

# Equitable Tolling of Title VII Time Limits in Actions Against the Government

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## Recommended Citation

Jack E. Fernandez, *Equitable Tolling of Title VII Time Limits in Actions Against the Government*, 74 Cornell L. Rev. 199 (1988)  
Available at: <http://scholarship.law.cornell.edu/clr/vol74/iss1/6>

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# EQUITABLE TOLLING OF TITLE VII TIME LIMITS IN ACTIONS AGAINST THE GOVERNMENT

## I INTRODUCTION

In 1964, Congress passed Title VII of the Civil Rights Act<sup>1</sup> which granted employees of certain organizations a private cause of action against their employers. Title VII sought to secure equal opportunity in employment regardless of race, color, religion, sex, or national origin.<sup>2</sup> Although it protected civilian employees, the 1964 Act failed to expressly protect federal employees.<sup>3</sup> Instead, Congress empowered the Civil Service Commissioner to establish procedures to monitor and adjudicate federal employees' employment discrimination complaints.<sup>4</sup> These procedures, however, failed to eliminate employment discrimination within the federal government.<sup>5</sup>

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<sup>1</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)). This note will refer to this statute and its subsequent amendments as "the statute" or "Title VII."

<sup>2</sup> 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer (1) to . . . discriminate . . . because of . . . race, color, religion, sex, or national origin. . . .")

<sup>3</sup> *Id.*

<sup>4</sup> H.R. REP. NO. 238, 92d Cong., 1st Sess. 25, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2157.

<sup>5</sup> The House Bill was passed in lieu of the Senate bill. The House Committee stated: "There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available." H.R. REP. NO. 238, 92d Cong., 1st Sess. 25, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2160. Similarly, the Senate Report stated:

The testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. . . . This [had], in turn, discouraged persons from filing complaints with the [Civil Service] Commission for fear that doing so [would] only result in antagonizing their supervisors and impairing any future hope of advancement.

S. REP. NO. 415, 92d Cong., 1st Sess. 1, 14.

The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt.

*Id.* at 16. See generally *Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 320, 322, 385-86, 391-92 (1971); *Hearings on S. 2515 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 296, 301, 308, 318 (1971).

To remedy these problems, Congress amended the Civil Rights Act in 1972.<sup>6</sup> The 1972 amendments transferred equal opportunity enforcement powers from the Civil Service Commission to the Equal Opportunity Employment Commission.<sup>7</sup> Moreover, the amendments granted federal employees a private cause of action for their employment discrimination claims against the federal government.<sup>8</sup> Although the amendments ameliorated many problems that existed in the 1964 version of the Civil Rights Act, one problem remained: are Title VII's time limits jurisdictional prerequisites to suit against the federal government, or statutes of limitations subject to equitable principles such as waiver, estoppel, or tolling?<sup>9</sup>

This note seeks to formulate a framework whereby courts can determine when to accept jurisdiction over untimely Title VII claims.

## II

### BACKGROUND

#### A. Equitable Estoppel of the United States

To see why a court's equitable assumption of jurisdiction over Title VII claims against the United States presents a problem, one must first understand the nature of the federal government's sovereign immunity. Absent an express statutory waiver, sovereign immunity prevents a federal court from exercising subject matter jurisdiction over suits against the United States.<sup>10</sup> Moreover, in those cases where Congress has waived the sovereign immunity of

<sup>6</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

<sup>7</sup> See 42 U.S.C. § 2000e-(4) (historical note). The Equal Opportunity Employment Commission will be referred to in this note as the "EEOC."

<sup>8</sup> 42 U.S.C. § 2000e-16(c).

<sup>9</sup> The Circuit Courts have split on this issue. See, e.g., *Stuckett v. United States Postal Serv.*, 469 U.S. 898, 899 (1984) (White, J. and Rehnquist, J., dissenting from the denial of certiorari) ("Because the complaint was dismissed for [lack of subject matter jurisdiction], the question of the jurisdictional significance of the 30-day limit is squarely presented. In light of the conflict among the circuit courts, I would grant certiorari.").

<sup>10</sup> *United States v. Shaw*, 309 U.S. 495, 500-01 (1940) ("[W]ithout specific statutory consent, no suit may be brought against the United States.") See generally C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS* § 3654, at 186-92 (1985 & Supp. 1988) stating:

The absence of [sovereign] consent [to be sued] is a fundamental jurisdictional defect that may be asserted at any time, either by the parties or by the court on its own motion. Only Congress can waive the United States' sovereign immunity and the government is not subject to assertions of waiver or estoppel when it raises the defense.

*Id.*; Note, *Limitations Periods Under Title VII: Has Time Run Out on the Sovereign Immunity Doctrine?*, 63 B.U.L. REV. 1157, 1157-58 nn.7-8 (1983) (authored by Lisa Naparstek Green) (arguing that courts are powerless to eliminate the sovereign immunity doctrine applied to Title VII time limits for filing in federal court).

the United States, the terms of the waiver statute, including time limits, define the parameters of the federal court's jurisdiction.<sup>11</sup> Additionally, the common law compels courts to construe these parameters strictly in favor of the United States.<sup>12</sup> Thus, unless the waiver statute expressly provides for equitable estoppel or waiver, courts theoretically lack the power to apply these doctrines in actions against the federal government and must therefore decline subject matter jurisdiction.<sup>13</sup>

The 1972 Amendments to Title VII allow individuals to sue the federal government. Thus, they constitute a waiver of federal sovereign immunity which courts must strictly construe. Title VII nowhere provides for federal courts to employ equitable principles such as waiver, tolling, or estoppel to assume jurisdiction over untimely claims against the United States. Thus, all other things equal, courts lack subject matter jurisdiction to hear untimely Title VII claims.<sup>14</sup>

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<sup>11</sup> See *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) ("the United States as Sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States v. Testan*, 424 U.S. 392, 399 (1975) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). See also *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

<sup>12</sup> 453 U.S. at 160-61 (strict construction of age discrimination act) ("[B]ecause of the power of the sovereign to attach conditions to its consent to be sued . . . Congress, despite the Seventh Amendment, may dispense with jury trial in suits brought in the Court of Claims.") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Soriano v. United States*, 352 U.S. 270, 276 (1957) (not allowing equitable tolling); *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (strict construction of Tucker Act); but see *United States v. Yellow Cab*, 340 U.S. 543, 550 (1951) (under FTCA, the court recognized a trend toward increased scope of waiver by federal government of its sovereign immunity); *Brooks v. United States*, 337 U.S. 49, 51 (1949) (courts should not apply automatic axioms of construction to Federal Tort Claims Act); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945) (Public Vessels Act broadly construed).

<sup>13</sup> See *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (courts consistently have refused to estop the government where an eligible applicant lost benefits because of erroneous replies to oral inquiries); *Federal Crop Ins. v. Merrill*, 332 U.S. 380, 385 (1947) (the terms and conditions for creating liability on the part of the government define the parameters of sovereign immunity, regardless of reliance on governmental agent's misstatement); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("[I]t is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

The sovereign immunity doctrine results from the belief that those suing the government should not have access to the public treasury without the sovereign's consent. For a thorough treatment of sovereign immunity, see Note, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609, 610-11 (1982) (authored by Deborah H. Eisen) ("The government's immunity from equitable estoppel derives from the concept of sovereign immunity. Courts feared that applying equitable estoppel against the government would interfere with policymaking and other necessary government functions.") (footnotes omitted); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979) (authored by David K. Thompson).

<sup>14</sup> See *supra* text accompanying note 10.

## B. Statutes and Regulations Applicable to Federal Title VII Actions

Under Title VII, Congress prohibited discriminatory practices affecting employees or applicants for employment of the federal government,<sup>15</sup> vested enforcement power with the Equal Employment Opportunity Commission ("EEOC")<sup>16</sup> and provided a means for federal employees to appeal final agency actions in a federal district court.<sup>17</sup> This portion of Title VII constitutes the specific congressional waiver of the sovereign immunity of the United States.

Pursuant to its statutory authority, the EEOC established procedures designed to ensure equal opportunity in federal governmental employment.<sup>18</sup> Under these procedures, each agency head must establish an equal opportunity program,<sup>19</sup> and must also provide equal opportunity counselors and informal adjudication procedures for resolution of discrimination complaints.<sup>20</sup>

The EEOC also established time limits governing prosecutions of Title VII employment discrimination complaints.<sup>21</sup> Under these procedures, an agency may accept a discrimination complaint only when "[t]he complainant brought to the attention of the Equal Employment Opportunity Counselor [within the offending agency] the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the allegedly discriminatory

<sup>15</sup> The statute provides as follows: "All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

<sup>16</sup> The statute states, "Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a). . . ." 42 U.S.C. § 2000e-16(b).

<sup>17</sup> The statute requires:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, . . . or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e-16(c).

<sup>18</sup> 29 C.F.R. § 1613 (1988).

<sup>19</sup> 29 C.F.R. § 1613.203.

<sup>20</sup> 29 C.F.R. § 1613.204(d)(4).

<sup>21</sup> 29 C.F.R. § 1613.214(a)(1)(i).

event. . . ."<sup>22</sup> The regulation provides for extension of the thirty-day limitation for circumstances beyond the complainant's control or for other reasons considered sufficient by the agency.<sup>23</sup>

If an agency-designated EEO Counselor fails to satisfactorily dispose of the federal employee's complaint through informal adjudication within twenty-one calendar days, the agency must send the employee written notice of his<sup>24</sup> right to file a formal complaint with the appropriate agency official within fifteen calendar days of receipt of the notice.<sup>25</sup> If the employee remains dissatisfied after the official's decision, he has twenty calendar days after receipt of the agency's notice of final decision to appeal to the EEOC.<sup>26</sup> It is important to note that, until the EEOC receives the plaintiff's appeal, all action occurs within the allegedly offending agency. Within this forum the opportunity for coercion is great.

When the EEOC makes a final determination on a complaint, it notifies the aggrieved employee of his right to file a civil action pursuant to Title VII. Upon receipt of this "right to sue" letter, the employee has thirty days to file a civil action in a federal district court.<sup>27</sup>

### C. Circuit Court Treatment of Equitable Tolling of Title VII Time Limits Against the Federal Government

As this note has discussed, unless expressly provided for, sovereign immunity should completely bar federal courts' subject matter jurisdiction over a Title VII claim against the United States where the plaintiff has missed one of the aforementioned time limits.<sup>28</sup> Therefore, unless Congress somewhere provided for equitable estoppel, waiver, or tolling, courts lack the power to invoke these doctrines to assume jurisdiction in Title VII actions against the federal government.<sup>29</sup>

Circuit Courts disagree over whether to invoke such principles to assume jurisdiction over untimely Title VII actions against the

<sup>22</sup> *Id.*

<sup>23</sup> 29 C.F.R. § 1613.214(a)(4) states:

The Agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

*Id.*

<sup>24</sup> This note is gender neutral. The pronoun he is used for simplicity.

<sup>25</sup> 29 C.F.R. § 1613.213(a).

<sup>26</sup> 29 C.F.R. § 1613.233(a).

<sup>27</sup> 29 C.F.R. § 1613.282.

<sup>28</sup> See *supra* text accompanying note 10.

<sup>29</sup> See *supra* text accompanying notes 9-13.

government.<sup>30</sup> Three basic approaches to this problem exist. First, some circuit courts accept jurisdiction over all untimely Title VII claims upon a sufficient equitable showing.<sup>31</sup> This note will refer to this approach as the "liberal standard."<sup>32</sup>

Second, one circuit declines jurisdiction over almost all untimely Title VII cases.<sup>33</sup> Under this approach, if the plaintiff misses a time limit applicable while the complaint was still within the allegedly offending agency, the plaintiff must show that one of the regulatory exception provisions applies; if the plaintiff misses the statutory thirty-day time limit, he must show affirmative governmental misconduct before the court will accept jurisdiction over an untimely claim.<sup>34</sup> This note refers to this approach as the "strict standard."<sup>35</sup>

Third, other circuits accept jurisdiction over untimely Title VII complaints so long as the plaintiff missed the time limit while the complaint was still within the offending agency. These circuits, however, consider time limits applicable after the complaint leaves the allegedly offending agency, especially the statutory thirty-day limit, as jurisdictional prerequisites to suit.<sup>36</sup> This note refers to this approach as the "intermediate standard."<sup>37</sup>

### 1. *The Liberal Standard*

Upon an adequate equitable showing by the plaintiff, courts applying the liberal standard accept jurisdiction over untimely Title VII claims against the federal government, regardless of the stage of the proceedings, or whether the time limit is statutory or agency promulgated.<sup>38</sup> Courts applying this standard reject the jurisdic-

<sup>30</sup> See case cited *supra* note 9.

<sup>31</sup> These include the Third, Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits. See, e.g., *Hornsby v. United States Postal Serv.*, 787 F.2d 87 (3d Cir. 1986); *Aronberg v. Walters*, 755 F.2d 1114 (4th Cir. 1985); *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam v. United States Postal Serv.*, 674 F.2d 860 (11th Cir. 1982); *Parks v. Dunlop*, 517 F.2d 785 (5th Cir. 1975); *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1972).

<sup>32</sup> See *infra* text accompanying notes 38-46.

<sup>33</sup> This is the Seventh Circuit. See, e.g., *Sims v. Heckler*, 725 F.2d 1143 (7th Cir. 1984).

<sup>34</sup> See *infra* text accompanying notes 46-67.

<sup>35</sup> See *infra* text accompanying notes 46-90.

<sup>36</sup> These include the Eighth and Ninth Circuits. See, e.g., *Cooper v. United States Postal Serv.*, 740 F.2d 714 (9th Cir. 1984); *Scott v. St. Paul Postal Serv.*, 720 F.2d 524 (8th Cir. 1983) (per curiam), *cert. denied*, 465 U.S. 1083 (1984).

<sup>37</sup> See *infra* text accompanying notes 91-98.

<sup>38</sup> See, e.g., *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984) (holding that equitable considerations require tolling the thirty-day limit for federal plaintiff to bring cause of action in federal district court); *Milam v. United States Postal Serv.*, 674 F.2d 860 (11th Cir. 1982) (timely filing in federal district court is not a jurisdictional prerequisite to suit in a Title VII action against the government); *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir.

tional label for Title VII time limits outright and subject all such time limits to equitable tolling or waiver.<sup>39</sup>

These courts justify the liberal standard by assuming that *Zipes v. Trans World Airlines, Inc.*<sup>40</sup> resolves whether a federal court may assume jurisdiction over an untimely Title VII claim both in federal and private Title VII actions. In *Zipes*, a union sued TWA, a private employer, for sex discrimination in violation of Title VII.<sup>41</sup> The Seventh Circuit barred most of the claims for claimants' failure to file timely charges with the EEOC.<sup>42</sup> The Seventh Circuit held that, although the plaintiffs had legitimate claims, lack of timely filing deprived the district court of subject matter jurisdiction to hear the claims. Moreover, the time limits were not subject to tolling or waiver such as to allow the court to obtain jurisdiction.<sup>43</sup>

In reversing, the Supreme Court held that timely filing "is not a jurisdictional prerequisite to suit in federal court, but . . . like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."<sup>44</sup> The Court reasoned, "a technical reading [of Title VII statutes] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'"<sup>45</sup>

Despite the Supreme Court's apparent acceptance of equitable creation of jurisdiction in Title VII actions, *Zipes* involved a dispute between private litigants. Between a private and federal litigant, sovereign immunity renders resolution of the jurisdictional issue more complex. The Court has not yet expressly addressed the circumstances under which a court may assume jurisdiction over an untimely Title VII claim against the federal government.<sup>46</sup>

1982) (holding that plaintiff can show equitable reasons for failure to file on time in federal district court).

<sup>39</sup> See, e.g., 738 F.2d at 1110 ("In view of the principle that Title VII 'is a remedial statute to be liberally construed in favor of victims of discrimination,' we conclude that the thirty-day limitation of section 2000e-16(c) is not jurisdictional and may be subject to equitable tolling in appropriate cases.") (quoting *Davis v. Valley Dist. Co.*, 522 F.2d 827, 832 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977)).

<sup>40</sup> 455 U.S. 385 (1982).

<sup>41</sup> *Id.* at 388. The airline grounded all female flight attendants who became mothers even though their male counterparts who became fathers continued flying.

<sup>42</sup> *Id.* at 389-90.

<sup>43</sup> *Id.* at 392-93.

<sup>44</sup> *Id.* at 393. The Court also stated:

By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

*Id.* at 398.

<sup>45</sup> *Id.* at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)).

<sup>46</sup> See case cited *supra* note 9.

## 2. *The Strict Standard*

Courts that apply the strict standard generally refuse to accept jurisdiction over untimely Title VII claims.<sup>47</sup> Under this standard, the court will only assume such jurisdiction in one of two circumstances: first, if the employee misses an agency-promulgated time limit, he must show that one of the exceptions enumerated in 29 C.F.R. § 1613.214(a)(4) applies;<sup>48</sup> second, if the employee misses the statutory thirty-day time limit for filing in district court, he must demonstrate affirmative governmental misconduct.<sup>49</sup>

In *Sims v. Heckler*,<sup>50</sup> the Seventh Circuit explained its view that all Title VII time limits, whether promulgated by statute or by an agency pursuant to the statute, are jurisdictional. In *Wolfolk v. Rivera*<sup>51</sup> the Seventh Circuit explained when a court should apply the agency promulgated exceptions enumerated in 29 C.F.R. section 1613.214(a)(4) to agency time limits.

*Sims* involved a black Department of Health and Human Services (HHS) employee. In December 1976, *Sims* complained to his EEO Counselor that HHS had engaged in racial discrimination against him.<sup>52</sup> *Sims*' complaint came eight months after the time limit for filing with the EEOC had expired.<sup>53</sup> On February 9, 1977, *Sims* and his EEO counsellor abandoned their attempts to informally resolve *Sims*' complaint, after which *Sims* formally filed with the HHS.<sup>54</sup> During the next five years, "dispositions were proposed, settlements were suggested, a hearing was held, and an extensive report was filed,"<sup>55</sup> after which HHS finally dismissed *Sims*' complaint.<sup>56</sup> Nevertheless, while his administrative claim was pending, *Sims* filed a Title VII action against the agency in federal district

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<sup>47</sup> See *Sims v. Heckler*, 725 F.2d 1143, 1146 (7th Cir. 1984) ("only an act which amounts to 'affirmative misconduct' can estop the government from asserting a defense").

<sup>48</sup> See *supra* text accompanying note 26.

<sup>49</sup> See, e.g., *Sims*, 725 F.2d at 1146.

<sup>50</sup> 725 F.2d 1143 (7th Cir. 1984).

<sup>51</sup> 729 F.2d 1114 (7th Cir. 1984).

<sup>52</sup> 725 F.2d at 1144. *Sims*' problems began in March 1975 when the Department of Health and Human Services, citing inadequate job performance, denied *Sims* a semi-automatic seniority promotion. *Sims* claimed that the denial was racially motivated. The court noted that, "the promotion denial soured Mr. *Sims*' attitude toward both his job and supervisors [leading] to incidents which further damaged Mr. *Sims*' prospects for advancement." *Id.*

<sup>53</sup> *Id.* (thirty-day time limit for filing complaint under 29 C.F.R. § 1613.214(a)(1)(i) expired because the complaint was filed in December and the event occurred in March).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* *Sims* filed suit in December 1976. The agency dismissed his complaint in May 1982.

court pursuant to section 2000e-16(c).<sup>57</sup> The court dismissed for lack of subject matter jurisdiction on the grounds that Sims had failed to comply with administrative prerequisites to suit, thus rendering the court powerless to entertain his suit.<sup>58</sup>

On appeal, Sims advanced two arguments. First, Sims sought refuge in section 1613.214(a)(4)'s exceptions to the thirty-day deadline within which he had to notify the EEO counsellor.<sup>59</sup> In rejecting this portion of Sims' claim, the Seventh Circuit held that Sims had given the agency insufficient time to determine whether the agency promulgated exception provisions applied because he had not completed the agency action before suing in federal court.<sup>60</sup>

Next, Sims argued that, even if he had failed to comply with the administrative provisions, the thirty-day time limit was not a jurisdictional prerequisite. Sims further argued that HHS should have been estopped from invoking his late complaint as a defense because HHS had processed his claims for five years without raising such a defense.<sup>61</sup> To support his estoppel argument, Sims relied extensively on the Supreme Court's reasoning in *Zipes*.<sup>62</sup> The Seventh Circuit rejected Sims' use of *Zipes* and denied this claim on sovereign immunity grounds,<sup>63</sup> reasoning that the government could

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<sup>57</sup> See *id.* at 1144. 42 U.S.C. section 2000e-16(c) allows federal employees to file discrimination suits against the federal government. In his complaint, Sims alleged several specific instances where HHS had allegedly discriminated against him. See *id.* at 1144.

<sup>58</sup> *Id.* The court stated, "It has been a rule of 42 U.S.C. section 2000e-16 jurisprudence that exhaustion of administrative remedies is a prerequisite for bringing an action in federal court." *Id.* (citing *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976); *Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1980).

Specifically, the district court held that Sims had failed to comply with administrative prerequisites when he complained to the EEO counsellor on December 15, 1977 for discriminatory acts that allegedly occurred in March and November of 1976. Sims therefore fell outside 29 C.F.R. section 1613.214(a)(1)(i) which required Sims to complain within thirty calendar days of when "[t]he complainant brought to the attention of the Equal Opportunity Counsellor the matter causing him to believe he had been discriminated against . . ." 29 C.F.R. § 1613.214(a)(1)(i).

<sup>59</sup> 725 F.2d at 1145. Recall that 29 C.F.R. section 1613.214(a)(4) directs the EEOC to extend the time limits if the complainant shows he was unaware of such limits or was prevented from complying with them by circumstances beyond his control.

<sup>60</sup> *Id.* The court stated: "We find section 1613.214(a)(4) inapplicable here. The plaintiff failed to make any showing as is required by the first exceptional circumstance, and HHS never reached a deliberate decision regarding possible grounds for an extension, as is clearly contemplated in the second exceptional circumstance." *Id.*

Presumably, if Sims had awaited completion of the agency action and the agency had denied the applicability of one of the exceptions enumerated in 29 C.F.R. § 1613.214(a)(4), Sims could have appealed the agency's decision.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* Recall that *Zipes* held the Title VII time limit not jurisdictional but rather subject to equitable estoppel. See *supra* text accompanying notes 40-45.

<sup>63</sup> The court stated:

It is established that the United States, as sovereign, is immune from suit

not be estopped<sup>64</sup> without a clear showing of affirmative governmental misconduct.<sup>65</sup> The Seventh Circuit distinguished *Zipes* as involving only private parties, finding that the significance of the federal defendant in relation to the jurisdictional issue rendered *Zipes* inapposite.<sup>66</sup> Under this analysis, because Sims was a federal employee, he had failed to overcome the presumption of sovereign immunity to his untimely suit. Moreover, Sims failed to show affirmative governmental misconduct—Sims' last resort in his effort to obtain federal jurisdiction.<sup>67</sup>

*Sims* stands for the proposition that, under the strict standard, all Title VII filing time limits applicable in suits against the federal government are jurisdictional prerequisites to suit in federal district court. This is true for statutory time limits that the plaintiff missed for reasons not rising to the level of affirmative governmental misconduct and is also true for agency promulgated time limits missed for equitable reasons not covered an exception provision.

Nevertheless, *Sims* leaves two important questions unanswered. First, what must a plaintiff seeking to invoke the administrative exception provisions show in order to succeed? *Wolfolk v. Rivera*<sup>68</sup> answers this first question. Second, how might a plaintiff unable to fit into one of the exception provisions establish affirmative governmental misconduct such as to overcome sovereign immunity? This is discussed in a later part of the note.<sup>69</sup>

In *Wolfolk v. Rivera*, the Seventh Circuit set forth the required showing for a plaintiff who wishes to invoke 29 C.F.R. section 1613.214(a)(4)'s exception provisions. The plaintiff in *Wolfolk*, a black federal employee, sued a federal agency alleging hiring discrimination.<sup>70</sup> Even though *Wolfolk* met GS-12 requirements, the

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save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. . . . Waivers of sovereign immunity are to be strictly construed . . . [and] valid administrative rules legislative in nature have the "force and effect of law."

725 F.2d at 1145 (citations omitted).

<sup>64</sup> *Id.* at 1146 ("[E]ven if the time limitation here were not jurisdictional, the plaintiff would not be entitled to relief because of the long-standing presumption against estopping the federal government from asserting its legal rights.").

<sup>65</sup> *Id.* at 1146 ("There has been no showing that the government's conduct in the case at bar was anything more serious than a mere oversight.").

<sup>66</sup> *Id.* at 1145. The *Sims* court also noted that, although two other circuits had extended *Zipes* to suits under 42 U.S.C. section 2000e-16(c) (citing *Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982) and *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982)), neither decision had considered the significance of the federal defendant in relation to the jurisdictional issue.

<sup>67</sup> *Id.*

<sup>68</sup> 729 F.2d 1114 (7th Cir. 1984).

<sup>69</sup> See *infra* text accompanying notes 139-55.

<sup>70</sup> *Wolfolk* worked for the Minority Business Development Agency ("MBDA"). He

agency hired Wolfolk on September 10, 1979 as a GS-9.<sup>71</sup> At this time, Wolfolk failed to inquire why, despite his qualifications, the agency hired him as a GS-9.<sup>72</sup> On August 14, 1980—eleven months later—Wolfolk received written notice of termination from the the Minority Business Development Agency [MBDA]. On that same day, Wolfolk also learned that the MBDA had hired less qualified white GS-11 employees in Wolfolk's office who performed the same job Wolfolk performed at the rank of GS-9. Finally, on the same day, Wolfolk discovered that his office had been reporting him to Washington as a GS-11.<sup>73</sup>

On September 3, 1980—twenty days after he discovered the discrimination, but eleven months after the agency had hired him — Wolfolk filed his discrimination complaint.<sup>74</sup> After exhausting his administrative remedies and receiving his notice of right to file a civil action, Wolfolk timely filed suit within thirty days in federal district court pursuant to 42 U.S.C. section 2000e-16(c).<sup>75</sup> The district court dismissed Wolfolk's complaint concluding that Wolfolk had failed to present his discrimination complaint to the MBDA's EEO counsellor within thirty days of the date of the allegedly discriminatory act—his hiring as a GS-9.<sup>76</sup> In reversing the district court,<sup>77</sup> the Seventh Circuit noted that the complaint had properly alleged that Wolfolk "lacked knowledge of facts which would have supported a discrimination claim" because of "circumstances beyond his control."<sup>78</sup> Wolfolk, therefore, fit squarely within the regulation's exception provision. The Seventh Circuit remanded the case for a determination of whether Wolfolk should have known of the hiring

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had responded to an announcement of available MBDA positions at the grades of GS-9, 11, or 12, depending upon the applicant's experience. The GS system is the government's system of employee seniority. Essentially, the higher the GS number, the more senior the employee. 729 F.2d at 1114-17.

<sup>71</sup> *Id.* at 1116.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Wolfolk filed his discrimination complaint with the Office of Civil Rights in the U.S. Department of Commerce. He received final notification of his right to sue from the EEOC on about May 9, 1981.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1115.

<sup>77</sup> *Id.* at 1117.

<sup>78</sup> *Id.* The Court stated:

[29 C.F.R. § 1613.214(a)(4)] provides for exceptions to the thirty-day limit in certain circumstances . . . .

. . . . .

'The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.'

discrimination prior to August 14, 1980, the date he first learned his agency reported him at a level of GS-11.<sup>79</sup>

In deciding whether *Wolfolk* was prevented "by circumstances beyond his control" from discovering discriminatory facts, the Seventh Circuit expressly rejected a subjective test and instead instructed the district court to apply a reasonableness standard.<sup>80</sup> The court reasoned:

A person is "prevented by circumstances beyond his control" from submitting a discrimination charge until the time when "facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."<sup>81</sup>

The Seventh Circuit went on to explain that "[w]hen the point in time has been reached, a person must submit the matter to the agency's EEO counselor within thirty days in order to take advantage of the exception at issue here."<sup>82</sup> The court adopted this standard "because it [struck] an appropriate balance between fairness to the claimant and the importance of beginning the administrative process of investigation and conciliation in a timely manner."<sup>83</sup>

Although the Fifth Circuit originally had set forth this test in the context of a Title VII action between private parties,<sup>84</sup> the Seventh Circuit in *Wolfolk* adopted it as consistent with the broad language of the regulation as applied to a federal plaintiff.<sup>85</sup> *Wolfolk* also suggested that the ideal case for application of the regulation's exception provision was a case where, as in the instant case, the employer had sole access to the facts concerning the discrimination.<sup>86</sup>

In distinguishing *Wolfolk* and *Sims*, the Seventh Circuit noted that *Sims*, unlike *Wolfolk*, had failed to show applicability of the regulation's exception provisions. Therefore, sovereign immunity rendered the regulatory thirty-day time limit a jurisdictional prerequisite and time barred *Sims*' claim.<sup>87</sup> In *Wolfolk*, the Seventh Circuit justified its use of a private Title VII case to adjudicate *Wolfolk*'s claim against a federal defendant despite sovereign immunity be-

<sup>79</sup> *Id.* at 1117, 1120.

<sup>80</sup> *Id.* at 1117.

<sup>81</sup> *Id.* at 1117 (quoting *Reeb v. Economic Opportunity of Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Reeb v. Economic Opportunity of Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975).

<sup>85</sup> 729 F.2d at 1118 ("[E]quitable considerations require application of the exception found in the regulation .").

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1119.

cause, the federal regulation's exception . . . is similar in scope to the tolling principles applicable in private Title VII actions."<sup>88</sup> Nevertheless, the Seventh Circuit nowhere explains in which cases the regulatory exception provisions were meant to be similar in scope to equitable principles in private Title VII actions and where they were meant to differ in scope. As a practical matter, given the *Wolfolk* test, it is difficult to imagine a case where equitable principles would apply but where the regulatory exception provisions would not. Nevertheless, the *Wolfolk* court noted that its holding did not eradicate the differences between private and federal Title VII actions because federal employees were limited to the enumerated exceptions while private employees had a potentially wider range of equitable exceptions.<sup>89</sup>

In summary, the strict standard considers all Title VII time limits in actions against a federal plaintiff to be jurisdictional. A plaintiff who misses such a time limit may only sue in federal court under one of two circumstances: first, to toll 42 U.S.C. section 2000e-16(c)'s statutory thirty-day limit, the employee must show affirmative governmental misconduct; second, to toll an EEOC promulgated time limit, the employee must show that his behavior was consistent with that of a person with a reasonably prudent regard for his rights similarly situated to the plaintiff.<sup>90</sup>

### 3. *The Intermediate Standard*

Courts that apply the intermediate standard equitably toll or waive Title VII time limits to gain jurisdiction over untimely Title VII cases up to and including the time when the complaint leaves the allegedly offending agency.<sup>91</sup> After the first interagency filing, however, these courts consider time limits to be jurisdictional prerequisites to suit.<sup>92</sup> *Cooper v. Bell*<sup>93</sup> illustrates the Ninth Circuit's ap-

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* As will be shown *infra* text accompanying notes 134-38, the intermediate standard obviates the need for such fine distinctions.

<sup>90</sup> See *infra* text accompanying notes 139-55.

<sup>91</sup> In the words of one Court: "All of the Ninth Circuit cases that have referred to Title VII filing periods as 'jurisdictional' have involved the [time limit for filing in federal district court]." *Cooper v. Bell*, 628 F.2d 1208, 1214 n.10 (9th Cir. 1980). See also *Scott v. St. Paul Postal Serv.*, 720 F.2d 524, 525 (8th Cir. 1983) (per curiam), *cert. denied*, 465 U.S. 1083 (1984) (federal court lacks subject matter jurisdiction because of untimely complaint); *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1084 (9th Cir. 1983) (holding that plaintiff's filing of a request for appointment of counsel along with a right-to-sue letter could be deemed filing of a civil action within the thirty-day jurisdictional period); *Mahroom v. Hook*, 563 F.2d 1369, 1374 (9th Cir. 1977) (thirty-day limit for filing in district court is jurisdictional but does not begin to run until plaintiff receives right-to-sue letter.).

<sup>92</sup> See cases cited *supra* note 91.

<sup>93</sup> 628 F.2d 1208 (9th Cir. 1980).

plication of the intermediate standard to a federal Title VII claim.

In *Cooper*, the plaintiff mailed a letter of resignation to his supervisor at a federal agency after having complained of harassment. One year later, in his federal district court action, Cooper argued that the court should construe his letter of resignation as a complaint.<sup>94</sup> Cooper argued that the court should therefore find that he had filed his complaint with the agency's EEO Counselor within the thirty-day time limit.<sup>95</sup> The district court ruled that the letter of resignation did not satisfy the filing requirement.<sup>96</sup> The Ninth Circuit affirmed, stating that the filing of a complaint in district court after the EEOC rejects the claim is a jurisdictional prerequisite to suit.<sup>97</sup> However, the court went on to compare the first intra-agency filing time limit to a statute of limitations and therefore subject to equitable tolling.<sup>98</sup>

### III

#### EVALUATION OF THE DIFFERENT APPROACHES

##### A. Statutory History of the 1972 Amendments

To evaluate the various standards, one must first examine the statutory history of the 1972 amendments to Title VII to see if it sheds any light on the extent to which Congress intended to waive the federal government's immunity in Title VII. Although the statutory history reveals congressional intent to extend to federal Title VII plaintiffs many of the same remedies that their civilian counterparts enjoy, the statutory history fails expressly to import the total equitable package that civilian employees enjoy.

Congress's Report on the 1972 amendments stated that Congress intended the amendments to extend the same protection to federal employees that civilian employees enjoyed.<sup>99</sup> The House Report explicitly stated, "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employ-

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<sup>94</sup> *Id.* at 1210.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1213 (citing *Mahroom v. Hook*, 563 F.2d 1369, 1374 (9th Cir. 1977)).

<sup>98</sup> *Id.* at 1212-13.

<sup>99</sup> See H.R. REP. NO. 238, 92d Cong., 1st Sess. 25, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2158. The House Report cited President Nixon's Memorandum Accompanying Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970), reprinted in President's Memorandum to Heads of Departments and Agencies, 5 WEEKLY COMP. PRES. DOC. 1098 (Aug. 8, 1969), in which President Nixon stated that "discrimination of any kind based on factors not relevant to job performance must be eradicated completely from federal employment."

ees in the private sector.”<sup>100</sup> Congress recognized that the pre-1972 complaint process impeded federal employment discrimination actions<sup>101</sup> because complainants hesitated to present their complaints, fearing their complaints would only antagonize already hostile supervisors and impair their advancement hopes.<sup>102</sup>

The milieu prior to the first interagency filing justifies this concern. All early filing procedures occur within the agency alleged to have committed the discriminatory act.<sup>103</sup> The plaintiff's superiors have the opportunity to mislead or coerce the plaintiff into missing the thirty-day filing deadline.<sup>104</sup> Absent individual self-restraint, there are few controls that can prevent this coercive activity.<sup>105</sup> Although section 1613.214(a)(4) provides exceptions for plaintiffs who fail to file timely complaints, it is easy to imagine a hypothetical plaintiff who, through threats or coercion, is prevented from timely filing. Similarly, it is easy to imagine a plaintiff who, though aware of the discriminatory act, is unaware that it is discriminatory. Moreover, lacking a clear definition of governmental misconduct sufficient to overcome the presumption of sovereign immunity, such plaintiffs are probably without a remedy.

Congress intended the amendment to create arms-length deal-

<sup>100</sup> H.R. REP. NO. 238, *supra* note 99, at 25.

<sup>101</sup> “The [grievance] system, which permit[ed] the Civil Service Commission to sit in judgment of its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built in conflict of interests.” *Id.* at 2159. *See also supra* text accompanying note 5.

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* text accompanying notes 15-27.

<sup>104</sup> Indeed, the current regulations implicitly recognize the potential for coercion: “The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.” 29 C.F.R. § 1613.213(d). The regulations continue:

The Counsellor shall not attempt in any way to restrain the aggrieved person from filing a complaint . . . [and] shall not reveal the identity of an aggrieved person who consulted the counsellor except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

29 C.F.R. § 1613.213(a)

Denial of equitable principles to a plaintiff at this point could even rise to the level of a due process deprivation. The risk to the plaintiff is high and the probable value of additional procedure at this point is similarly high. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (three distinct factors determine if additional procedure is warranted: (i) affected private interest; (ii) risk of erroneous deprivation through procedures used and the likelihood that additional procedures will provide additional safeguards; (iii) public/governmental interests); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975) (in a rough ordering of priorities in the elements of a fair hearing, an unbiased tribunal is number one).

<sup>105</sup> *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *ADMINISTRATIVE LAW, CASES AND COMMENTS* (1987) (“self control, reinforced by professional attitudes within the public service . . . must not be overlooked, for without it, external controls would be of small moment”).

ing in the complaint procedures to encourage employees to protect their employment rights.<sup>106</sup> The drafters of the 1972 amendments sought to minimize the risks of coercion within the offending agency: "The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved [federal] employees. . . . Aggrieved employees . . . will also have the full rights available in the courts as are granted to individuals in the private sector under Title VII."<sup>107</sup> A system where the courts may equitably extend time limits applicable early in the agency proceedings advances this goal by reducing the effectiveness of coercion.<sup>108</sup> Nevertheless, once the complaint leaves the allegedly discriminatory agency, claims of a lack of arms-length dealing between the offending agency and the aggrieved federal plaintiff lose much of their persuasiveness. After this first interagency filing, congressional concerns with coercion within the workplace should disappear. At this point, it would be perfectly reasonable for courts to assume that Congress was aware that common law notions of sovereign immunity would prevent application of equitable principles against the government absent express congressional intent to the contrary. Thus, Congress must have intended at least 42 U.S.C. section 2000e-16(c)'s time limit as a jurisdictional barrier to suit in federal court. At this point, only a showing of affirmative governmental misconduct should restore jurisdiction over an untimely Title VII claim against the federal government.<sup>109</sup>

Thus, although the statutory history of the 1972 amendments supports those courts that accept jurisdiction over untimely Title VII claims before the first interagency filing, the statutory history fails to support any further expansion of equitable principles to waive or toll the congressionally enacted statutory time limit. The 1972 amendments have no exception provision analogous to those contained in 29 C.F.R. section 1613.214(a)(4) that might support equitable estoppel or waiver of Title VII's statutory time limit.<sup>110</sup> Courts must therefore view the statute's thirty-day time limit for filing in federal district court as a jurisdictional prerequisite to suit.<sup>111</sup> This is consistent with congressional intent. After the EEOC sends the plaintiff a right-to-sue letter, less risk of coercion exists from the

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<sup>106</sup> See *supra* text accompanying notes 4-8.

<sup>107</sup> See S. REP. NO. 415, 92d Cong., 1st Sess. 16 (1971).

<sup>108</sup> Cf. *Cooper v. Bell*, 628 F.2d 1208, 1213 n.9 (9th Cir. 1980) ("[T]he reasons for equitable tolling at the second stage of the process may be less compelling than at the first stage, because by then the employee should have received counselling about how to proceed with his charge. Circumstances might, nonetheless, warrant equitable treatment in a given case.").

<sup>109</sup> See *infra* text accompanying note 139.

<sup>110</sup> See *supra* text accompanying note 23.

<sup>111</sup> See *supra* text accompanying notes 10-13.

offending agency. At this point, the plaintiff has received an unbiased adjudication of his claim, and absent governmental misconduct, there is little probability that the plaintiff has not received fair treatment.

#### IV ANALYSIS

##### A. The Liberal Standard

Courts that apply the liberal standard accept jurisdiction over any untimely Title VII claims upon a sufficient equitable showing, regardless of which time limit the plaintiff has missed<sup>112</sup> and allow the plaintiff to estop the government from raising the defense of failure to comply with the Title VII time limits.<sup>113</sup> The statutory history of the 1972 Amendments supports this approach with respect to time limits applicable before the first interagency filing.<sup>114</sup> Nevertheless, these courts mis-construe *Zipes* in applying it to extend time limits applicable after the first interagency filing, especially the statutory thirty-day limit for filing suit in federal district court.

*Zipes* equitably altered both agency promulgated and statutory time limits in Title VII actions between private parties. When the federal government is the defendant, however, sovereign immunity changes the analysis.<sup>115</sup> After the first interagency filing, the possibility of coercion within the offending agency which concerned Congress no longer exists; the statutory history of the 1972 amendments fails to justify a court assuming jurisdiction over an untimely Title VII claim at this point.<sup>116</sup> The liberal standard thus errs in allowing courts to use these doctrines to create jurisdiction after the first interagency filing.

##### B. The Strict Standard

Under the strict standard, compliance with Title VII time limits is a jurisdictional prerequisite to suit in federal district court.<sup>117</sup> Absent affirmative governmental misconduct, or a showing that one of the agency promulgated exceptions applies, courts applying the strict standard refuse to toll either statutory or agency-promulgated time limits.<sup>118</sup>

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112 See *supra* note 36 and cases cited *supra* note 38.

113 See *supra* text accompanying notes 38-46.

114 See *supra* text accompanying notes 99-111.

115 See *supra* text accompanying notes 10-13.

116 See *supra* text accompanying notes 99-111.

117 See *supra* text accompanying notes 47-91.

118 *Id.*

The Seventh Circuit correctly rejects *Zipes* to justify equitable tolling or waiver of both agency and statutory time limits for three reasons. First, courts must strictly construe the waiver statute under general common law principles of interpretation.<sup>119</sup> Because the statute does not provide for equitable tolling of the thirty-day filing limit Seventh Circuit courts refuse jurisdiction over untimely Title VII cases where the plaintiff has missed the statutory thirty-day limit. Second, the Seventh Circuit holds that valid administrative rules have the force and effect of law<sup>120</sup> and thus define the terms of the sovereign's consent to suit<sup>121</sup> such that the courts must construe them strictly.<sup>122</sup> Third, even if the time limits are not jurisdictional, the Seventh Circuit will not estop the government as a general principle of common law.<sup>123</sup>

The strict standard approach properly refuses jurisdiction over cases where the plaintiff has missed 42 U.S.C. section 2000e-16(c)'s statutory time limit. Courts must construe waivers of sovereign immunity strictly as a general principle of common law.<sup>124</sup> The statutory history of the 1972 amendments fails to clearly express congressional intent to grant courts the power to waive the statute's time limit<sup>125</sup> Therefore, as a matter of statutory construction, courts must refuse to apply principles of equitable estoppel and waiver to the statute's thirty-day filing requirement.

Presumably, however, the strict standard would refuse jurisdiction over certain untimely Title VII claims against the federal government where equitable jurisdiction would otherwise exist for a civilian defendant.<sup>126</sup> This approach fails to recognize Congress' express concern with intra-agency coercion and too rigidly attempts to shoehorn generally applicable equitable principles into the two regulatory exception provisions.<sup>127</sup> Equitable tolling at the initial

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<sup>119</sup> *Sims v. Heckler*, 725 F.2d 1143, 1145 (7th Cir. 1984).

<sup>120</sup> *Id.* at 1146 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979)); *United States v. Nixon*, 418 U.S. 683, 695 (1974).

<sup>121</sup> 725 F.2d at 1146.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See *supra* text accompanying notes 10-13.

<sup>125</sup> See *supra* text accompanying notes 99-111.

<sup>126</sup> See *supra* text accompanying note 89.

<sup>127</sup> See *supra* text accompanying notes 99-111. Indeed, unless the Seventh Circuit is surreptitiously importing equitable principles into the regulation's exception provisions—which it claims it is not, see *supra* text accompanying note 89—it is difficult to imagine why circumstances should *per se* remain out of the plaintiff's control until facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights—the *Wolfolk* test. For example, a plaintiff who, upon pain of discharge, fails to submit a complaint against a hostile supervisor would fail the *Wolfolk* test because the plaintiff would be aware of the discriminatory event. Apparently, so long as this did not rise to the level of affirmative governmental misconduct, a civilian plaintiff who suffered this injustice

stages of the complaint process is consistent with congressional intent and the regulatory scheme.<sup>128</sup> Congress did not premise federal court jurisdiction upon complaint to the EEO Counselor within thirty days. Rather, Congress simply required the plaintiff to exhaust all administrative remedies<sup>129</sup> and empowered federal agencies to promulgate regulations to implement Title VII's remedies.<sup>130</sup> Moreover, the EEOC did not intend to promulgate rigid jurisdictional requirements.<sup>131</sup> A plaintiff denied equitable jurisdiction for lack of timeliness while the complaint was still within the offending agency would be no better off today than under the pre-1972-amendments regime where the Civil Service Commission carried out the government's employment discrimination program.<sup>132</sup> The strict standard neither sufficiently considers Congress' remedial purpose nor the numerous equitable considerations present through the first interagency filing that the regulation's exception provision might rectify.<sup>133</sup>

### C. The Intermediate Standard

Both the statutory history of the 1972 amendments and the common law principles of sovereign immunity support the intermediate standard. Moreover, by distinguishing action occurring within the allegedly discriminatory agency from action occurring outside of such agency, the intermediate standard obviates the need for fine distinctions required by the strict standard and conforms perfectly to Congress' stated purpose. Courts that apply the intermediate standard treat time limits up to and including the first interagency time limit like statutes of limitations<sup>134</sup> subject to equitable tolling or waiver.<sup>135</sup> As the plaintiff proceeds in the complaint process, however, these courts require him to make an increasingly greater equitable showing before they will toll a Title VII time limit.<sup>136</sup> Finally, these courts treat the statutory time limit for filing in federal

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could equitably access a Seventh Circuit court while a federal plaintiff could not. This seems contrary to the statute's purpose in removing enforcement power from the Civil Service Commission and vesting it in the EEOC.

<sup>128</sup> See *supra* text accompanying notes 99-111.

<sup>129</sup> 42 U.S.C. § 2000e-16(c).

<sup>130</sup> 42 U.S.C. § 2000e-16(b).

<sup>131</sup> *Cooper v. Bell*, 628 F.2d 1208, 1213 (9th Cir. 1980) ("The regulations themselves . . . indicate that the [agency] did not intend the first filing period as a rigid jurisdictional requirement" and that equitable tolling at the initial stage of the process is consonant with the regulatory scheme.).

<sup>132</sup> See *supra* text accompanying notes 1-5.

<sup>133</sup> Again, the legislative history of the 1972 amendments implicitly addresses both of these considerations. See *supra* text accompanying notes 99-121.

<sup>134</sup> See *supra* text accompanying notes 91-98.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

district court as jurisdictional and therefore not subject to equitable waiver or tolling.<sup>137</sup> Thus the intermediate approach is the only approach consistent both with sovereign immunity and Congress' intent set forth in the statutory history of the 1972 amendments.<sup>138</sup>

#### IV

##### AFFIRMATIVE GOVERNMENTAL MISCONDUCT

Even if we assume that a plaintiff who misses one of the statutory time limits relinquishes federal court jurisdiction, the Supreme Court has suggested that a plaintiff who can show affirmative governmental misconduct will not be foreclosed from federal court jurisdiction.<sup>139</sup> Traditionally, courts have refused to estop the government no matter how compelling the circumstances.<sup>140</sup> The Court has yet to define the standard for governmental misconduct sufficient to invoke estoppel against the government,<sup>141</sup> but the Tenth Circuit in *Martinez v. Orr*<sup>142</sup> did provide a standard for evaluating governmental misconduct.

In *Martinez*, the plaintiff brought to the EEOC a discrimination action against the Air Force. When EEOC negotiations failed, the EEOC sent Martinez his right-to-sue letter.<sup>143</sup> The right-to-sue letter gave Martinez the option either to sue in district court within the statutory thirty days or to request reconsideration of the EEOC's decision.<sup>144</sup> Martinez chose the latter and after ten months the EEOC denied reconsideration. This denial came nine months after

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* text accompanying notes 99-121.

<sup>139</sup> See, e.g., *Immigration and Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (suggesting that affirmative misconduct might provide a ground for estopping the federal government from raising a defense); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961) (suggesting that governmental misconduct provides for estoppel in appropriate cases); *Sims v. Heckler*, 725 F.2d 1143, 1146 (7th Cir. 1984) (citing *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir. 1982)); Note, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, *supra* note 13, at 627 (proposing a standard for evaluating affirmative misconduct).

<sup>140</sup> See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (courts consistently have refused to estop the government where an eligible applicant lost benefits because of erroneous replies to oral inquiries); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (the terms and conditions for creating liability on the part of the government define the parameters of sovereign immunity, regardless of reliance on governmental agent's misstatement); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("It is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."). See also Note, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, *supra* note 13, at nn.33 & 36.

<sup>141</sup> See generally, Note, *Equitable Estoppel Against the Government*, *supra* note 13, at 552 (seeking to develop uniform principles of government estoppel).

<sup>142</sup> 738 F.2d 1107 (10th Cir. 1984).

<sup>143</sup> *Id.* at 1109.

<sup>144</sup> *Id.*

the thirty-day federal time limit expired.<sup>145</sup> Martinez next filed suit in district court but the court dismissed his claim as untimely<sup>146</sup> because, contrary to what Martinez had been told, the request for reconsideration had not tolled the thirty-day limit.<sup>147</sup> On appeal, Martinez argued that, even if the thirty-day time limit presented a jurisdictional bar, equitable considerations required the court to toll the time limit. The Tenth Circuit agreed.<sup>148</sup> The court held that mailing the right-to-sue letter together with the option for reconsideration constituted " 'active deception' sufficient to invoke the powers of equity."<sup>149</sup> On this basis Martinez, could estop the government from raising the lack-of-timeliness defense, even as to the statutory thirty-day limit.<sup>150</sup>

Although the court never referred directly to affirmative misconduct, " 'active deception' sufficient to invoke the powers of equity" seems to embody the concept of affirmative misconduct.<sup>151</sup> The court also explained that equitable tolling might be appropriate where a past employer, the state, the federal agency, or the courts "lulled" the plaintiff into inaction.<sup>152</sup> *Martinez* implicitly balanced the governmental interest in denying the plaintiff equitable estoppel against the resultant harm to the plaintiff.<sup>153</sup>

Courts should evaluate governmental misconduct under the following procedure. First, courts must apply the threshold inquiry of whether the governmental interest outweighs the plaintiff's interests. If the balance does not favor the government, the plaintiff then has the opportunity to show that governmental agents engaged in

<sup>145</sup> *Id.* Martinez believed that the request for reconsideration had tolled the thirty-day limit.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1110 (citations omitted).

<sup>150</sup> *Id.* at 1111. The court stated:

Absent an explicit indication that the right to sue permanently expires after thirty days notwithstanding the pendency of a reconsideration request, we do not think it unreasonable for a pro se recipient of the notice to request EEOC reconsideration on the assumption that if the request were denied, a new thirty day period . . . would arise.

*Id.*

<sup>151</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>152</sup> 738 F.2d at 1110.

<sup>153</sup> *Id.* at 1112. ("This case does not involve an unreasonable or unnecessary delay. Nor does it constitute an attempt to revive a long stale claim or otherwise circumvent the statutory period at issue.") This language suggests that the court, at least implicitly, considered the government's interest in repose as one of the factors to be balanced against the plaintiff's need for just dispute resolution. Recall that the Seventh Circuit applied a similar balancing approach when determining whether or not to apply the 29 C.F.R. § 1613.214 exceptions. See *supra* text accompanying note 83. Cf. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

active deception sufficient to invoke the powers of equity.<sup>154</sup> Such active deception might consist of an institutionalized affirmative act—such as in *Martinez*—that misleads or lulls the plaintiff into inaction.<sup>155</sup> Only when the plaintiff satisfies this test should a court estop the government from asserting jurisdictional time limitations in defense to a Title VII claim. This test not only satisfies the common law presumption strictly construing waivers of sovereign immunity absent a showing of affirmative misconduct, it also implements Congress' broad remedial purpose.

### CONCLUSION

In 1972, Congress amended the 1964 Civil Rights Act, in part to provide federal employees with a private cause of action in cases of federal employment discrimination. As such, Congress expressly waived its sovereign immunity from suit. The common law presumes that such waivers of sovereign immunity must be strictly construed. Nevertheless, the 1972 Amendments failed to provide expressly for recognition of the equitable doctrines of estoppel, tolling, or waiver in Title VII actions against the federal government. Thus, the extent to which Congress waived the government's immunity, and consequently the extent to which federal courts may apply equitable principles to assume jurisdiction over untimely Title VII claims, remains unclear. The statutory history of the 1972 Amendments provides some insight, but tension still exists between the statute's express remedial purpose and the lack of express provision for courts to use equity to assume jurisdiction over untimely but compelling cases.

This note suggests an analytical framework for courts to use to determine whether to assume subject matter jurisdiction over Title VII claims whose prerequisites have not strictly been met. The court must determine whether the plaintiff missed a time limit while his complaint was still within the allegedly discriminatory agency. If so, upon sufficient equitable showing, courts should utilize equitable principles to assume jurisdiction over otherwise untimely Title VII claims against the United States. A plaintiff has made a sufficiently equitable showing if the plaintiff acted as a person similarly

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<sup>154</sup> Absent more fact patterns like that presented in *Martinez*, this note does not resolve the question of what facts are sufficient to invoke the powers of equity.

<sup>155</sup> This requires the plaintiff not only to show active deception such as to mislead a plaintiff with a fairly acute sense of his Title VII rights, but also to show that he was actually misled. Active deception need not be malicious. It need only be some institutionalized affirmative act—such as mailing the right to sue letter with a request for consideration—that misleads a plaintiff. The fact that the federal Title VII plaintiff is, by this time, quite familiar with his Title VII remedies suggests that the active deception will have to be quite misleading.

situated to the plaintiff with a reasonably prudent regard for his rights. If the plaintiff makes such a showing, the court should toll or waive the time limit, estop the government from asserting non-compliance with the time requirements as a defense, and assume jurisdiction over the case.

Once the complaint leaves the allegedly offending agency, and especially after the plaintiff receives the right-to-sue letter, courts should refuse jurisdiction over untimely Title VII claims unless the plaintiff shows that the government engaged in affirmative misconduct. Such a plaintiff must show that, despite his diligence in pursuing relief, an institutionalized procedure exists that results in active deception sufficient to invoke the powers of equity that in fact misled or lulled the plaintiff into inaction.

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