. *EEOC Policy Statement on No Cause Findings*, [2 Laws & Regulations] EEO Compl. Man. (P-H) ¶ 81,921 (Dec. 15, 1986). In its policy statement, the EEOC noted it "is concerned that occasionally a charging party may have been incorrectly denied complete access to the Commission's law enforcement mechanisms due to deficiencies in the investigative phase of the charge process. . . . [W]e must assure ourselves that our no cause findings do not result from a flawed investigative process." *Id.* This review procedure is implemented through regulations codified at 29 C.F.R. § 1601.19 (1990).

For example, investigators have been accused of limiting the review to an examination of the information submitted by the parties rather than conducting an independent assessment. Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir.) (EEOC determination of no reasonable cause admitted even though employee claimed investigator only reviewed information submitted by employer), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990); EEOC v. Keco Indus., 748 F.2d 1097, 1099 (6th Cir. 1984) (district court's reliance on magistrate's recommendation of summary judgment for employer because EEOC investigation composed only of reviewing employer's affirmative action guidelines prior to issuing cause determination held erroneous on appeal).

163. Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984); *accord* Tulloss v. Near N. Montessori School, 776 F.2d 150, 153 (7th Cir. 1985); Hilton v. Wyman-Gordon Co., 624 F.2d 379, 383 (1st Cir. 1980).

164. *Johnson*, 734 F.2d at 1309.

165. *Michael Constr. Co.*, 706 F.2d at 247 (determination of cause rendered despite EEOC investigator's acknowledgment that claim had no validity).

tion of the EEOC.[166] Courts tend to accord the EEOC great deference concerning what constitutes a sufficient investigation.[167] Justifying this deference, one court maintained that:

> The EEOC is not required . . . to conduct a full-scale, almost adversarial investigation that would run down every lead and confront every fact relevant to the charge. If that were the case, there would be little need for a trial on the merits of an allegation of unlawful job discrimination.[168]

Judges are also resistant to prolonging the length of a trial by allowing an inquiry into the sufficiency of an investigation.[169] Consequently, the inadequacy of an EEOC investigation may not serve as the basis for dismissing a discrimination claim.[170] Nor may a party disgruntled with an investigation seek a remedy directly against the EEOC, for Title VII provides no express remedy[171] and the courts are unwilling to imply a remedy into the statute.[172]

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166. *Keco Indus.*, 748 F.2d at 1100; EEOC v. Sears, Roebuck & Co., 24 Fair Empl. Prac. Cas. (BNA) 937, 940 (D. Ga. 1980).

167. *See, e.g.*, Blizard v. Fielding, 572 F.2d 13, 16 (1st Cir. 1978) ("findings by the EEOC are entitled to great deference by the district court"); EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974) (Congress did not intend courts to test factual basis for EEOC determination), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *see also* 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 12.2.4 (2d ed. 1988) (deference to EEOC findings appropriate for three reasons: (1) *de novo* federal trial serves as review of EEOC determination; (2) abbreviated EEOC investigation frequently sufficient to make reasonable cause decision; and (3) inquiry into investigation may expose employees who have assisted EEOC to retaliation). *But see* Hicks v. ABT Assoc., 572 F.2d 960, 966 (3rd Cir. 1978) (presumption of regularity of EEOC investigation may be rebutted by showing EEOC investigator never contacted employee and employee did not know investigation was proceeding until receiving final determination of no cause by mail); EEOC v. Western Elec. Co., 382 F. Supp. 787, 794 (D. Md. 1974) (court may examine whether EEOC complied with its investigatory procedures in reaching reasonable cause determination).

168. EEOC v. American Mach. & Foundry, 13 Fair Empl. Prac. Cas. (BNA) 1634, 1640 (D. Pa. 1976).

169. *Tulloss*, 776 F.2d at 154; *Keco Indus.*, 748 F.2d at 1100.

170. *Keco Indus.*, 748 F.2d at 1100; EEOC v. Albertson's Inc., 48 Fair Empl. Prac. Cas. (BNA) 1895, 1895 (D. Or. 1988); *Sears, Roebuck & Co.*, 24 Fair Empl. Prac. Cas. (BNA) at 939-40. *But see* EEOC v. King's Daughters Hosp., 12 Fair Empl. Prac. Cas. (BNA) 484, 489-90 (D. Miss. 1976) (summary judgment for employer granted where EEOC failed to investigate charging employee's lack of qualifications for position she applied for).

171. McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984); Ward v. EEOC, 719 F.2d 311, 313 (9th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).

172. *McCottrell*, 726 F.2d at 351-52; *Ward*, 719 F.2d at 313; Stewart v. EEOC, 611 F.2d 679, 682 (7th Cir. 1979); Francis-Sobel v. University of Me., 597 F.2d 15, 17 (1st Cir.), *cert. denied*, 444 U.S. 949 (1979); Gibson v. Missouri Pac. R.R., 579 F.2d 890, 891 (5th Cir.), *cert. denied*, 440 U.S. 921 (1979).

B. *The Standard for Finding Reasonable Cause*

Ultimately, an EEOC investigation results in a finding of reasonable cause, or no reasonable cause, to believe that an employee's charge of discrimination is true.[173] The EEOC standard for a finding of reasonable cause is a "good or even prospect of establishing the alleged violation" from the information provided in the investigation file.[174] This is known as the "litigation-worthy" standard.[175]

The purpose for issuing a cause determination is to put the employer on notice of the EEOC's findings.[176] Should attempts at conciliation of the charge fail, the employer is also on notice that a lawsuit may be filed.[177] A finding of reasonable cause, however, is not a prerequisite to filing an employment discrimination claim in federal court.[178] In fact, an employee may proceed to trial even if the EEOC determines that no reasonable cause exists to believe the discrimination occurred.[179] This is allowed because, regardless of the outcome of an EEOC investigation, a plaintiff's claim in federal court is entitled to *de novo* consideration.[180]

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173. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 949, 962. After investigating the charge, the EOS will make a recommendation of reasonable cause or no reasonable cause to the Regional Attorney. The Regional Attorney will then discuss the file with the EEOC District Director, who will issue the appropriate determination or return the file for further investigation. *Id.* at 949-50. This delegation of authority in issuing cause determinations is allowed pursuant to 29 C.F.R. § 1601.21(d) (1990). These procedures are set forth in *Issuance of Cause Determinations*, EEOC Compl. Man., *supra* note 2, ¶¶ 1061-1084 (Mar. 1988).

174. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 109 (2d ed. Supp. 1984). The determination "is based on, and limited to, evidence obtained by the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination." 29 C.F.R. § 1601.21(a) (1990).

175. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 109 (2d ed. Supp. 1984).

176. EEOC v. Keco Indus., 748 F.2d 1097, 1100 (6th Cir. 1984); EEOC v. St. Anne's Hosp. of Chicago, 664 F.2d 128, 131 (7th Cir. 1981).

177. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981).

178. *Id.*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973).

179. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 465 & n.3 (1982); Barfield v. Orange County, 911 F.2d 644, 649 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990).

180. *Associated Dry Goods*, 449 U.S. at 595. *De novo* consideration means that the plaintiff is entitled to a fresh consideration of the facts surrounding the charge, rather than being confined to the administrative record. Chandler v. Roudebush, 425 U.S. 840, 862 n.37, 863 (1976). Therefore, an EEOC determination is in no way dispositive in a federal trial on the issue of whether discrimination has occurred. Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504 (9th Cir. 1981); Blizard v. Fielding, 572 F.2d 13, 16 (1st Cir. 1978); Smith v. Universal Servs., 454 F.2d 154, 157 (5th Cir. 1972) (en banc); EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *see also Kremer*, 456 U.S. at 474 ("the requirement of a trial *de novo* in federal district court following EEOC proceedings was added primarily to protect employers from overzealous enforcement by the EEOC").

C. *Introducing the EEOC Determination as Evidence*

Title VII does not address whether an EEOC determination is admissible evidence in a federal trial.[181] As the results of an EEOC investigation are not binding in court,[182] the purpose in introducing a determination is to lend evidentiary support to either the employee's prima facie case or the employer's defense to the charge.[183]

An EEOC determination is hearsay evidence.[184] The fact-finding process is conducted out of court by field investigators and the conclusion, which is used to support or deny the alleged discrimination, is rendered out of court by EEOC representatives.[185] Despite its hearsay qualities, such a determination is presumed admissible evidence, as an exception to the hearsay rule, under Federal Rule of Evidence 803(8)(C).[186] The rationale for this hearsay exception is that public reports, prepared pursuant to a legal duty to investigate,[187] are considered sufficiently reliable.[188] Moreover, it would be impractical to have an investigator testify in court every time a litigant seeks to introduce the results of an official investigation.[189]

To come within the parameters of Rule 803(8)(C), a public report must be composed of "factual findings."[190] An EEOC reasonable cause determination constitutes an investigator's opinion as to the merit of the discrimination charge. Arguably, then, EEOC determinations are not admissible under the public records exception because they represent

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181. Smith v. Universal Servs., 454 F.2d 154, 156 (5th Cir. 1972); 3 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 167, § 33.3.3.

182. 9 Empl. Coordinator, *supra* note 2, at 92,537 (Jan. 15, 1990).

183. *See supra* notes 144-45 and accompanying text.

184. *Smith*, 454 F.2d at 157. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

185. *Smith*, 454 F.2d at 157.

186. Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976); McClure v. Mexia Indep. School Dist., 750 F.2d 396, 399 (5th Cir. 1985); Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984); FED. R. EVID. 803(8)(C). *See generally* MCCORMICK ON EVIDENCE § 316 (E. Cleary 3d ed. 1984) (discussion of hearsay nature of investigative reports and trend toward admissibility).

187. 42 U.S.C. § 2000e-5b (1988).

188. Young, *The Use of Public Records and Reports as Trial Evidence Under the Federal Rules of Evidence*, 10 AM. J. TRIAL ADVOC. 117, 119-21 (1980). A court may be hesitant to ascribe an improper motive to an agency's investigative efforts given that the agency's purpose is to serve the public. *See* Ellis v. International Playtex, 745 F.2d 292, 300 (4th Cir. 1984); MCCORMICK ON EVIDENCE, *supra* note 186, § 315, at 889 ("The impetus for this [public records] exception is found in the inconvenience of requiring public officials to appear in court and testify concerning the subject matter of their records and reports.").

189. Gentile v. County of Suffolk, 129 F.R.D. 435, 448 (E.D.N.Y. 1990).

190. FED. R. EVID. 803(8)(C).

conclusions, rather than facts.[191] Yet the United States Supreme Court foreclosed this type of challenge in *Beech Aircraft Corp. v. Rainey*.[192] In that case, the Court held: "[P]ortions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report."[193]

Thus, the party opposing introduction of an EEOC determination is left with two main challenges.[194] First, Rule 803(8)(C) expressly provides that an untrustworthy public document may be excluded.[195] An affirmative showing of untrustworthiness undercuts the presumption of reliability upon which the public records exception is premised.[196] The second means of challenging the introduction of an EEOC determination, pursuant to Federal Rule of Evidence 403, is by proving that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[197] This challenge requires trial judges to weigh the costs and benefits of admitting proffered evidence.[198] The Federal Rules of Evidence appear to support an application of this balancing test on a case-by-case basis.[199] Nevertheless, the federal courts are divided on whether a judge has discretion to apply this balancing test to exclude an EEOC determination from a jury.[200] The following sections describe, in

191. MCCORMICK ON EVIDENCE, *supra* note 186, § 316, at 890 n.7.

192. 488 U.S. 153 (1988).

193. *Id.* at 170. The Court dispensed with the notion that the Congressional debates demanded a narrow interpretation of the meaning of "factual findings." *Id.* at 166-67 & n.10. In fact, the Court found that there was no indication from the advisory committee's comments that opinions were meant to be excluded. *Id.*

194. Young, *supra* note 188, at 120-21. The party opposing the introduction of the EEOC determination has the burden of persuading the court to reject the evidence. *Id.* at 131.

195. FED. R. EVID. 803(8)(C); *see* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988).

196. *Gentile*, 129 F.R.D. at 449.

197. FED. R. EVID. 403; *accord Beech Aircraft Corp.*, 488 U.S. at 167-68.

198. MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 544-48.

199. FED. R. EVID. 403 advisory committee's note; *see also Beech Aircraft Corp.*, 488 U.S. at 167-68 ("safeguards built into other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them"); Hines v. Brandon Steel Decks, 886 F.2d 299, 302 (11th Cir. 1989) ("public reports, otherwise admissible under Rule 803(8)(C), may nonetheless be excluded in whole or in part if the trial court finds that they are either irrelevant or more prejudicial than probative"); MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 544.

200. Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988). *Compare* Barfield v.

more detail, evidentiary challenges based on Rule 803(8)(C) and Rule 403.

1. Exclusions based on Federal Rule of Evidence 803(8)(C)

Given the express caveat concerning untrustworthy documents in the public records exception, there is little dispute that EEOC determinations may be excluded on this ground.[201] Indeed, the United States Supreme Court has stated that "a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof—whether narrow 'factual' statements or broader 'conclusions'—that she determines to be untrustworthy."[202] Yet the burden of proving untrustworthiness rests with the party seeking exclusion,[203] for it is presumed that public records are accurate and reliable.[204]

Underlying this presumption of reliability is the belief that agency officials will properly perform their duties,[205] and that they remain accountable to the public based on the results of their investigations.[206] This view presupposes, then, that the investigating official relies on personal knowledge or unbiased information to prepare the report.[207] To put these assumptions to the test, four factors are most often used to

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Orange County, 911 F.2d 644, 650-51 (11th Cir.) (judge has discretion to exclude EEOC determinatons on Rule 403 grounds), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990) *and Johnson*, 734 F.2d at 1309-10 (judge has discretion to exclude EEOC determinations on Rule 403 grounds) *with McClure*, 750 F.2d at 400 (EEOC determinations are per se admissible evidence) *and* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981) (EEOC determinations are per se admissible evidence).

201. Tulloss v. Near N. Montessori School, 776 F.2d 150, 153 (7th Cir. 1985); *McClure*, 750 F.2d at 400.

Note that the Ninth Circuit appeared to adopt a per se rule of admissibility for EEOC determinations. *See Plummer*, 656 F.2d at 505. Whether the court intended to foreclose untrustworthiness objections is unclear. For example, in a non-employment context, the Ninth Circuit suggested that a public record might be excluded for untrustworthiness. *In re* Aircrash in Bali, Indonesia, 871 F.2d 812, 816 (9th Cir.) (Federal Aviation Administration report admissible under public records exception where defendant failed to demonstrate report was untrustworthy), *cert. denied*, 110 S. Ct. 277 (1989). Nevertheless, the Eleventh Circuit interpreted *Plummer* to mean that under no circumstance, untrustworthiness included, does a judge have discretion to exclude an EEOC determination. *Barfield*, 911 F.2d at 649-50.

202. *Beech Aircraft Corp.*, 488 U.S. at 167.

203. Masemer v. Delmarva Power & Light Co., 723 F. Supp. 1019, 1021 (D. Del. 1989); *In re* Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1493, 1497 (D. Colo. 1989); Young, *supra* note 188, at 131.

204. *Gentile*, 129 F.R.D. at 449; Grant, *The Trustworthiness Standard for the Public Records and Reports Hearsay Exception*, 12 W. ST. L. REV. 53, 55 (1984).

205. Grant, *supra* note 204, at 56.

206. *Id.*

207. *Id.* at 57.

assess trustworthiness:[208] (1) the timeliness of the investigation; (2) the investigating official's special skill or experience; (3) whether a hearing is available; and (4) whether the agency had the motivation to conduct a thorough and impartial investigation.[209]

a. timeliness of the investigation

The amount of time which elapses between the filing of a charge and the resulting EEOC investigation and findings may affect trustworthiness in two distinct ways. Primarily, a timely investigation serves to minimize reliance on stale evidence.[210] An investigative report is considered more reliable than a witness at trial whose recollection has dimmed.[211] Of course, the force of this argument hinges on the assumption that a public official will have the opportunity to investigate a charge fairly quickly.[212] Unfortunately, this assumption may often be unwarranted with respect to an EEOC investigation. Swamped with backlogged charges, investigations are sometimes delayed for long periods of time.[213] Meanwhile, memories may fade and employees may either be discharged from or voluntarily leave their jobs.

Sometimes, however, the passage of time will support a determination's reliability. A long period of time between the filing of a charge and

208. *Beech Aircraft Corp.*, 488 U.S. at 167 n.11. These four are not considered an exclusive list of factors to consider. *Id.*

209. FED. R. EVID. 803(8)(C) advisory committee's note.

210. *Gentile*, 129 F.R.D. at 450.

211. *Id.* Title VII suggests that a determination be issued within 120 days of the filing of the charge. 42 U.S.C. § 2000e-5(b). However, this is not a mandatory deadline. 9 Empl. Coordinator, *supra* note 2, at 92,537 (Jan. 15, 1990). The EEOC's failure to meet the deadline neither constitutes an actionable wrong nor has jurisdictional ramifications. *Id.*

212. Grant, *supra* note 204, at 82 n.147. A variety of factors will influence the amount of time it takes the EEOC to issue a determination:

> (1) the legal or factual complexity of the allegations; (2) the geography of the parties in relation to the district office; (3) the resources in comparison to the case load at that office; (4) the cooperation of both parties; (5) the skill of the investigator involved in the charge; (6) the particular method of processing chosen by the EEOC; (7) the willingness of the parties to settle prior to determination; and (8) whether the charge must or will be processed first by [another] agency.

9 Empl. Coordinator, *supra* note 2, at 92,537 (Jan. 15, 1990).

213. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1150 (1989). Despite efforts to expedite the processing of charges, there were 61,000 backlogged cases in 1987. *Id.* at 1157. By the end of 1987, 26% of all charges were still unreviewed after 300 days. *Id.* Additionally, the number of charges filed with the EEOC may actually increase in response to the Court's narrowing of the availability of section 1981 remedies in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Shanor & Marcosson, *supra* note 71, at 174; *cf.* EEOC v. National City Bank, 694 F. Supp. 1287, 1291-94 (N.D. Ohio 1987) (EEOC's lengthy delay in beginning investigation prejudiced employer in its ability to prepare defense and exposed it to greater potential liability).

the ultimate determination on cause may indicate that a thorough investigation was conducted.[214] If there are many documents to evaluate or witnesses to hear from, the passage of time, by itself, should not detract from the trustworthiness of the results of a protracted investigation.[215]

b. special skill or experience of the investigating official

Trustworthiness is also measured, in part, by the degree of expertise of the agency conducting the investigation.[216] The greater the agency's experience in conducting investigations, the more confident a court can be that the investigating official formed accurate conclusions from the evidence.[217] It is possible, however, that even an agency experienced in conducting investigations may at times act in a reckless or inexpert manner.[218]

A court may consider the experience of both the agency and the investigating official when assessing trustworthiness.[219] The essential inquiry is whether the agency as a whole, or the individual investigator, qualifies as an expert under the evidence code.[220] Litigants in employment discrimination suits may have a difficult time convincing a court that the EEOC and its investigators are not specially qualified to gather evidence. Indeed, the EEOC is described as an impartial agency[221] with extensive resources and staff available for conducting investigations.[222] Its field investigators are, in fact, considered experts at uncovering discriminatory practices.[223] Consequently, the objecting party's only real challenge to the EEOC's expertise, on which it may be difficult to prevail,

214. EEOC v. Great Atl. & Pac. Tea Co., 735 F.2d 69, 81-84 (3d Cir.), *cert. dismissed,* 469 U.S. 925 (1984); *Masemer,* 723 F. Supp. at 1021; Note, *Admitting Opinions and Conclusions in Evaluative Reports: The Trustworthiness Inquiry,* 64 WASH. L. REV. 975, 985 (1989).

215. *Gentile,* 129 F.R.D. at 451. *But see* Gillin v. Federal Paper Bd. Co., 479 F.2d 97, 99 (2d Cir. 1973) (260-page investigative report, characterized as a "mish-mash of self-serving and hearsay statements and records" neither reliable nor trustworthy).

216. *Gentile,* 129 F.R.D. at 452-53.

217. *See* Note, *supra* note 214, at 986.

218. *Gentile,* 129 F.R.D. at 453.

219. *Id.* at 452-53 (both government agency and agency's staff qualified to conduct investigation into law enforcement misconduct).

220. Note, *supra* note 214, at 986 ("It would be anomalous to admit a report under a hearsay exception when the preparer of the report would not be permitted to give the same testimony in court as an expert witness."); *see* FED. R. EVID. 702, 703; *see also* Heard v. Mueller Co., 464 F.2d 190, 194 (6th Cir. 1972) ("Since it is within the sound discretion of the District Court whether to accept an EEOC investigator as an expert witness, it would seem to be within the same discretion whether or not to accept the EEOC's final investigation report.").

221. *Plummer,* 656 F.2d at 505.

222. *Smith,* 454 F.2d at 157.

223. *Id.* (investigators are trained and experienced in seeking out discrimination in its various forms); *see also* Mitchell v. Office of Los Angeles County, 805 F.2d 844, 847 (9th Cir.

is that the EEOC staff investigator failed to carry out the EEOC's express investigative procedures.[224]

c. *availability of a hearing*

The availability of a hearing generally weighs in favor of a finding of trustworthiness.[225] Although a hearing does not guarantee trustworthiness, it may ensure that findings are based on investigations in which procedural safeguards were followed.[226] Yet when interpreting this factor, courts have not required a full evidentiary hearing with cross-examination.[227] Rather, findings are considered trustworthy as long as the investigating agency complied with procedures[228] allowing both sides the opportunity to present their positions, and to reply to the opposing position.[229]

Although EEOC determinations are rendered after fairly informal proceedings,[230] these proceedings are conducted pursuant to agency compliance standards.[231] An EOS gathers information in accordance with EEOC investigation procedures.[232] Moreover, the EEOC cannot issue a finding that cause exists to believe discrimination occurred unless evidence uncovered in the investigation meets the "litigation worthy" standard.[233] Opportunity for agency review of a no cause determination exists.[234] Thus, unless a litigant can show that the compliance procedures were not carried out, the EEOC's investigative process should satisfy the hearing requirement.

1986) (EEOC determination sufficient to create triable issue of fact due to EEOC's expertise in investigating employment discrimination claims), *cert. denied*, 484 U.S. 858 (1987).

224. *See, e.g., Gentile*, 129 F.R.D. at 453 (court refused to entertain objection that staff members of state's criminal investigation commission failed to follow procedures after deciding that commission itself qualified as an expert). *But see* EEOC v. Western Elec. Co., 382 F. Supp. 787, 794 (D. Md. 1974) (court may examine whether investigators followed EEOC compliance procedures).

225. Note, *supra* note 214, at 988.

226. *Id.*

227. *In re* Japanese Elec. Prods., 723 F.2d 238, 268 (3d Cir. 1983); *Gentile*, 129 F.R.D. at 456.

228. *Gentile*, 129 F.R.D. at 455-56.

229. United States v. AT&T, 498 F. Supp. 353, 365 (D.D.C. 1980).

230. 3 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 167, § 33.3.3, at 284 n.3.

231. *Investigations*, EEOC Comp. Man., *supra* note 2, ¶¶ 821-957 (Mar. 1988).

232. *Id.*

233. See *supra* notes 173-75 and accompanying text for a discussion of the meaning of the "litigation worthy" standard.

234. 29 C.F.R. § 1601.19 (1990).

d. motivation to conduct an impartial investigation

This final factor may serve as grounds to exclude biased or inadequately investigated findings.[235] The primary focus here is on investigations conducted in anticipation of litigation.[236] The EEOC may become involved in Title VII litigation in two ways. First, the Attorney General, on behalf of the EEOC, may elect to file a Title VII complaint[237] against an employer if to do so would serve the public interest[238] and conciliation efforts have failed.[239] The EEOC must issue a reasonable cause determination prior to the Attorney General filing suit.[240] Arguably, then, this determination will reflect the agency's interest in pursuing the employer's compliance with Title VII. Second, the EEOC may attempt to intervene in a Title VII suit initiated by a private party.[241] Completion of the investigative process and issuance of a reasonable cause determination is, however, not a prerequisite to EEOC intervention.[242]

Bias may also stem from partisan political or policy goals that an investigating agency seeks to implement.[243] The EEOC has been entrusted with no less a task than guiding the fundamental change of "the patterns of employment discrimination that [have] become ossified in the labor market."[244] EEOC investigators, charged with the responsibility of ferreting out employment discrimination in all its various forms,[245] may be biased[246] or pressured into finding violations.[247]

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235. Harris v. Birmingham Bd. of Educ., 537 F. Supp. 716, 722 (N.D. Ala. 1982) (court refused to place any weight on EEOC determination issued six months after suit filed because it was prepared in anticipation of litigation and so lacked trustworthiness), *aff'd in part and reversed in part*, 712 F.2d 1377 (11th Cir. 1983); Grant, *supra* note 204, at 82 n.150.

236. *Gentile*, 129 F.R.D. at 457; Note, *supra* note 214, at 988.

237. 42 U.S.C. § 2000e-6 (1988).

238. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 1138.

239. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 469 (1982).

240. B. SCHLEI & P. GROSSMAN, *supra* note 49, at 1142.

241. *Id.* at 1168-71.

242. *Id.* at 1168-69.

243. *Gentile*, 129 F.R.D. at 457; Note, *supra* note 214, at 989.

244. Chambers & Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 242 (1985).

245. *Smith*, 454 F.2d at 157.

246. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 45 Fair Empl. Prac. Cas. (BNA) 1257, 1301-04 (7th Cir. 1988) (EEOC investigator, who also prepared reasonable cause determination, "palpably" biased against Sears); *see also* Note, *The Scope of Federal Rule of Evidence 803(8)(C)*, 59 TEX. L. REV. 155, 165-66 (1980) ("What appears invidious to an official may appear innocent to a jury. The danger of confusion is especially great if the official is not present to explain what he meant by his conclusion.").

247. EEOC v. Michael Constr. Co., 706 F.2d 244, 247 (8th Cir. 1983) (investigator issued determination finding cause so as to facilitate settlement despite personal belief claim lacked merit), *cert. denied*, 464 U.S. 1038 (1984).

Despite the EEOC's apparent interest in Title VII litigation, courts tend to refer to the agency as impartial.[248] This may be because the five Commission members, although selected by the President, must be confirmed by the Senate.[249] Additionally, no more than three of the Commission members may be from the same political party.[250] The consequence of this apparent bipartisanship is that courts are reluctant to exclude an agency finding unless specific evidence of bias is presented.[251] Indeed, one court concluded that an agency's interest in its conclusions goes to the weight, not the admissibility, of the evidence.[252]

2. Exclusions based on Federal Rule of Evidence 403

Assuming that a proffered EEOC determination is trustworthy, the objecting party may still contend that it is improper evidence for jury consideration. Trustworthiness means only that the EEOC determination is reliable enough to substitute for the in-court testimony of the investigating official. An EEOC determination will generally pass this trustworthiness test if it is rendered after an investigation of the discrimination charge by a skilled, unbiased investigator.[253] Thus, a finding of trustworthiness does not resolve the issue presented by a Rule 403 objection—will the proffered EEOC determination induce the jury to engage in inaccurate decision-making?

Federal Rule of Evidence 403, the evidence code's balancing test,[254] is the tool judges have for excluding evidence that may foster inaccurate or unfair decision-making by a jury.[255] Rule 403 requires the potential costs of unfair prejudice, jury confusion and undue trial delay to be weighed against the benefit of admitting an EEOC determination probative of the very discrimination charge at issue in the case.[256] Evidence may be excluded only if one of these factors substantially outweighs its

248. Gifford v. Atchison, T. & Sta. F. Ry., 685 F.2d 1149, 1156 (9th Cir. 1982); *Plummer*, 656 F.2d at 505.

249. 42 U.S.C. § 2000e-4(a) (1988). The legislative history of Title VII confirms that the EEOC is supposed to be "bipartisan in character." H.R. REP. NO. 914, 88th Cong., 1st Sess. 28, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2404.

250. 9 Empl. Coordinator, *supra* note 2, at 91,341 (Oct. 15, 1990).

251. *Gentile*, 129 F.R.D. at 457; *Stapleton Int'l Airport*, 720 F. Supp. at 1498.

252. *Stapleton Int'l Airport*, 720 F. Supp. at 1498.

253. See *supra* notes 201-52 and accompanying text for a discussion of the factors courts look to in determining the trustworthiness of a public document.

254. FED. R. EVID. 403.

255. Leonard, *supra* note 20, at 12; S. SALTZBURG & M. MARTIN, *supra* note 29, at 160.

256. The balancing test is supposed to be applied in the context of the circumstances of a particular case. Lewis, *supra* note 14, at 318-19; Berger, United States v. Scop: *The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOKLYN L. REV. 559, 588 (1989).

probative value.[257]

EEOC determinations are generally described as highly probative evidence on the issue of employment discrimination.[258] This description seems somewhat overstated, however, given that a determination is merely a preliminary finding that there is reason to believe there has been a violation of Title VII, rather than a conclusive finding of a violation.[259] Yet courts point to the impartiality of the EEOC,[260] the extensive resources and staff it has available for investigations,[261] and its highly trained investigators as supporting the probative value of a determination.[262] Merely because the EEOC has the capability of conducting quality investigations, however, does not mean its findings always reflect this expertise.[263] Moreover, juries may be particularly influenced by the value of an official government report, and give it undue weight.[264] Thus, although an EEOC determination may pass the threshold test of trustworthiness, it still may be improper for jury consideration.[265]

Rather than excluding the evidence, a judge may instead attempt to diffuse any potential prejudice by issuing a limiting instruction informing the jury of the proper weight to accord the EEOC's finding.[266] A limiting instruction, however, may not always effectively protect the interests of the party objecting to introduction of the evidence.[267] Thus, exclusion of the evidence in an appropriate case remains the surest way of maintaining the integrity of the truth-seeking process. The following sections

257. FED. R. EVID. 403.

258. *Barfield*, 911 F.2d at 649; *Plummer*, 656 F.2d at 505; *Smith*, 454 F.2d at 157.

259. *See* Gilchrist v. Jim Slemons Imports, 803 F.2d 1488, 1500 (9th Cir. 1986) (noting qualitative difference between EEOC cause determination and EEOC letter of violation). See also *supra* notes 173-75 and accompanying text for an explanation of the "litigation worthy" standard.

260. *Plummer*, 656 F.2d at 505.

261. *Smith*, 454 F.2d at 145.

262. *Mitchell*, 805 F.2d at 847; *Smith*, 454 F.2d at 157.

263. Hilton v. Wyman-Gordon Co., 624 F.2d 379, 383 (1st Cir. 1980); *accord* Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106, 1113 (1st Cir.), *cert. denied*, 110 S. Ct. 406 (1989); *see also Michael Constr. Co.*, 706 F.2d at 247 (EEOC investigation not in bad faith or frivolous, but proceeded in an unreasonable way and without foundation).

264. *Barfield*, 911 F.2d at 651; Note, *supra* note 214, at 975.

265. *Barfield*, 911 F.2d at 651; *Gillin*, 479 F.2d at 99.

266. FED. R. EVID. 403 advisory committee's note; *see Abrams*, 702 F. Supp. at 512 (EEOC determination admissible because limiting instruction will ensure jury does not deem it dispositive); Strickland v. American Can Co., 575 F. Supp. 1111, 1112 (N.D. Ga. 1983) (EEOC determinations admissible but court will issue jury instruction "to aid in the proper evaluation of that determination letter.").

267. Bruton v. United States, 391 U.S. 123, 132 n.8 (1968); MCCORMICK ON EVIDENCE, *supra* note 186, § 59, at 151-52.

set forth the primary factors a judge may review in deciding whether to exclude an EEOC determination from jury consideration.

a. unfair prejudice and confusing or misleading the jury

Evidence is not considered unfairly prejudicial merely because it is damaging to one of the parties.[268] Rather, unfair prejudice means the evidence has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[269] A potential worry, particularly for defendant employers, is that jurors may sympathize with an employee's complaint. Thus, an EEOC determination that reasonable cause exists to believe the charge of discrimination is true may coincide with jurors' own biases and receive more weight than it deserves.[270]

Another concern is that jurors might feel bound to place more weight on an EEOC determination, an official opinion about the charge, than on their own analysis of the facts.[271] Jurors are sometimes swayed by conclusions endorsed by the government, especially when the conclusions are in writing.[272] Official reports tend to lull jurors into believing that the government's conclusions are correct or, at least, worthy of great deference.[273] Prejudice to one of the parties may arise where the jury adopts the conclusions of the EEOC, rather than making an independent assessment of the facts.[274] This may especially be a problem if the jury's ability to make such an assessment is limited by the unavailability of witnesses or an incomplete or inaccurate EEOC report.

Determinations rendered after only an *ex parte* investigation[275] by

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268. *Gentile*, 129 F.R.D. at 461; *McClure*, 750 F.2d at 400; MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 545.

269. FED. R. EVID. 403 advisory committee's note.

270. Lewis, *supra* note 14, at 842.

271. *Johnson*, 734 F.2d at 1309. In *Johnson*, the complete EEOC determination was composed of only two sentences: "Evidence of record fails to reflect that Charging Party was counseled and/or warned about his poor job performance and attitude. However, the record shows that similarly situated white employees were counseled and/or warned on numerous occasions prior to their discharge." *Id.* The court maintained that the determination had little probative value, and might prejudice the jury. *Id.*

272. Note, *supra* note 214, at 978; *see, e.g.*, Fowler v. Firestone Tire & Rubber Co., 92 F.R.D. 1, 2 (1980) (administrative finding excluded pursuant to Rule 403 because its probative value was outweighed by danger that its "official" nature would unduly prejudice or mislead jury).

273. Note, *supra* note 214, at 978.

274. Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492, 495 (1982); Note, *supra* note 214, at 978.

275. An *ex parte* investigation is an investigation conducted about a person who is not personally contacted or questioned. BLACK'S LAW DICTIONARY 517 (5th ed. 1979).

the EEOC have been excluded from jury consideration, for fear a jury may be unfairly influenced by a determination based on a one-sided assessment of the facts.[276] Additionally, highly conclusory EEOC determinations have been excluded on the ground of unfair prejudice.[277] Conclusory statements regarding the merit of a charge of employment discrimination have little probative value because they provide virtually no insight into the basis for the findings.[278] Without in-court testimony by the investigating EEOC official, jurors are left to speculate on the ambiguities.

In certain cases a judge may believe the jury is ill-equipped to properly assess the probative weight of an EEOC determination, notwithstanding a limiting instruction.[279] The determination may confuse jurors, for example, if it includes a lot of statistical data on employment discrimination patterns or EEOC jargon.[280] Or, an EEOC determination may be misleading if, given its official nature, jurors regard it as conclusive rather than preliminary evidence of a Title VII violation.[281] Indeed, jurors are generally less aware than judges of the "limits and vagaries of administrative determinations."[282] The fear, then, is that jurors might ignore disputed facts or will draw unwarranted inferences from proffered evidence.[283]

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276. Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977).

277. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105-06 (8th Cir. 1988); *Johnson*, 734 F.2d at 1309.

278. *Estes*, 856 F.2d at 1105.

279. MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 546. Professor Gold has noted that "[t]he courts fail to make much of a distinction among the 'dangers' of prejudice, confusion of the issues and misleading the jury. They often discuss both confusion of the issues and misleading the jury in terms of prejudice." Gold, *supra* note 30, at 500 n.16.

280. *Gillin*, 479 F.2d at 99 (EEOC report "is a mishmash of self-serving and hearsay statements and records which contain conflicting opinions, comments and inferences drawn by investigators, potential witnesses, and unidentified persons. This maze of material would thwart rather than ease the trier's efforts.").

281. *See* Gold, *supra* note 29, at 506 ("Inferential error . . . occurs when the jury decides that evidence is more or less probative of a fact or event than it is.").

282. *Barfield*, 911 F.2d at 651; *accord Hilton*, 624 F.2d at 383 (judge in bench trial found EEOC determination to be replete with "untruths, or only partial truths" and so refused to accept it as probative evidence). *But see* City of New York v. Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981) (not error to exclude government finding because government reports are presented to jurors with an "aura of special reliability and trustworthiness" even when they are incomplete and lack reliability); *Gentile*, 129 F.R.D. at 461 (state investigative report admissible because jurors were skeptical and self-reliant and unlikely to give undue deference to state commissioners).

283. Lewis, *supra* note 14, at 844.

b. undue trial delay

Evaluative official documents are, of course, "subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions."[284] When the time it takes to explain or refute a piece of evidence substantially outweighs its probative value, however, a judge has discretion to exclude the evidence.[285] The time-consumption factor has been described as "the fundamental reason to exclude relevant evidence."[286] Nevertheless, probative evidence is generally not excluded solely on the grounds of undue trial delay or inefficiency.[287]

Admitting an EEOC determination may unduly lengthen a trial because the party objecting to its introduction will have to spend time exposing the weaknesses of the underlying EEOC investigation.[288] EEOC investigation documents will have to be introduced and explained to the jury. Witnesses will have to be called to testify as to both the EEOC's investigatory standards and the alleged lack of compliance with those standards. The presumption that an investigating official is competent may be difficult and time-consuming to rebut.[289] This added trial time may be too costly when weighed against the limited probative evidentiary value of a substandard EEOC determination.[290]

The expenditure of time, however, is not a court's sole concern when considering whether to allow rebuttal. Ironically, an objecting party's attempt to discredit an EEOC investigation may add weight to the value of an EEOC determination in the eyes of a jury. In such instances, a jury may focus on the EEOC's prior investigative conduct rather than on the facts as presented in the courtroom.[291] A jury which becomes persuaded that the investigation was adequately conducted may give more credence to the EEOC's preliminary conclusion than the determination deserves. This reaction would detract from the *de novo* character of the trial.

284. *Beech Aircraft Corp.*, 488 U.S. at 168.
285. FED. R. EVID. 403.
286. MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 546 n.34.
287. Lewis, *supra* note 14, at 853.
288. *Johnson*, 734 F.2d at 1309.
289. Note, *supra* note 274, at 495.
290. *Johnson*, 734 F.2d at 1309; *see Pullman*, 662 F.2d at 915.
291. Lewis, *supra* note 14, at 852.

IV. SHOULD JUDGES HAVE DISCRETION TO EXCLUDE EEOC DETERMINATIONS FROM JURIES BASED ON FEDERAL RULE OF EVIDENCE 403?

A. The Circuit Split

The circuit courts are in conflict over whether judges should have discretion to apply the evidence code's balancing test to exclude EEOC cause determinations from juries.[292] The Fifth and Ninth Circuits take the view that EEOC determinations are so probative that their relevance to the charge of employment discrimination can never be outweighed by the concerns of unfair prejudice, confusing or misleading a jury or undue trial delay.[293] These two circuits essentially refuse to apply the balancing test on a case-by-case basis in the employment discrimination context. Consequently, this view has become known as the per se rule of admissibility.[294]

In contrast, the First, Third, Eighth and Eleventh Circuits allow judges the discretion to apply the balancing test independently in each case.[295] Their rationale is that neither EEOC determinations, nor the investigations upon which the findings are based, are consistently of adequate quality.[296] These courts recognize that at times the probative value of an EEOC determination may be slight.[297] Weighed against the danger that juries may be swayed or confused by the conclusions of an official agency, or by the time it may take to expose the investigation's weaknesses, these courts allow trial judges to decide whether the determination merits jury consideration.

1. The per se admissible view

Although EEOC findings on reasonable cause were initially considered per se admissible only in Title VII bench trials,[298] the Fifth and

292. *See* Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988) (noting circuit court conflict).

293. McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985); Plummer v. Western Int'l Hotels Co., 656 F.2d 502 (9th Cir. 1981).

294. *See supra* note 20 and accompanying text.

295. Barfield v. Orange County, 911 F.2d 644 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990); Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106 (1st Cir.), *cert. denied*, 110 S. Ct. 406 (1989); Briseno v. Central Technical Community College Area, 739 F.2d 344 (8th Cir. 1984); Johnson v. Yellow Freight Sys., 734 F.2d 1304 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984); Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3d Cir. 1977).

296. *Johnson*, 734 F.2d at 1309.

297. *Id.*

298. *See, e.g.*, Bradshaw v. Zoological Soc'y, 569 F.2d 1066 (9th Cir. 1978) (EEOC's cause determination admissible in *de novo* bench trial); Smith v. Universal Servs., 454 F.2d 154 (5th

Ninth Circuits have extended this rule to employment discrimination cases heard by juries.[299] While the Fifth Circuit explicitly recognizes that public documents may be excluded for untrustworthiness, it refuses to exclude EEOC determinations based upon the balancing test.[300] The Ninth Circuit, taking an apparently more extreme position, implied that under no circumstance may a judge have discretion to exclude an EEOC determination.[301] Recently, the Eleventh Circuit concluded that this latter view foreclosed even untrustworthiness exclusions,[302] although whether the Ninth Circuit intended this broad interpretation remains to be seen.[303]

a. the Ninth Circuit view

The Ninth Circuit was the first to conclude that an EEOC determination may not be excluded from a jury on balancing test grounds. In *Plummer v. Western International Hotels Co.*,[304] an employee filed suit under both Title VII and section 1981, alleging racial discrimination in passing over her for a promotion.[305] The EEOC's investigation revealed a finding of reasonable cause to believe the employee's charges were true.[306] The employee sought to introduce the EEOC's reasonable cause determination as evidence of discrimination.[307] The trial court, without specifying a reason, excluded the determination from jury considera-

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Cir. 1972) (en banc) (probative value of EEOC reports outweigh any possible prejudice). *But see* Tulloss v. Near N. Montessori School, Inc., 776 F.2d 150, 153-54 (7th Cir. 1985) (judge may factor unfair prejudice and time required to expose EEOC report weaknesses into decision whether to exclude report in Title VII case); Heard v. Mueller Co., 464 F.2d 190, 194 (6th Cir. 1972) (decision to exclude EEOC report in Title VII case within sound discretion of trial court).

299. One federal court stated it was following the *Plummer* rule of per se admissibility. *Abrams*, 702 F. Supp. at 512. Yet the court also noted it "might choose to exclude EEOC letters of determination . . . in cases where the administrative decision is shown to be particularly untrustworthy." *Id.* As this Comment discusses at *supra* note 201, it is unclear whether the Ninth Circuit recognizes the untrustworthiness exception of 803(8)(C). Arguably, then, the *Abrams* court is not adhering to as rigid a rule as the *Plummer* reference suggests.

300. *McClure*, 750 F.2d at 400.

301. *Plummer*, 656 F.2d at 505.

302. *Barfield*, 911 F.2d at 650.

303. The United States Supreme Court, in *Beech Aircraft Corp. v. Rainey*, expressly acknowledged that public documents may be excluded on the ground of untrustworthiness. 448 U.S. 153, 167-68 (1988). Consequently, even if the Ninth Circuit intended to foreclose a trustworthiness inquiry into EEOC determinations, it would appear invalid.

304. 656 F.2d 502 (9th Cir. 1981).

305. *Id.* at 502.

306. *Id.* at 503.

307. *Id.* at 504.

tion.[308] The employee subsequently lost on both causes of action.[309]

The appeals court reversed, holding that the reasonable cause determination should have been admitted.[310] The court acknowledged that the per se rule of admitting EEOC determinations previously had been applied only in bench trials.[311] Consequently, it offered several reasons to support an extension of the rule to the jury setting. First, EEOC investigations are generally conducted by "professional investigators on behalf of an impartial agency."[312] Any deficiencies in the accuracy of the findings, the court maintained, may be presented to the jury by the employer.[313] The court failed to consider, however, whether defects in the findings might cause unfair prejudice to the parties. For example, deficiencies in EEOC investigations may not be obvious from the face of a determination, or the investigators may not be available as witnesses. Thus, absent exclusion of the evidence, the potential for prejudice might go unchecked. The court also ignored the issue of whether presentation of deficiencies in an EEOC investigation might unduly lengthen the trial. Additionally, the court failed to recognize that inquiry into the conduct of an EEOC investigation may expose those employees who assisted the EEOC to retaliation by the accused employer.[314]

Next, rejecting the employer's contention that a jury might become confused over the proper weight to assign the report,[315] the court held there is no reason to keep an EEOC determination from a jury as it is "not only admissible, but . . . highly probative" evidence.[316] Yet the fact that an EEOC determination is not a conclusive finding on whether a Title VII violation has occurred should weigh against its probative value.[317] Moreover, merely because evidence is probative does not mean

308. *Id.* at 503.
309. *Id.* at 504.
310. *Id.* at 506.
311. *Id.* at 505.
312. *Id.*
313. *Id.* at 505 n.9.
314. S. SHULMAN & C. ABERNATHY, *supra* note 50, § 12.2.4.
315. *Plummer*, 656 F.2d at 504.
316. *Id.* at 505.
317. Although the *Plummer* court justified its per se rule by emphasizing the probative value of EEOC determinations, the Ninth Circuit maintained in another case that a determination "does not suggest to the jury that the EEOC has already determined that there has been a violation. Rather, it suggests that preliminarily there is reason to believe a violation has taken place." Gilchrist v. Jim Slemons Imports, 803 F.2d 1488, 1500 (9th Cir. 1986). The *Gilchrist* court maintained that this distinction between "preliminary" and "conclusive" EEOC findings might affect the tendency of the evidence to unduly prejudice the jury. *Id.* Conclusive findings, the court held, will increase the possibility of unfair prejudice because jurors will have a more difficult time making an independent evaluation of the charge. *Id.* Yet the court ignored

it is free from potentially prejudicial attributes. Indeed, the Rule 403 balancing test is triggered only after an initial assessment by a trial judge that the proffered evidence has probative value.[318]

Finally, the court believed that hinging admissibility on the distinction between a bench and jury trial would waste the value of the EEOC investigation whenever an employee filed both section 1981 and Title VII claims together.[319] The court failed to recognize that it is precisely when a jury is hearing a claim that proper application of the balancing test is crucial.

In this way, the Ninth Circuit launched an unprecedented expansion of the per se admissibility rule. The *Plummer* court virtually ignored application of the balancing test to the facts of the case at hand. The costs and benefits of admitting the evidence were never weighed. No attempt was made to discern the reason why the trial court excluded the EEOC determination. Instead, deference to the EEOC's general investigative capabilities and ultimate findings became paramount in the decision to admit the evidence. The Ninth Circuit's unconventional approach is particularly disturbing because it flouted the general rule that evidentiary rulings will not be disturbed on appeal absent a clear and prejudicial abuse of discretion by the trial court.[320]

b. the Fifth Circuit view

The per se rule was further developed, and distinguished from the untrustworthiness exception, in *McClure v. Mexia Independent School District*.[321] In *McClure*, the Fifth Circuit decided that a trial judge has discretion to exclude an EEOC determination from a jury only when " 'the sources of information or other circumstances indicate the lack of trustworthiness.' "[322] The plaintiff in *McClure* was discharged from her position as bookkeeper/office manager a few months after she filed a sex discrimination charge with the EEOC.[323] The school district contended

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the logical extrapolation of its contention: a preliminary finding may be less likely to induce unfair prejudice than a conclusive finding, but it will also have less probative value. Thus, there is a sound argument for application of the Rule 403 balancing test on a case-by-case basis notwithstanding the preliminary nature of an EEOC determination.

318. Gold, *supra* note 30, at 498 n.9.

319. *Plummer*, 656 F.2d at 505.

320. Sherrod v. Berry, 856 F.2d 802, 804 (7th Cir. 1988); Jones v. Board of Police Comm'rs, 844 F.2d 500, 505 (8th Cir. 1988), *cert. denied*, 490 U.S. 1092 (1989); United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983); Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362, 1364 (9th Cir. 1980).

321. 750 F.2d 396 (5th Cir. 1985).

322. *Id.* at 400 (quoting FED. R. EVID. 803(8)(C)).

323. *Id.* at 397-98. The school district classified plaintiff's position as "Aide III" rather

that the employee's position was eliminated as part of an administrative reorganization,[324] but plaintiff filed suit for retaliatory discharge under both Title VII and section 1983.[325] Finding the discharge retaliatory, the jury awarded plaintiff section 1983 damages, and the court awarded plaintiff reinstatement and attorney's fees pursuant to Title VII.[326]

One of the primary issues on appeal was whether the district court erroneously admitted the EEOC determination of reasonable cause for retaliatory discharge.[327] In admitting the report, the district court had relied on the reasoning[328] of an earlier Fifth Circuit decision, *Smith v. Universal Services*.[329] The *Smith* court concluded that an EEOC determination on reasonable cause may not be excluded on the ground of unfair prejudice given its high probative value.[330] Although recognizing that *Smith* was decided in a non-jury setting, the *McCure* district court maintained that the reasoning applies equally well in jury cases.[331]

The employer's contention, on appeal, was that the district court judge's reliance on *Smith* established a per se rule of admissibility and foreclosed an untrustworthiness objection.[332] The employer maintained this was error because the evidence code specifically recognizes that public records may be excluded if found to be untrustworthy.[333] The Fifth Circuit rejected the employer's interpretation of the district court judgment and affirmed the admissibility of the EEOC determination.[334]

The court confirmed that there are two distinct means of challenging the introduction of an EEOC finding of reasonable cause: (1) the sources of information upon which the determination is based or other circumstances indicate a lack of trustworthiness;[335] and (2) the probative

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than as business manager. *Id.* at 397. The annual salary was $7,800 for the Aide III position and $9,600 for the business manager position. *Id.* Plaintiff alleged this classification was motivated by sex discrimination, and she filed a complaint with the EEOC. *Id.* at 397-98.

324. *Id.* at 398.

325. *Id.*

326. *Id.*

327. *Id.* The EEOC issued two findings that there was reasonable cause to believe the employee's charges were true. The first pertained to plaintiff's initial charge that the school district's job classification was motivated by sex discrimination. *Id.* The second, which formed the basis of the employer's appeal, focused on the retaliatory discharge allegation. *Id.*

328. *Id.* at 400.

329. 454 F.2d 154 (5th Cir. 1972).

330. *Id.* at 157.

331. *McClure*, 750 F.2d at 400.

332. *Id.* at 401.

333. *Id.* at 400-01.

334. *Id.* at 401.

335. *Id.* at 400. This challenge may be raised pursuant to FED. R. EVID. 803(8)(C).

value of the report is outweighed by the danger of unfair prejudice.[336] The court refused to foreclose the first type of challenge.[337] It rejected the employer's argument that adoption of the *Smith* reasoning precluded an untrustworthiness challenge, because *Smith* was decided prior to the adoption of this express ground for exclusion under the evidence code.[338] The district court's admission of the EEOC determination was proper, the Fifth Circuit concluded, because the employer failed to raise the untrustworthiness issue until the appeals stage.[339]

As to the second type of challenge, the court followed the lead of the Ninth Circuit and held that the high probative value of an EEOC determination will outweigh "any possible prejudice."[340] The court, without discussing the potential for undue trial delay, maintained that litigants may refute the evidence by exposing any defects in an EEOC determination to the jury.[341]

2. The view allowing judicial discretion to exclude EEOC determinations

Although several circuits follow the view allowing trial judges discretion to exclude EEOC determinations on "balancing test" grounds, only the Eighth and Eleventh Circuits have considered the issue in any depth. The next two sections set forth the reasoning these circuits use to reject the per se rule of admissibility.

a. the Eighth Circuit view

The Eighth Circuit first faced the issue of whether judges should have discretion to exclude EEOC determinations from juries in *Johnson v. Yellow Freight System*.[342] The plaintiff, who was discharged for allegedly failing to adequately perform his job, filed a charge of racial discrimination against his employer with the EEOC.[343] After the EEOC issued a determination that reasonable cause existed to believe the discrimination charge was true, the employee filed suit in federal court pursuant to Title VII and section 1981.[344] The employee received a jury trial on the

336. *McClure*, 750 F.2d at 400. This challenge may be raised pursuant to FED. R. EVID. 403.
337. *McClure*, 750 F.2d at 400.
338. *Id.* at 399.
339. *Id.* at 401.
340. *Id.* at 400.
341. *Id.*
342. 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984).
343. *Id.* at 1306.
344. *Id.* at 1306-07.

section 1981 claim, but lost the suit on both counts.[345]

On appeal, the employee contended that the trial judge erred in failing to admit the EEOC determination as evidence to support the section 1981 claim, when it had been admitted for the Title VII claim.[346] The court rejected the employee's contention, holding that the trial judge properly exercised discretion under Federal Rule of Evidence 403[347] to exclude the EEOC determination from the jury.[348]

Two factors appeared to guide the court's decision on this issue. First, recognizing that EEOC determinations vary in quality and detail, the court stated that a per se rule of admissibility would "shackle the discretion of trial judges" who should consider potential prejudice and trial delay.[349] Second, the EEOC determination at issue in the case was "highly conclusory" and only minimally probative on the issue of employment discrimination.[350] The court felt that introducing the determination might sway the jury from reaching its own conclusions regarding the claim.[351] Moreover, the minimal value of introducing the determination did not merit the extra time it would take to explain the scope of the EEOC investigation to the jury.[352]

In *Briseno v. Central Technical Community College Area*,[353] the Eighth Circuit demonstrated that employees may also benefit from a case-by-case application of the balancing test. The plaintiff in *Briseno*, a part-time college instructor, filed suit under Title VII and section 1981 for discharge based on racial discrimination.[354] After investigating the charge, the EEOC issued a determination that no reasonable cause existed to believe discrimination was the reason for the discharge.[355] The district court excluded the determination from the jury, and the employee ultimately received an award of back pay, reinstatement and attorney's fees.[356]

On appeal, the employer argued that the EEOC determination was improperly excluded by the trial judge.[357] The court rejected this con-

345. *Id.* at 1306.
346. *Id.* at 1308 & n.1.
347. FED. R. EVID. 403.
348. *Johnson*, 734 F.2d at 1309-10.
349. *Id.* at 1309.
350. *Id.*
351. *Id.*
352. *Id.* at 1309-10.
353. 739 F.2d 344 (8th Cir. 1984).
354. *Id.* at 346.
355. *Id.* at 347.
356. *Id.* at 346-47.
357. *Id.* at 347.

tention, concluding that *Johnson* had established that admitting an EEOC determination is a discretionary decision left to the trial judge.[358] The employee's award was slightly modified, but affirmed in substance.[359]

Thus, unlike either the Fifth or Ninth Circuit decisions on this evidentiary issue, the *Johnson* and *Briseno* courts analyzed the propriety of allowing discretion on both general and specific grounds. After refusing to accept the proposition that all EEOC determinations are highly probative, both courts looked to the particular determination offered as evidence in the case before them. This tailored application of the balancing test seems more in keeping with the objectives of a trial *de novo*. As is also evident by the *Johnson* and *Briseno* results, both employers and employees potentially stand to benefit from a more individualized application of the balancing test.

b. the Eleventh Circuit view

Just recently, in *Barfield v. Orange County*,[360] the Eleventh Circuit decided that the issue of whether to exclude EEOC determinations on reasonable cause from juries should be left to trial judges.[361] In so holding, the court joined the First,[362] Third[363] and Eighth Circuits[364] which also accord trial judges complete discretion. In addition, the *Barfield* court took this opportunity to consider and expressly reject both the Fifth[365] and Ninth Circuit[366] approaches.

The employee in *Barfield* filed suit under Title VII and sections 1981 and 1983, alleging that she was discharged from her position as a corrections officer with the county sheriff on account of her race and sex.[367] The EEOC's investigation of these charges resulted in a finding of no cause to believe the discharge stemmed from discrimination.[368] The trial judge refused to exclude the determination from the jury.[369] The

358. *Id.*
359. *Id.* at 348.
360. 911 F.2d 644 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990).
361. *Id.* at 650-51.
362. *Smith*, 877 F.2d at 1113.
363. *Walton*, 563 F.2d at 74-75; *Angelo*, 555 F.2d at 1176.
364. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105 (8th Cir. 1988); *Briseno*, 739 F.2d at 347; *Johnson*, 734 F.2d at 1309.
365. *Barfield*, 911 F.2d at 650.
366. *Id.*
367. *Id.* at 649.
368. *Id.*
369. *Id.* at 651.

employee lost the suit in its entirety.[370]

On appeal, the employee claimed that the trial judge erred in denying her motion in limine to exclude the EEOC determination.[371] The motion had requested exclusion on the grounds of hearsay, undue prejudice, trial delay and because the determination was only minimally probative on the issue of employment discrimination.[372] After extensively reviewing the various circuit court decisions on this evidentiary question, and analyzing the employee's motion to exclude the evidence, the court affirmed the trial judge's decision to admit the determination.[373]

The court agreed that EEOC determinations may be highly probative.[374] Yet it departed from the Fifth and Ninth Circuits' approach by also recognizing that determinations are of varying quality.[375] As such, the court contended that admitting an official determination on a per se basis may at times create the danger of unfair prejudice in the minds of jurors.[376] The court stressed that "the change from a bench to a jury trial may very well affect the analysis under Rule 403."[377] Deciding that trial judges must have the discretion to weigh the costs and benefits of admitting an EEOC determination in a given case, the court flatly rejected the per se rule of admissibility.[378]

As to the employee's specific argument that the trial judge erred in admitting the no cause determination, however, the court balked. The employee's motion to exclude the evidence under Rule 403 was "conclusory," and she failed to raise an untrustworthiness objection.[379] The employee argued that the EEOC only contacted management during its investigation, but the court, after reviewing all of the EEOC records, found that both parties were asked to submit information on the charge.[380] Consequently, the employee's evidentiary challenges failed.[381]

Unlike several of the other cases construing this issue, the *Barfield* court ultimately admitted the determination based on an application of the balancing test. Yet by reaching its decision after a thorough review of the costs and benefits of admitting the proffered evidence, the court

370. *Id.*
371. *Id.* at 649.
372. *Id.*
373. *Id.* at 651.
374. *Id.* at 649.
375. *Id.* at 650.
376. *Id.*
377. *Id.* at 651.
378. *Id.* at 650-51.
379. *Id.* at 651.
380. *Id.*
381. *Id.*

rendered a judgment tailored to the facts of the case. The employee, although disgruntled with the result, at least should realize that her objections to introduction of the evidence were fully heard and considered.

B. The Rationale for Allowing Judicial Discretion to Exclude EEOC Determinations Under Federal Rule of Evidence 403

1. Policy underlying the Federal Rules of Evidence

The "search for truth and justice"[382] in litigation is an overriding policy concern of the Federal Rules of Evidence.[383] This policy objective is promoted, in large part, by application of the Rule 403 balancing test.[384] Rule 403 is essentially a means of regulating the flow of information to the jury.[385] It is " 'a rule of exclusion that cuts across [all] the rules of evidence.' "[386] By according a judge discretion to exclude from a jury evidence which is less probative than prejudicial, misleading or confusing, the truth-seeking process is enhanced.[387]

The primary inquiry under Rule 403 is whether a jury's consideration of proffered evidence will "enhance or detract from accurate fact finding."[388] It is the trial judge's responsibility to make this determination.[389] The rationale for allowing a trial judge discretion to exclude evidence under the balancing test is that the judge "is in a superior position to evaluate all of the circumstances connected with [the competing interests of the parties], 'since he [or she] sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions.' "[390] When a trial

382. Leonard, *supra* note 20, at 4; Lewis, *supra* note 14, at 290.

383. Lewis, *supra* note 14, at 290.

384. Leonard, *supra* note 20, at 12; Lewis, *supra* note 14, at 291; *see also* Gold, *supra* note 12, at 67 ("[B]oth truth and fairness share a similar meaning in [the evidentiary] context: rendition of verdicts by an unbiased jury based upon the logical implications of the evidence.").

385. Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 831 (1989).

386. Jones v. Board of Police Comm'rs, 844 F.2d 500, 505 (8th Cir. 1988) (quoting Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983)), *cert. denied*, 490 U.S. 1092 (1989); *accord* Lewis, *supra* note 14, at 291 n.6 ("The only exceptions to Rule 403 coverage are found in Rules 412 and 609.").

387. Gold, *supra* note 12, at 67; Leonard, *supra* note 20, at 12.

388. Gold, *supra* note 12, at 67.

389. Tanford, *supra* note 385, at 832.

390. United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983) (quoting United States v. Robinson, 560 F.2d 507, 514 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978)). One commentator suggests that trial judges are in a position to assess jury reaction to a particular piece of evidence for three reasons: (1) trial judges have general experience viewing jury reaction to the type of evidence under consideration; (2) trial judges are aware of the jurors' backgrounds and so may be sensitive to their likely reactions in the particular case; and (3) trial judges may consider the specific context in which the evidence is offered. Gold, *supra* note 12, at 69. Nevertheless, there is concern that judges are biased when evaluating the introduction

judge is prevented from exercising this discretion, Rule 403 is reduced to a nullity.[391]

The per se rule of admitting EEOC determinations blatantly ignores the balancing test as contemplated by Rule 403.[392] The balancing test specifically allows the exclusion of relevant evidence under certain circumstances.[393] Therefore, whether the evidence is generally probative is only a threshold question.[394] Rule 403 demands, in addition, that a judge weigh the costs and benefits of admitting the evidence in the case at hand.[395] It may be that the EEOC determination is conclusory,[396] or that the investigation was inadequate,[397] or that the time it would take to expose the weaknesses in the determination is prohibitive,[398] or that the jurors may be inappropriately swayed by the official nature of the determination.[399] Indeed, these scenarios have all arisen during the trials of employment discrimination claims. The per se rule of admissibility simply fails to account for these potential concerns. Rather, it relegates Rule 403 to "a redundant relevance requirement," thereby undermining the truth-seeking process.[400]

Additionally, there is simply no good reason to "shackle the discretion of trial judges with a rule of per se admissibility"[401] of EEOC determinations. Rule 403 is not an unlimited grant of authority allowing trial

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of evidence. Tanford, *supra* note 385, at 832-33 ("judges in reality make [evidentiary] decisions consistent with their political orientation").

391. Gold, *supra* note 12, at 93-94.

392. *See id.*

393. FED. R. EVID. 403 & advisory committee's note.

394. MCCORMICK ON EVIDENCE, *supra* note 186, § 185, at 544.

395. *Id.*

396. Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984).

397. Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir.) (EEOC determination of no reasonable cause admitted even though employee claimed investigator only reviewed information submitted by employer), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990); EEOC v. Keco Indus., 748 F.2d 1097, 1099 (6th Cir. 1984) (magistrate recommended summary judgment for employer because EEOC investigation was composed only of reviewing employer's affirmative action guidelines prior to issuing determination that cause existed for discrimination charge); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977) (EEOC determination based on only *ex parte* investigation of discrimination charge excluded); EEOC v. King's Daughters Hosp., 12 Fair Empl. Prac. Cas. (BNA) 484, 489-90 (D. Miss. 1976) (summary judgment granted to employer where EEOC failed to investigate whether job applicant was qualified for position applied for).

398. *Johnson*, 734 F.2d at 1309; City of New York v. Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981).

399. *Barfield*, 911 F.2d at 650-51.

400. Gold, *supra* note 12, at 94.

401. *Johnson*, 734 F.2d at 1309.

judges to exclude evidence at the slightest provocation.[402] Rather, proper application of Rule 403 requires first a preliminary detection of some form of unfair prejudice or other enumerated danger.[403] Next, the probative value of the proffered evidence must be established.[404] Finally, only if the probative value is substantially outweighed by the potential for unfair prejudice will the evidence be excluded.[405] This is not an easy burden for the objecting party to meet, in part because the Federal Rules of Evidence were drafted to favor the admissibility of evidence.[406]

2. Fairness to the parties

According trial judges discretion to exclude EEOC determinations when appropriate under the balancing test will promote fairness in the litigation process.[407] Although the concept of fairness is somewhat ambiguous,[408] it has been identified as including the meaningful opportunity of a litigant to be heard[409] and the lack of bias in jury decision-making.[410] Both of these concerns may be subverted by a per se admissibility rule if conclusory or inadequately investigated EEOC determinations are admitted without regard to their effect on the parties at trial.

Providing victims of employment discrimination with a meaningful opportunity to be heard was important to the Title VII drafters.[411] Indeed, Title VII specifically provides a litigant with the right to a federal trial *de novo*,[412] whether a claim is filed by an individual[413] or by the EEOC.[414] By extending *de novo* review to Title VII claims, Congress sought to provide an aggrieved employee with more than just an adminis-

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402. Gold, *supra* note 30, at 500.
403. *Id.*
404. *Id.* at 498 n.9.
405. *Id.*
406. *Id.* at 497.
407. Gold, *supra* note 12, at 69.
408. *Id.*
409. Washington v. Texas, 388 U.S. 14, 19 (1967).
410. *In re* Murchison, 349 U.S. 133, 136 (1955).
411. During the legislative debates over passage of Title VII, it was established that:
> A substantial number of committee members . . . [prefer] that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement, we believe that settlement of complaints will occur more rapidly and with greater frequency. In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 29, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2515-16.
412. Chandler v. Roudebush, 425 U.S. 840, 861 (1976).
413. 42 U.S.C. § 2000e-5(e) (1988).
414. *Id.* § 2000e-5(f).

trative forum for redress.[415] Given this *de novo* approach, EEOC determinations on cause are not binding on the trier of fact.[416]

This seemingly generous opportunity to be heard may be undermined, however, if evidence is admitted which may mislead, confuse or foster bias in a jury.[417] EEOC determinations on cause, official findings on the charge of discrimination at issue before the jurors, may be particularly influential.[418] Rather than focusing on a fresh review of the facts as presented in the courtroom, jurors may be tempted to adopt the EEOC's interpretation of the case.[419] As a result, the accuracy of a jury's fact finding process may suffer, and fairness to the parties may be jeopardized.[420] These concerns, and the fact that EEOC determinations are insulated from appellate review,[421] militate against a per se rule of admissibility.

The per se rule of admissibility also denies litigants the appearance of fairness in the adjudication of their claims. If an employer or employee subjectively believes that the EEOC rendered an unfair determination, a court will be doing both litigants a disservice by requiring admission of EEOC determinations on a per se basis. Trials are conducted, after all, not only for the search for truth but also to allow citizens their day in court.[422] The rules of evidence serve to protect society's belief in the legitimacy of the courtroom process.[423] If the balancing test is properly applied and the evidence is, nevertheless, admitted, the objecting party is at least assured that the court reviewed the matter according to the strictures of the evidence code.[424] The per se rule of

415. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). The rationale for extending federal *de novo* review is that federal judges are more likely to withstand political pressure when enforcing the goal of equal employment opportunity. *Chandler*, 425 U.S. at 851-52. The contention that judges are neutral decision-makers has been criticized. *See* Tanford, *supra* note 385, at 838.

416. *See, e.g.*, Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504 (9th Cir. 1981) ("a civil rights plaintiff has the right to a *de novo* trial in federal court, and while prior administrative determinations are not binding, they are admissible evidence"); Georator Corp. v. EEOC, 592 F.2d 765, 768-69 (4th Cir. 1979) (EEOC findings on cause have no determinate consequences and only carry "as much weight as the trial court ascribes to it").

417. Gold, *supra* note 12, at 71.

418. *Barfield*, 911 F.2d at 651.

419. *See* Gold, *supra* note 12, at 71.

420. *Id.*

421. Note, *supra* note 274, at 499.

422. Leonard, *supra* note 20, at 39. Professor Leonard suggests that trials serve the cathartic function of offering people an opportunity to present information in a satisfactory way so that they will refrain from violence outside of the courtroom. *Id.* at 41. Catharsis is "an emotional response, hinging on our sense of satisfaction with the processes of the court." *Id.*

423. *Id.*

424. *See, e.g., Barfield*, 911 F.2d at 651 (trial judge's decision to admit EEOC determina-

admissibility, in contrast, may leave the objecting party feeling cheated.[425]

V. CONCLUSION

The experience in jurisdictions which give judges discretion to exclude EEOC determinations based on the balancing test suggests that overturning the per se admissibility rule will result in the exclusion of at least some proffered determinations.[426] In fact, EEOC determinations were excluded from evidence pursuant to Rule 403 in five of the six main circuit court cases discussed in this Comment.[427] Of course, the burden of convincing judges that the costs of admitting an EEOC determination significantly outweigh its probative value ultimately remains with the objecting party.[428] As the employee in *Barfield v. Orange County*[429] discovered, a successful challenge may require more than a few conclusory statements.[430] Yet Chief Justice Marshall stated it best long ago: "a motion to the discretion of the court . . . is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[431] Only when the balancing test of Rule 403 is applied to the specific facts in each case, rather than on a per se basis, will the equal

tion affirmed, but only after appellate review of "lengthy EEOC file" pursuant to employee's Rule 403 objection).

425. *See Georator Corp.*, 592 F.2d at 769. Responding to the employer's contention that admitting an EEOC reasonable cause determination constitutes a violation of the opportunity to be heard, the court noted that only in the Fifth and Ninth Circuits are judges required to admit the determinations without review. *Id.* Thus, the court implied, due process concerns are vitiated when a judge has discretion to exclude an EEOC determination on balancing test grounds. *Id.*

426. *See, e.g.*, Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105-06 (8th Cir. 1988); Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977).

427. *Estes*, 856 F.2d at 1105-06; Briseno v. Central Technical Community College Area, 739 F.2d 344, 347 (8th Cir. 1984); Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309-10 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984); *Walton*, 563 F.2d at 75; *Angelo*, 555 F.2d at 1176. Only in Barfield v. Orange County, 911 F.2d 644, 650-51 (11th Cir.), *petition for cert. filed*, No. 90-6501 (U.S. filed Dec. 11, 1990), did the court admit the proffered EEOC determination after application of the Rule 403 balancing test.

428. Lewis, *supra* note 14, at 292-93.

429. 911 F.2d 644 (11th Cir. 1990).

430. *Id.* at 649. The court noted, "[t]he motion asserted in a purely conclusory manner that the EEOC report was hearsay, that an EEOC report is of minimal probative value, and that its admission would prolong the trial and unduly prejudice the plaintiff." *Id.*

431. United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d).

employment rights of litigants be best addressed and the integrity of the legal system be enhanced.

Leslie Abbott *

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