1978

Continuing Violations of Title VII: A Suggested Approach

Minn. L. Rev. Editorial Board

Note: Continuing Violations of Title VII: A Suggested Approach

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[1] prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[2] The Act places a large part of the burden of enforcement squarely on the victims of discrimination.[3] With the exception of "pattern or practice" cases,[4] only an aggrieved person, acting as a "private attorney general,"[5] can bring suit directly against a discriminating employer.[6] A private party, however, has only 180 days[7] from

---

1. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1970 & Supp. V 1975).

2. 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 . . . .

Id. § 2000e-2(a).

3. *See* 42 U.S.C. § 2000e-5(b), (e) (1970 & Supp. V 1975); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1222 (9th Cir. 1971) (objectives obtained by enforcement initiated by aggrieved individuals); 110 CONG. REC. 14186-90 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966).

4. The Attorney General may bring a civil action whenever he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter. . . ." 42 U.S.C. § 2000e-6(a) (1970). The EEOC was given authority to investigate and act on a pattern or practice charge by the 1972 amendments, which also provided that such a charge could be filed by a member of the Commission. Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 707(e), 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e-6(e)(Supp. V 1975)). *See* note 10 *infra*.

5. *See* Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968). In *Jenkins*, the court also referred to the individual as taking on the "mantel of the sovereign." *Id.* at 32.

6. 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. V 1975). A union, acting in its representative capacity, can be an "aggrieved person" and file charges with the EEOC. Chemical Workers Local 795 v. Planters Mfg. Co., 259 F. Supp. 365 (N.D. Miss. 1966).

7. 42 U.S.C. § 2000e-5(e)(Supp. V 1975). If an applicable state or local agency has its own enforcement precedures, the time for filing is the earlier of 300 days from the date of the alleged illegal practice or 30 days after notice is received by the complainant that the state or local agency has terminated its proceedings. *Id.* Both this 300/30-day period and the standard 180-day period were established by the 1972 amendments. As originally passed in 1964, Title VII allowed only 90 days for filing in cases where no local or state agency was involved, and 180 days when state agency involvement was present. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 260 (1964). A thorough examination of the legislative history gives no indication as to why the 90-day limit was originally chosen. Most of the legislative history surrounding the passage of Title VII comes from debates on the floor of the Senate and

the date of an alleged unlawful employment practice to exercise this power of enforcement by filing a charge with the Equal Employment Opportunity Commission (EEOC).[8] As laypersons, employees often are not fully aware of their rights under Title VII or the limitations thereon, and a 180-day time limit for filing complaints may be prohibitively short.[9] Thus, there seems to be a fundamental tension in Title VII between its system of private enforcement and its short limitations period.

The courts have attempted to resolve this tension by developing the "continuing violation" doctrine. This doctrine circumvents the time limitations for filing, thereby bringing an untimely charge within the jurisdiction of the EEOC and the courts, and aiding the "private attorney general" in his effort to effectuate the policies of Title VII.

In general, the courts have found a continuing violation when the discriminatory acts of an employer over a period of time form a sufficiently integrated pattern to constitute, in effect, a single discriminatory act.[10] If some part of this pattern occurred within the 180 days

---

therefore fails to clearly express congressional intent. *See generally* Vaas, *supra* note 3, at 457.

For the sake of convenience, this Note will refer only to the 180-day figure in discussions of Title VII's limitations period. For the same reason, this Note also will refer to the party filing a complaint with the EEOC as "employee" and the party committing the alleged discriminatory act as "employer," although this is not always the case. *See* 42 U.S.C. §§ 2000e-2(b)-(d) (1970); note 6 *supra*.

8. The EEOC is the federal agency created by the Civil Rights Act of 1964 and charged with the responsibility of investigating alleged violations of Title VII. 42 U.S.C. § 2000e-4(a) to 4(i) (1970).

9. Courts that refuse to dismiss the untimely complaint of an employee are often influenced by the fact that the employee is a layperson. *See, e.g.*, EEOC v. Western Publishing Co., 502 F.2d 599, 602-03 (8th Cir. 1974). Factors other than a layperson's lack of knowledge also may contribute to delay in filing charges of discrimination. For example, an employee may fear reprisal by the employer, *see* EQUAL EMPLOYMENT OPPORTUNITY: COMPLIANCE AND AFFIRMATIVE ACTION 16 (T. Powers ed. 1969), or may refer the matter to a union which may decide to take no action until after the 180 days have elapsed.

10. Patterns of employer discrimination are given a special status by the Act. The provisions of the Civil Rights Act authorizing the Attorney General to bring pattern or practice suits directly against an employer, *see* note 4 *supra*, became effective immediately upon enactment, although the rest of Title VII did not become effective until July of 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 266 (1964). Evidently, Congress considered patterns of discrimination by employers an evil of such magnitude that the financial resources of the government were to be contributed toward their immediate eradication. *See* Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. INDUS. & COM. L. REV. 495, 501 (1966).

It is possible that the courts have seized upon the term "pattern" as a license to create "equitable modifications" to the provisions of the Act—specifically the limitations period requiring timely filing with the EEOC. When other issues are raised in

prior to filing of the complaint, the jurisdictional requirements of Title VII are deemed satisfied, and the employer's liability is often extended beyond the limitations period to encompass the whole "act."[11] To the extent that employer liability is extended in this manner, the requirement that charges must be filed with the EEOC within 180 days has no effect.

Three significant problems currently surround the concept of continuing violation. First is the considerable confusion that exists over how to determine whether a "pattern of discrimination" exists

---

Title VII litigation, such as mootness, class standing, and relief, special priority is given by the courts to "patterns" of discrimination. In Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), for example, the complainant alleged "plant-wide, system-wide" racial discrimination primarily in the denial of promotions. Within a few weeks after the charge was filed, the employer offered, and the aggrieved employee accepted, the desired promotion. Nevertheless, the court refused to consider the action moot:

> [T]he charge itself is something more than the single claim that a particular job has been denied [the complainant]. Rather it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination.
>
> Considering that in this immediate field of labor relations what is small in principal is often large in principle, element (2) has extreme importance with heavy overtones of public interest. Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated.

Id. at 32-33 (footnote omitted); *cf.* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1222 (9th Cir. 1971) (discontinuance of a job in controversy does not moot litigation where discrimination in general company employment is alleged).

If a pattern or practice of employer discrimination is established, the courts do not limit relief to those who were employees in the prescribed period prior to the filing of the charge with the EEOC. "Thus, all persons presently subject to the alleged discriminatory policies of the defendant and all persons who have in the past been so subjected and continue to be affected by the same, are proper parties to this action." Briggs v. Brown & Williamson Tobacco Corp., 414 F. Supp. 371, 378 (E.D. Va. 1976). One court has even found that when a pattern or practice is shown, an individual complainant who is no longer directly affected by the employer's alleged discrimination and failed to file a charge on time, still may remain within the class of those properly before the court. Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed,* 496 F.2d 1094 (2d Cir. 1974):

> [The complainant's] individual grievance provides merely the springboard from which to investigate the employer's alleged continuing violation with respect to the class as a whole . . . . This result is not a perversion of the class action device permitting an individual to revive a time barred claim by asserting the grievances of others. Rather, it is a way of defining the jurisdiction-conferring concept of continuing violation so as to carry out the underlying purposes of the Act.

Id. at 578 (footnotes omitted). The court in *Kohn* also asserted that giving a pattern of discrimination overriding importance in comparison with the limitations period of the Act does not frustrate the purposes underlying the latter because a pattern of ongoing discrimination by its very nature is not a stale claim. *Id. But see* notes 116-24 *infra* and accompanying text.

11. *See* text accompanying notes 97-113 *infra.*

in a given case. Second is the question of the doctrine's continuing viability after the Supreme Court's recent decision in *United Air Lines, Inc. v. Evans.*[12] In *Evans,* the Court considered the doctrine, albeit indirectly, and seemed to indicate some disfavor with the entire concept, thereby introducing an additional element of uncertainty for courts charged with applying the doctrine.[13] Indeed, since *Evans,* the lower courts have divided on the question of the doctrine's enduring validity. Third, the continuing violation doctrine, as currently applied, can result in undue prejudice to employers by facilitating the extension of their liability to include acts that occurred years earlier. Since the doctrine looks only to the existence of a "pattern" to determine whether a violation continues and liability should be extended, the policies behind the limitations period may be overridden without explicit consideration.

This Note attempts to define a continuing violation by focusing primarily on language used by the courts and the EEOC in describing and applying the doctrine. Next follows an analysis of the potential impact of *United Air Lines, Inc. v. Evans* on the doctrine, pointing out the problems of prejudice to employers that have arisen through its application. Finally, the Note proposes an alternative to the pattern analysis currently utilized by the courts, in an effort to lessen the doctrine's prejudicial effects while preserving the flexibility necessary to effectuate the purposes of Title VII.

II. THE CONTINUING VIOLATION DOCTRINE

The continuing violation doctrine serves two functions. First, its application provides the courts with jurisdiction over the complaint of an aggrieved employee that was not filed with the EEOC within the statutory limitations period. Second, it imposes liability on an employer for acts committed more than 180 days prior to the filing of the complaint.

The first use of the doctrine is essentially an equitable, common sense modification of the Act's time limitations for filing with the EEOC[14] that seems clearly warranted in light of the fact that charges

12. 431 U.S. 553 (1977).

13. *See* text accompanying notes 77-85 *infra.*

14. The Supreme Court has not decided whether the limitations period of Title VII is to be construed as an absolute jurisdictional bar or a jurisdictional requirement subject to equitable modification. If the former, a court's jurisdiction under Title VII would be limited solely to those acts of employer discrimination that occurred within the limitations period. On the other hand, if the Title VII jurisdictional limitation is considered to be analogous to jurisdictional limitations imposed by traditional statutes of limitations it may properly be subject to equitable modifications, such as tolling. Shell Oil Co. v. Dartt, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided court,* 434 U.S. 99 (1977), is instructive in this regard. In that case, the court

of discrimination are most often filed by laypersons.[15] The primary focus of the courts in this context is whether the employee has alleged enough information in the complaint to permit the inference of a *present* violation. If no present violation can be inferred, the complaint must be dismissed. If, however, the discrimination alleged is not an isolated act but part of an ongoing policy of the employer still in existence and affecting the employee, the violation alleged is considered to be "continuing" and the complaint is deemed timely.[16] Dismissal of the facially untimely complaint in such cases would be a "futile gesture" since the employee could simply file another complaint with the EEOC that would be timely filed.[17]

---

held that the 180-day limitations period for the filing of a complaint under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1970), was jurisdictional in a procedural sense and subject to equitable modification. The court relied on several lower court opinions that had reached the same conclusion with respect to Title VII, including Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928 (5th Cir. 1975), and Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

Those courts that have found continuing violations have construed the limitations period to be "jurisdictional" only in this latter, procedural sense, and have allowed it to be circumvented when the violation alleged was continuing. *See, e.g.*, Reeb. v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 927 (5th Cir. 1975); Jamison v. Olga Coal Co., 335 F. Supp. 454, 458 (S.D. W. Va. 1971); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896 (D. Me. 1970). In the view of these courts,

> the timing provisions [of Title VII] will be subject to the same sort of equitable modifications that are applied to statutes of limitations, with the important additional requirement that these modifications will be applied in the interest of effectuating the broad remedial purposes of the statute. Thus, even in circumstances where a modification might be denied application at the common law, the modification might still be applied if the court felt that doing so would further the purposes of the statute considered as a whole.

Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 927 (5th Cir. 1975).

15. *See, e.g.*, EEOC v. Western Publishing Co., 502 F.2d 599, 602-03 (8th Cir. 1974) ("It is well established that lay complainants' charges are to be construed broadly in a liberal manner in order to effect the 'remedial and humanitarian underpinnings of Title VII and the crucial role played by the private litigant in the statutory scheme.' ") (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970)).

16. *See, e.g.*, Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Hecht v. Cooperative Am. Relief Everywhere, 351 F. Supp. 305 (S.D.N.Y. 1972)(dictum); Moreman v. Georgia Power Co., 310 F. Supp. 327 (N.D. Ga. 1969); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); Banks v. Lockheed-Georgia Co., 46 F.R.D. 442 (N.D. Ga. 1968).

17. [W]hen it is obvious that a Title VII plaintiff is complaining of discriminatory hiring, promotion, or transfer practices, it would seem to be a needless, futile gesture to require that plaintiff to make a formal reapplication for the desired position, simply because the EEOC complaint was not filed within 180 . . . days of the initial application.

Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1181 (N.D. Ga. 1975). *See also*

The second function of the continuing violation doctrine—imposing liability upon an employer for acts committed beyond the limitations period—is not primarily concerned with whether or not a present violation is alleged. A present violation is assumed and the issue becomes whether the present and past acts of the employer can be viewed as one overall act that warrants imposition of liability for all violations.[18]

The definitions of a continuing violation that have been formulated by the courts do not distinguish between these two functions, but rather focus solely on the nature of the discriminatory acts alleged. For example, one court's definition excludes the mere "mechanical consequences" of an employer's act and includes an "affirmative perpetuation" by the employer of the original discrimination.[19] A more succinct, though still ambiguous, definition is that a continuing violation includes any "pattern" of discrimination on the part of the employer but not any specific act.[20] The EEOC approaches the continuing violation in a similar manner through what it calls the "Policy/Policy-Application Distinction":

> A Charging Party may attack a current employment *policy*, in addition to past *applications* of that policy; and, since a policy is by nature continuing, a "policy" charge always is timely filed . . . .
>
> Charges which do not specifically include the work [*sic*] "policy", or otherwise suggest a continuing course of conduct, normally may be read, in context, to allege a continuing, i.e., policy-type, violation.[21]

If a court finds a "pattern" of discrimination, it may assume that the discriminatory acts of the employer continue into the present and that the liability of the employer may properly be extended into the past. Unfortunately, however, mere invocation of the word "pattern" does not decide particular cases, and no clear guidelines have been

---

Egleston v. State Univ. College, 535 F.2d 752 (2d Cir. 1976); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974)(order not appealable); Banks v. Lockheed-Georgia Co., 46 F.R.D. 442, 444 (N.D. Ga. 1968)("[O]ne isolated incident is not being challenged but rather an entire allegedly discriminatory system. In such a situation, there is an alleged continual violation; therefore, filing within a specified time is not required to bring the action before this Court.").

18. Extending employer liability beyond the limitations period of the Act raises questions that require a deliberate inquiry into the competing policies behind the Act's limitations period and its substantive provisions. *See* notes 118-124 *infra* and accompanying text.

19. Kennan v. Pan Am. World Airways, Inc., 424 F. Supp. 721, 726 (N.D. Cal. 1976).

20. *See* Banks v. Lockheed-Georgia Co., 46 F.R.D. 442, 444 (N.D. Ga. 1968).

21. EEOC COMPL. MAN. (CCH) ¶ 4101 (EEOC Compliance Manual § 208.1).

developed by the courts for determining when a "pattern" exists.[22]

An analysis of the various judicial approaches used in continuing violation determinations, however, reveals a number of factors which, when viewed together, aid in determining the showing necessary for finding a "pattern." The first of these factors is inherent in the concept of a "pattern" itself. Clearly, the word "pattern" implies more than one discriminatory act. An isolated act, such as a refusal to hire,[23] a termination,[24] a transfer,[25] or a demotion,[26] is not itself a continuing violation. Even if an employer retains a discriminatory attitude toward his employees, this, without more, will not convert a single discriminatory act into a continuing violation.[27]

When two or more discriminatory acts sufficient to constitute a pattern are found, a continuing violation still will not exist unless at least one of the acts in the pattern occurred within the 180-day limitations period.[28] An employee who alleges several discriminatory acts—for example, general harassment, denial of transfer requests, and demeaning work assignments—still must establish to the satisfaction of a court that at least one of the acts occurred within the limitations period or the court will dismiss for lack of jurisdiction.[29] Thus, an employer who abandons a certain discriminatory policy more than 180 days before a complaint is filed and commits no further discriminatory acts will be free from the threat of any charge

22. The Eighth Circuit's continuing violation test is a good example of how nebulous the inquiry can be:

> We do not purport to construct an acid test as to what may or may not constitute "compelling circumstances" sufficient to warrant a finding of "continuing" discrimination. Each case must be decided upon its own facts with the ultimate result depending upon the complainant's ability to carry his evidentiary burden.

Richard v. McDonnell Douglas Corp., 469 F.2d 1249, 1253 (8th Cir. 1972), *cited with approval in* Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975).

23. *See, e.g.*, Smith v. OEO, 538 F.2d 226 (8th Cir. 1976); Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972) (per curiam).

24. *See, e.g.*, King v. Seaboard Coast Line R.R., 538 F.2d 581 (4th Cir. 1976); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975); Higginbottom v. Home Centers, Inc., 10 Empl. Prac. Dec. 5371 (N.D. Ohio 1975).

25. *See, e.g.*, Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972); Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195 (W.D. Va. 1969).

26. *See, e.g.*, Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176 (N.D. Ga. 1975); Gordon v. Baker Protective Serv., Inc., 358 F. Supp. 867 (N.D. Ill. 1973).

27. *See* Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195, 197 (W.D. Va. 1969) ("regardless of what precipitated" the conduct it becomes final when limitations period passes).

28. *See, e.g.*, Wallace v. International Paper Co., 426 F. Supp. 352, 354 (W.D. La. 1977) (origination of acts only and not entire conduct may extend beyond the 180-day period).

29. Loo v. Gerarge, 374 F. Supp. 1338, 1339-40 (D. Hawaii 1974). *See also* Alleman v. T.R.W., Inc., 419 F. Supp. 625, 626, 629-30 (M.D. Pa. 1976).

under Title VII.[30]

But even a series of discriminatory acts, one of which occurred within 180 days of filing, is not sufficient to constitute a "pattern." The third necessary element is some logical interrelationship between these acts.[31] To find such an interrelationship, the courts have looked to three basic linking "themes": (1) repetition of a discriminatory act over time, (2) the continuing existence of an employment relationship, and (3) the perpetuation of past effects by present discriminatory acts.[32] Although occasionally a continuing violation will be found by virtue of only one of these themes, both repetition over time and an ongoing employment relationship generally must be found in order to establish the interrelationship between discriminatory acts that is necessary to find a continuing violation.[33] Perpetuation of past effects

30. *See* Campbell v. A.C. Petersen Farms, Inc., 69 F.R.D. 457 (D. Conn. 1975) (racially discriminatory grooming standards phased out more than 300 days before filing of the complaint with the EEOC).

31. A pattern of discrimination cannot exist, even when two discriminatory acts are shown, if the connection between them is random. A pattern is "the largest unit of classification . . . constituting a group of phases having several distinguishing and fundamental features in common . . . ." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1657 (3d unabridged ed. 1976).

32. These "themes" may be seen as factors that can be used to link past acts with present violations. One authority has suggested a different approach, viewing the cases as fitting within three independent categories determined by specific factual contexts. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 884-908 (1976). These categories are: (1) a series of independent discriminatory acts one of which occurred within the filing period; (2) the maintenance of a system of discrimination; and (3) the existence of present effects of past discrimination. *Id.* It is not clear from the classification just where a "series of independent actions" ends, and a "system of discrimination" begins, however, and the authors themselves recognize that the continuing violation doctrine "pose[s] very difficult line drawing problems," *id.* at 884. This lack of clarity was recognized in Elliott v. Sperry Rand Corp., No. 4-74-Civ. 627 (D. Minn., July 12, 1978) (motion to amend class certification granted), where the court used the framework suggested by Schlei and Grossman, but noted that "the cases rarely fall neatly into one category or another and there may be additional methods of categorizing the cases . . . ." *Id.* at 4.

Rather than attempt to fit a given practice within a specific category, the "theme" approach suggested by this Note concentrates on factors that may be used to determine whether a continuing violation exists. Although there may be "line drawing" problems with the "theme" analysis, as well, this approach may nevertheless be preferable since it facilitates consideration of the interrelationship of the factors.

33. The only exception to this rule comes from those cases that have found a continuing violation based on repeated requests for employment or reemployment that are discriminatorily refused. *See* notes 44-45 *infra* and accompanying text. At least one court, however, has stated that the existence of an ongoing employment relationship is a prerequisite to finding a continuing violation: "While the continuing discrimination theory may be available to present employees . . . we do not think it has validity when asserted by a former employee." Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975).

An excellent example of the manner in which courts search for linking themes is

by present discriminatory acts plays a more supportive, less determinative role.[34]

A. Repetition of Discriminatory Acts Over Time

The repetition of discriminatory acts over a period of time is the clearest indicator of a "pattern" of discrimination. Repetition is often the result of a particular policy adopted by the employer that, when enforced on an ongoing basis, produces a series of discriminatory acts. Indeed, most cases in which continuing violations have been found involve ongoing implementation of discriminatory promotion,[35] transfer,[36] hiring,[37] or testing[38] policies.

The significance and meaning of repetition has been clouded, however, by cases involving an employer's failure to remedy a single past discriminatory act. The courts have exhibited a certain amount of confusion in attempting to decide whether such a failure is more properly viewed as an isolated act and therefore irremediable, or as

---

Tarvesian v. Carr Div. TRW, Inc., 407 F. Supp. 336 (D. Mass. 1976). In *Tarvesian*, the plaintiff, "an American of Armenian extraction," *id.* at 337, claimed a discriminatory termination by his employer on the grounds that he had received a salary lower than normal for his position, was told by his supervisor that "there was no future for an Armenian in a 'Yankee outfit,' " *id.* at 338, and was replaced by an employee with less work experience. The charge alleging this discriminatory termination was untimely filed with the EEOC. The plaintiff also alleged, however, a discriminatory and malicious reference by the employer that occurred after his termination. This charge was timely filed. The court sought to determine whether the untimely and timely claims of the employee formed an "integrated pattern" of discrimination. *Id.* at 339. After considering all three "themes" mentioned above, it concluded that no "pattern" existed. First, no employment relationship continued between the plaintiff and defendant because of the termination. Second, the effects of the termination were not perpetuated by the adverse reference; the plaintiff no longer "actively suffered the effects . . . at the time of . . . suit." *Id.* Third, the discrimination did not extend without interruption beyond the limitations period, presumably because the termination, and the acts surrounding it, occurred only once and were not repeated on a continual basis. The court concluded that "[i]n this case no analogous theme unites the alleged discriminatory acts of the defendants into a continuous pattern. The claims growing out of actions taken during plaintiff's employment are stale. The allegation of acts of a totally different nature occurring many months later cannot freshen them." *Id.* at 340.

34. *See* notes 66-67 *infra* and accompanying text.

35. *See, e.g.*, Noble v. University of Rochester, 535 F.2d 756 (2d Cir. 1976); Cates v. Trans World Airlines, Inc., 8 Empl. Prac. Dec. 6144 (S.D.N.Y. 1974); Franczek v. Michigan Bell Tel. Co., 7 Fair Empl. Prac. Cas. 1005 (E.D. Mich. 1974).

36. *See, e.g.*, Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975); Jamison v. Olga Coal Co., 335 F. Supp. 454 (S.D.W. Va. 1971).

37. *See, e.g.*, Watson v. Limbach Co., 333 F. Supp. 754 (S.D. Ohio 1971); Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D.N.C. 1969).

38. Franczek v. Michigan Bell Tel. Co., 7 Fair Empl. Prac. Cas. 1005 (E.D. Mich. 1974); Watson v. Limbach Co., 333 F. Supp. 754 (S.D. Ohio 1971).

an affirmative policy of nonaction and therefore a continuing violation. For example, in *Culpepper v. Reynolds Metals Co.*,[39] a federal district court in Georgia held that the failure of an employer to award a job to a black employee who had seniority was not a continuing violation. The court stated, "[T]here is no known authority to the effect that a failure to rectify an alleged unlawful act converts it into a continuing transaction or suspends the [limitation] period."[40] Repeating this language in *Hutchings v. United States Industries, Inc.*,[41] another court found that a failure to restore a job classification that was discriminatorily refused the plaintiff was not a continuing violation.

In *Moreman v. Georgia Power Co.*,[42] however, decided only a few months after *Culpepper*, the same federal district court in Georgia found that the failure of a union to reword a collective bargaining contract to delete certain discriminatory employment practices was a continuing violation. The provisions of a union contract arguably may be more "continuous" in nature than a single refusal to promote an employee, since they remain in effect on a daily basis,[43] but under the reasoning in *Culpepper* and *Hutchings* it still was open for the court in *Moreman* to view the union's failure to reword the agreement as a single act that did not continue. The somewhat contradictory results of these cases suggest that it is not easy to discern whether a failure to act constitutes a single act or an affirmative policy of nonaction.

In addition to finding a continuing violation based on action or failure to act, in some instances, the courts have found a continuing violation when the actions of an employee caused an employer to repeat discriminatory acts over time. For example, an ongoing discriminatory refusal to reconsider a denial of tenure has been held sufficient to constitute a pattern.[44] Similarly, renewal of an application for a job can convert an original discriminatory refusal to hire into a continuing violation.[45] One court, however, has taken a position contrary to this approach. In *Davidson v. Tapley*,[46] the court held

39. 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd and remanded on other grounds*, 421 F.2d 888 (5th Cir. 1970).

40. *Id.* at 1235.

41. 309 F. Supp. 691, 693 (E.D. Tex. 1969).

42. 310 F. Supp. 327 (N.D. Ga. 1969).

43. *See also* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969); Glus v. G. C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971), Longshoremen Local 329 v. South Atl. Gulf Coast Dist., 295 F. Supp. 599 (S.D. Tex. 1968).

44. Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (employee requested reconsideration by tenure committee).

45. Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D.N.C. 1969).

46. 10 Empl. Prac. Dec. 6074 (S.D.N.Y. 1975).

that an allegation that repeated requests for reemployment had been made and discriminatorily refused could not revive an original discriminatory termination. The court stated that "the legislative intention to establish a reasonable statute of limitations may not be frustrated by giving plaintiff a perpetual right to litigate a time-barred claim."[47] One reason for this difference in approach may be that, although the linking "theme" of repetition of discriminatory conduct over time was present in *Davidson*, the "theme" of a continuing employment relationship was not.

B. The Continuing Existence of the Employment Relationship

The "link" between discriminatory acts provided by an employment relationship is regarded as a strong one by the courts. Although an ongoing employment relationship is not enough to render a single act continuing, a pattern of discrimination may be found so long as two separate discriminatory acts have some connection, even a most tenuous one. In *Cox v. United States Gypsum Co.*,[48] for example, three employees charged their employer with a discriminatory layoff. The charge was untimely filed and contained no additional claim of discrimination, although it referred to the layoff as "continuing." The court found that "under the circumstances of this case and in the light of the purposes of the act," it was appropriate to read the charge as also claiming a discriminatory recall.[49] Since the right to be recalled preserved the employees' relationship to the employer and existed at the time the charge was filed, the court found that discrimination continued into the present and the charge was therefore timely.

The "link" provided by an ongoing employment relationship is also a factor in finding a pattern of discrimination in retirement plans. In this context, the complainant generally is not an active employee and there is no continuity in the employment relationship itself. The "pattern" of discrimination is strengthened simply by the contractual obligation of the employer to pay retirement benefits. For example, in *Bartmess v. Drewrys U.S.A., Inc.*, [50] an employee filed a charge with the EEOC four and one-half months before her retire-

47. *Id.* at 6076.

48. 409 F.2d 289 (7th Cir. 1969).

49. *Id.* at 290.

> [L]ayoff, as distinguished from discharge or quitting, suggests a possibility of reemployment . . . . The record shows that the company had bound itself, by its collective bargaining agreement, to consider seniority in making a recall, and the agreement provides that an employee does not lose seniority by reason of layoff until one year has expired . . . .

Id. at 290-91.

50. 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

ment date, alleging that her employer's retirement plan was discriminatory because it mandated a retirement age of 62 for female employees and 65 for males. The employer and the employee's union maintained that the claim was not timely filed because the statute required that charges be filed within 90 days *after* the occurrence of alleged unlawful employment practices, and the employee had not waited until after her retirement to file the claim. The court disagreed, holding that the mere presence of the discriminatory retirement plan in the collective bargaining agreement constituted a violation "within the meaning of Title VII and would continue to do so for the entire time the individual was employed."[51] This language seems to require that an aggrieved individual be employed for the violation to continue.[52] Such a reading would avoid the problem of perpetual liability.[53]

This limitation, however, was not imposed in *Mixson v. Southern Bell Telephone & Telegraph Co.*[54] In *Mixson,* a male employee died at the age of 59 years and 10 months, ineligible for benefits under a pension plan that fixed retirement age at 60 for males and 55 for females. The court held that the decedent's widow had a timely claim even though she did not file within the limitations period following his death. The court reasoned that as long as the widow alleged that the pension plan existed both currently and at the time of her husband's death, the filing was timely. Thus, so long as the company maintained the plan, she presumably could file at any time in the future.

American Finance System, Inc. v. Harlow[55] adopted a similar position. In that case, the court held that a continuing violation existed so long as final distribution of a former employee's benefits from a discriminatory pension fund had not been made by the employer. The employee therefore was not required to file a charge with the EEOC within the applicable limitations period after termination of his employment, but was free to raise the claim at any future date

51. *Id.* at 1188.

52. *Bartmess* also received this interpretation in B. SCHLEI & P. GROSSMAN, *supra* note 32, at 902.

53. *Cf.* McCarty v. Boeing Co., 321 F. Supp. 260 (W.D. Wash. 1970), where a Washington district court evidently took the view that when a former employee merely is receiving retirement benefits, the employment relationship has become so attenuated that no pattern of discrimination can be found even though the payments from the employer were made on a regular monthly basis. The court ruled that in such a case the complainant must file charges with the EEOC within the applicable limitations period after receiving the first payment. Otherwise, "aggrieved persons could well assert their claim fifteen, twenty, or thirty years hence." *Id.* at 261.

54. 334 F. Supp. 525 (N.D. Ga. 1971).

55. 65 F.R.D. 94 (D. Md. 1974).

prior to final distribution.[56]

These cases indicate that the concept of an employment relationship is extremely broad. A complainant need not be an actual, working employee. He is free to challenge an employer's discriminatory acts from the "outside" without regard to the statutory limitations period so long as the employer retains a contractual obligation to him.

C. Perpetuation of Past Effects by Present Acts

A third theme that may serve to link together an employer's discriminatory acts is the perpetuation of the effects of past acts by present discriminatory acts. "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time."[57] The ordinary effects that follow any discriminatory act are not enough to supply this link. If the contrary were true, any employee who suffered continuing adverse effects from an isolated act of discrimination would be free to litigate at any time by claiming a continuing violation.[58] The courts have consistently held that an isolated discriminatory act does not continue, even if its effects do.[59]

The perpetuation of past effects by present acts refers instead to present discriminatory acts that, by their nature, contain or "lock in" the effects of past acts. This "lock in" analysis originated in *Griggs v. Duke Power Co.*,[60] the Supreme Court's first major pronouncement on the meaning and scope of Title VII.[61] Prior to the enactment of Title VII, the employer in *Griggs* openly discriminated on the basis

56. The *Harlow* court expressly rejected the reasoning of McCarty v. Boeing Co., 321 F. Supp. 260 (W.D. Wash. 1970):

> As for McCarty v. Boeing . . . it is apparent that this decision was unsupported by the vast majority of the precedent on the question which is reflected by the lack of pertinent citation in the opinion. Furthermore, other courts have denigrated the importance of strict enforcement of the limitations period when the employer implements a wide-spread system of discrimination in violation of Title VII.

65 F.R.D. at 103.

57. Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975).

58. Of course, every past act of discrimination may have some future impact, and certainly the "sins of the fathers" are often perpetuated. As a result, a broad extension of the continuing discrimination concept would arguably permit a lawsuit to be commenced irrespective of when the alleged discrimination occurred, thereby completely eliminating any period of limitations for Title VII actions.

Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1181 (N.D. Ga. 1975).

59. *See* notes 23-26 *supra* and accompanying text.

60. 401 U.S. 424 (1971).

61. *See* Jones, *The Development of the Law under Title VII Since 1965: Implications of the New Law*, 30 Rutgers L. Rev. 1, 1-6 (1976).

of race in hiring and assigning employees. On the day Title VII became effective, the employer instituted a policy of testing that, though neutral on its face, had the effect of continuing the employer's pre-Act discriminatory hiring and assignment practices. The Court held that the testing policy perpetuated the employer's discrimination and bore no relation to measuring job capability. It therefore constituted a present violation of Title VII.[62]

Essential to the result in *Griggs* was the Court's conclusion that Congress did not intend Title VII to permit employers to assume that the status quo at the time the Act was passed was the starting point from which any alleged discriminatory act would be measured. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[63] With this foundation, *Griggs* held that a present act that perpetuates pre-Act discrimination was a present violation of Title VII. And although the employer's liability in *Griggs* extended only to his present act of discrimination and not beyond the effective date of the Act, the Court's decision nevertheless operated to remedy a discriminatory structure that existed before the passage of the Act.

Since *Griggs,* some courts have viewed the "lock in" theory as another "theme" that can bind an employer's discriminatory acts into a "pattern" for the purpose of finding a continuing violation. This theme has been used, for example, to justify a finding of a continuing violation when a discriminatory recall perpetuated the discriminatory effects of a layoff,[64] and when failure to change a discriminatory retirement system perpetuated a discriminatory age differentiation based on sex.[65] These cases, however, did not rely solely on the theme of perpetuation of past effects. They also clearly pointed out that a contractual relationship, however tenuous, existed between the employer and the employee.[66] The perpetuation theory, therefore, was relied on only as a supplemental linking theme to establish the required interrelationship.[67]

---

62. 401 U.S. at 432.

63. *Id.* at 429-30.

64. Tippet v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970).

65. American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 103 (D. Md. 1974) ("[C]ontinuing problems of bias only toll the limitations period . . . where the unlawful practices have a present and recurring effect . . . .").

66. *See, e.g., id.* at 104 ("And like the plaintiffs challenging discriminatory layoffs and promotion policies, the possibility always exists of a change in the terms of the ongoing relationship if the purported bias [in the discriminatory retirement plan] is voluntarily eliminated . . . . ").

67. It is difficult to see how an employer's present act can perpetuate or "lock in" the effects of a past act once the employment relationship has been severed. Seemingly, the "lock in" will occur only within that relationship. Once it is termi-

D. SUMMARY

The linking themes of repetition over time, continuation of the employment relationship, and perpetuation of past effects of discrimination by present acts seem to be all-encompassing; any discriminatory series of acts or affirmative policy by an employer within an employment relationship is likely to feature one or more of the themes and be deemed a continuing violation. Even two acts connected only by rights embodied in an employment contract may constitute a continuing violation.[68]

The only situation in which the continuing violation doctrine has not been applied is where an employment relationship has been severed and only two discriminatory acts are alleged—one while the complainant was an employee (untimely) and one after employment was terminated (timely). For example, a wrongful termination (untimely complained of) followed by a discriminatory refusal to rehire (timely complained of) does *not* constitute a continuing violation.[69] Nor does a termination followed by an unjustified adverse recommendation establish a pattern sufficient to make the employer liable for both acts.[70]

The result in these cases may turn on the fact that when repetition of a discriminatory act cannot be found and the employment relationship has been severed, the prejudice an employer may suffer from the bringing of stale claims is likely to be most acute. It seems arguable, however, that even where a "pattern" of discrimination clearly exists, an employer also may suffer unwarranted prejudice from the bringing of stale claims. The "pattern" analysis currently used by the courts not only precludes consideration of this possibility but may result in making it a reality. The problems involved in applying the continuing violation doctrine without expressly considering prejudice to the employer is exemplified in *United Air Lines, Inc. v. Evans.*[71]

III. THE POTENTIAL EFFECT OF *UNITED AIR LINES, INC. v. EVANS* ON THE CONTINUING VIOLATION DOCTRINE

Carolyn Evans, a flight attendant, was forced to resign from

---

nated, adverse effects may continue but only in the sense that the effects of a discriminatory act always may be personally felt. Thus, these two "links" necessarily overlap.

A problem arises, however, when a terminated employee is "rehired." *See* text accompanying notes 72-81 *infra* (discussing United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)).

68. *See* notes 48-49 *supra* and accompanying text.

69. *See* notes 46-47 *supra* and accompanying text.

70. *See* Tarvesian v. Carr Div. TRW, Inc., 407 F. Supp. 336 (D. Mass. 1976).

71. 431 U.S. 553 (1977).

United Air Lines because of her marriage. In a subsequent lawsuit to which she was not a party, United's policy was held violative of Title VII.[72] Four years after her forced resignation, Evans was rehired by United, and a year later she filed a complaint with the EEOC alleging continuing discrimination as a result of United's seniority policies, which provided that only continuous time-in-serivce was counted for seniority. Because Evans' service had been interrupted, she lost all seniority accrued during her previous term of employment. This result, she claimed, perpetuated the effects of the original discriminatorily forced resignation and, in itself, amounted to a violation of Title VII. Evans sued to recover lost seniority and back pay from the date of her original forced resignation.

In order to succeed, Evans had to make two separate showings. First, it was necessary to show that the seniority system was a present violation of Title VII. The five-year-old discriminatory discharge, by itself, was not actionable because the continuing violation doctrine has never held an isolated discriminatory act, without more, to be continuing.[73] Evans argued, however, that the seniority system constituted a present violation of Title VII because it perpetuated the effects of the original discharge. Even if this were so, the problem remained that her charge concerning the seniority system had not been filed with the EEOC until a year after she was rehired, after the limitations period had run. Evans' second showing, then, had to be that the seniority system was an ongoing, continuing policy of United and that, as in cases concerning similar policies of hiring, transfer, or testing that constituted continuing violations,[74] expiration of the limitations period for filing had no preclusive effect. Had Evans succeeded with this second showing, she could have claimed that the proper remedy for the violation was back pay for the two years preceding the filing of the charges and seniority credit all the way back to the original termination.[75]

---

72. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

73. *See* notes 23-27 *supra* and accompanying text.

74. *See* notes 35-38 *supra* and accompanying text.

75. 42 U.S.C. § 2000e-5(g)(1970) limits the recovery of backpay by providing in relevant part:

> [T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with . . . back pay . . . . Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

See United Air Lines, Inc. v. Evans, 431 U.S. 553, 561 (Marshall, J., dissenting).

"As to post-1965 [conduct] . . . 'liability exists . . . for practices occurring after the effective date of the Act . . . and accrues only from a date two years prior to the filing of charges with the EEOC.' " Miller v. Miami Prefabricators, Inc., 438 F. Supp. 176, 182 (S.D. Fla. 1977) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 410

The Seventh Circuit found that Evans had made her two showings but refused to extend her relief back to the original termination. Relief was granted from the date that United rehired her.[76] The Supreme Court reversed, finding that Evans had not successfully made her first showing; the seniority system was not a present violation of Title VII.[77] Furthermore, since the original forced resignation was not a present violation, neither alleged discriminatory act could support a finding of a continuing violation. Hence, the Court concluded that Evans had no cause of action under Title VII.[78]

The most potentially significant and problematic aspect of the *Evans* opinion is the Court's response to Evans' argument that the seniority system—the alleged present discriminatory act—perpetuated the effects of her discriminatory termination. The Court stated:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed . . . . A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
>
> Respondent emphasizes the fact that she has alleged a

n.3 (1975)). In *Miller* the court construed the two year limit on backpay recovery as applying only after the court had determined the full extent of injury suffered by employees. *Id.*

76. Evans v. United Air Lines, Inc., 534 F.2d 1247, 1251 (7th Cir. 1976).

77. 431 U.S. at 558; *cf.* Kennan v. Pan Am World Airways, 424 F. Supp. 721 (N.D. Cal. 1976), where the court refused to conclude that a seniority system could be viewed as an ongoing system of discrimination so that a charge could be filed any time while one was being denied retroactive seniority; the seniority system was to be viewed as a single act that occurred when the employee was laid off.

78. If Evans' charge had been considered timely, it would have been necessary for the court to determine what past, untimely acts the employer should be held liable for under the continuing violation doctrine. It could have been argued that the past discriminatory termination followed by rehiring and the maintenance of the discriminatory seniority system established a pattern of discrimination sufficient to make the employer liable for the whole. With this application of the continuing violation doctrine, Evans thus could have obtained what she sought—retroactive seniority from the date of the discriminatory termination in 1968.

Before *Evans* was decided, however, no court that found a seniority system to be a present violation of Title VII was also willing to conclude that a pattern of discrimination was thereby established, making an employer liable for the whole of its unlawful conduct. In fact, the court in Kennan v. Pan Am. World Airways, 424 F. Supp. 721 (N.D. Cal. 1976), expressly rejected this approach. *See* note 77 *supra*.

> *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.[79]

Apparently, the Court's conclusions that such acts are the equivalent of pre-Act discrimination[80] and that an otherwise neutral seniority system cannot "continue" an untimely filed charge,[81] are based on its

---

79. 431 U.S. at 558 (emphasis in original).

80. The holding of *Evans* was expressed in its companion case, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), as follows: "*Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates *post*-Act discrimination that has not been the subject of a timely charge by the discriminatee." *Id.* at 348 n.30 (emphasis added). The Court then concluded in *Teamsters* that a seniority system that perpetuates *post*-Act discrimination is not violative of Title VII even though a timely charge has been filed. *Id.*

81. The argument rejected by the Court—that a seniority system can violate Title VII by perpetuating the effects of past discrimination—was essentially a product of two prior Supreme Court cases, Griggs v. Duke Power Co., 401 U.S. 424 (1971), *discussed at* notes 60-63 *supra* and accompanying text, and Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

In *Griggs*, the Court concluded that any employer practice, even if neutral on its face, was a present violation of Title VII if it perpetuated the effects of past discrimination. 401 U.S. at 429-30. In *Evans* the seniority system admittedly perpetuated the effects of the past wrongful termination, 431 U.S. at 558, and under *Griggs*, it therefore seemed to violate Title VII. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977).

The factor that precluded extending the *Griggs* perpetuation theory to seniority systems was section 703(h) of the Act, 42 U.S.C. § 2000e-2(h) (1970), which exempts bona fide seniority systems from Title VII coverage:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Without exception, however, lower courts and the EEOC had held that section 703(h) did not apply to seniority systems that perpetuated the effects of prior discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 378-80 nn.2-5 (1977) (Marshall, J., concurring in part, dissenting in part). Moreover, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), seemed to suggest that this was the position the Supreme Court also would adopt. The question in *Franks* was whether section 703(h) barred a grant of retroactive seniority to job applicants who had been the victims of racially discriminatory hiring practices. The Court concluded that the relief was not barred even when the seniority system was neutral on its face:

> [I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved
>
> . . . .

view that a seniority system is not a present violation of the Act merely because it perpetuates the effects of untimely filed acts of discrimination.

It should be noted that the primary question in *Evans* was whether the seniority system was a *present* violation of Title VII. Since it was not, the Court had no need to address any other aspect of the continuing violation doctrine[82] and the language quoted above was clearly incidental to the Court's result. This conclusion is strengthened by the fact that in *Evans'* companion case, *International Brotherhood of Teamsters v. United States*,[83] the Court concluded that bona fide seniority systems are not violations of Title VII regardless of whether they perpetuate the effects of pre or post Act discrimination.[84] Therefore, the fact that the Court in *Evans* viewed an untimely claimed violation as pre-Act discrimination made no difference to the outcome of the case; even if the violation had been viewed as post-Act discrimination, the seniority system,

---

Id. at 761-62. The Court also stressed the "make whole" objective of Title VII toward victims of employment discrimination, *id.* at 764, and seemed to be heading toward a restricted view of the applicability of section 703(h).

This, at least, was the interpretation given *Franks* by the Seventh Circuit Court of Appeals in Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976), *rev'd*, 431 U.S. 324 (1977). Initially, that court had refused to invalidate United's seniority system, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), but it reversed its position in light of *Franks*. *Franks* was read as interpreting section 703(h) to protect only seniority systems that perpetuated pre-Act discrimination. Since Evans' original discriminatory termination occurred post-Act, it did not apply. 534 F.2d at 1251.

In reversing the Seventh Circuit Court, the Supreme Court sharply disagreed with this reading of *Franks*. The Court stressed that, although section 703(h) does not bar a grant of retroactive seniority, it does prevent a facially neutral seniority system from being treated as a present violation of Title VII, even though the seniority system may perpetuate pre-Act discrimination. *See* notes 79-80 *supra* and accompanying text. The Court also disagreed with the Seventh Circuit in viewing Evans' claim of a discriminatory termination that occurred four years after passage of the Act, solely as post-Act discrimination: "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which accrued before the statute was passed." 431 U.S. at 558. Thus, under *Evans*, United's seniority system was not a present violation of Title VII, even though it perpetuated the effects of past discrimination, because of the special protection afforded bona fide seniority systems by section 703(h).

> 82. When [Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)] reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. In contrast, in the case now before us we do not reach any remedy issue because respondent did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired in 1972.

431 U.S. at 559 (footnotes omitted).

83. 431 U.S. 324 (1977).

84. *Id.* at 348 n.30.

which merely perpetuated its effects, would not have been violative of Title VII. Nevertheless, the Court's statement that an untimely complained of discriminatory act is "the legal equivalent of a discriminatory act which occurred before the statute was passed," may have significant consequences for the continuing violation doctrine, for all courts agree that Title VII applies only prospectively; pre-Act discrimination is not actionable.[85] If untimely filed claims of discrimination equal pre-Act discrimination, an employer will not be liable for them. Yet this often is exactly what the continuing violation doctrine has accomplished by making an employer liable for untimely filed claims of discrimination if that discrimination formed a "pattern" with present discriminatory acts.

If the *Evans* dictum is broadly read, the only use of the continuing violation doctrine that will remain open to the courts is liberal construction of a layperson's untimely charge with the EEOC to avoid dismissing a complaint completely.[86] For example, an untimely charge of a discriminatory practice of testing would allege a continuing violation in that it would permit a court to infer the actual use of the discriminatory test within the limitations period, but the court would not be able to hold the employer liable for the entire discriminatory practice. This, by the reasoning of *Evans*, would be an imposition of liability for the equivalent of pre-Act discrimination. Moreover, by further extending the *Evans* analysis, it even can be argued that an employer who carries on a systematic, ongoing, day-to-day discriminatory policy cannot be held liable for the whole of it, but only for that period 180 days prior to the filing of the charge.[87]

Lower court decisions since *Evans* have been mixed as to the appropriate interpretation of the Court's dictum. In *Caldwell v. Sea-*

85. *See, e.g.*, EEOC v. University of N.M., 504 F.2d 1296, 1301 (10th Cir. 1974); Scott v. City of Anniston, 430 F. Supp. 508, 516 (N.D. Ala. 1977); Henderson v. First Nat'l Bank, 360 F. Supp. 531, 547 (M.D. Ala. 1973).

86. *See* notes 14-17 *supra* and accompanying text.

87. To avoid these possible effects of the *Evans* dictum, the EEOC has stated its interpretation of the Court's opinion, trying to limit the case to its facts:

> The Commission interprets *United Airlines v. Evans* to hold only that discharges are not continuing violations. If a claim for unlawful discharge is not filed within 180 days of termination, the charge is not timely.
>
> The Commission does not consider that the case affects the continuing violation principle with respect to other employment practices. In particular, any allegation of discriminatory denial of transfer or promotion will be deemed continuing if the practice or policy accounting for the denial remains in effect within 180 days of the charge. The Commission will assume jurisdiction over such allegations.

2 EMPL. PRAC. GUIDE (CCH) ¶ 5029, at 3106 (EEOC Interpretive Memorandum, dated July 8, 1977) (adopted July 12, 1977 by the EEOC).

board Coastline Railroad,[88] the court distinguished *Evans* as not involving a violation that was part of a pattern or practice of discrimination.[89] The court held that when such a pattern exists, the continuing violation doctrine still applies. In *Dickerson v. United States Steel Corp.*,[90] however, another court gave *Evans* an expansive reading: "[T]he Court [in *Evans*] holds that a prior discriminatory act cannot be a basis of liability if the individual failed to file a charge . . . even if its effects are continuing. This opinion clearly holds that the statute of limitations is an absolute bar and that it cannot be circumvented by 'lock-in.' "[91]

The impact of the dictum in *Evans* on the continuing violation doctrine is therefore uncertain. Several factors, however, indicate that the Court's dictum should be narrowly construed. First, a discriminatory termination, by itself, has never been held to be a continuing violation, even though the effects of the discrimination may continue to linger in the life of the employee.[92] The continuing violation cases, therefore, are consistent with *Evans*. Second, the existence of present effects of past acts has not been regarded as a crucial link in the formation of a pattern of discrimination.[93] Rather, in finding a pattern, the courts have placed more reliance on the linking effects of a repetition of discriminatory acts and existence of an ongoing employment relationship.[94] These stronger links were not present in *Evans*, and therefore the continuing violation doctrine appears to remain viable when those two themes exist. A third reason for not discarding the continuing violation doctrine, absent a more direct

88. 435 F. Supp. 310 (W.D.N.C. 1977).

89. Neither plaintiff in the *Evans* or [International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)] cases appeared to have alleged a pattern or practice of racial discrimination in employment. Neither plaintiff alleged that any discriminatory practices continued after the discharge. Neither case was a class action.

Plaintiff in this case has alleged a pattern or practice of racial discrimination that continues against him and a class of black employees and applicants recently certified by this court partially on the basis of evidence showing similar racial disparities throughout defendant's facilities.

Id. at 312. *See* Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) ("A continuously maintained illegal employment policy may be the subject of a valid complaint within a specified number of days after the last occurrence of an instance of that policy."); Miller v. Miami Prefabricators, Inc., 438 F. Supp. 176 (S.D. Fla. 1977) (though *Evans* may limit proof of actual violation of Title VII to 180-day period, court is not constrained to go beyond limitations period for purposes of remedy).

90. 439 F. Supp. 55 (E.D. Pa. 1977).

91. *Id.* at 70.

92. *See* note 24 *supra*.

93. *See* Farris v. Board of Educ., 576 F.2d 765, 768-69 (8th Cir. 1978) (construing *Evans* as indicating present effects of past discrimination was not a linking theme).

94. *See* notes 33-34, 64-67 *supra* and accompanying text.

expression by the Supreme Court, is that the doctrine, as developed by lower courts, has received some measure of congressional approval. During the consideration of the 1972 amendments to the Act, which effected, *inter alia,* a lengthening of the limitations period,[95] an attitude of acceptance was expressed toward the continuing violation doctrine, even though it was realized that the doctrine results in a circumvention of the limitations period.[96] Apparently, Congress at-

95. *See* note 7 *supra* and accompanying text.

96. In establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected. It is intended by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints, and that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight.

118 CONG. REC. 4941 (1972)(remarks of Senator Williams, Chairman, Committee on Labor and Public Welfare, concerning S.2515, which the Senate passed; the House replaced S.2515 with H.R.1746, which eventually became law and which contained the same extensions of the limitations periods as S.2515).

It is possible, of course, that this 1972 expression of congressional approval does not accurately reflect the views of the Congress that passed the Act in 1964. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court, interpreting another section of Title VII that was viewed differently by the Congresses of 1964 and 1972, found the 1964 legislative history to be controlling. The Court stated:

> [T]he section of Title VII we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

Id. at 354 n.39.

It is thus possible that the Supreme Court may accord "little if any weight" to the congressional approval given the continuing violation doctrine in 1972. But there are two important differences between the section of the Act construed in *Teamsters* and the section establishing the limitations period for filing with the EEOC. First, the opinion in *Teamsters* makes it clear that there was a great deal of debate about the meaning of section 703(h) in the Senate in 1964. The only piece of legislative history concerning the continuing violation doctrine, however, is from 1972, and in seeking expressions of congressional intent beyond the words of the Act itself, the Supreme Court therefore can only look to the 1972 amendments. Second, section 703(h) has not been amended since its original enactment in 1964, while Congress changed the limitations period from 90 to 180 days (or from 210 days to 300 days where a state agency is involved), in 1972. *See* note 7 *supra.* Of course, any litigation after 1972 is governed by this amendment. It would seem, then, that the congressional approval of the continuing violation doctrine is more authoritative than the congressional approval of the lower courts' interpretation of section 703(h).

tached some importance to letting the courts arrive at their own equitable resolution of the conflicting policies of Title VII. Finally, perhaps the most compelling reason to conclude that the Supreme Court's one-sentence dictum in *Evans* should not be interpreted to preclude use of the continuing violation doctrine is simply that the doctrine facilitates Title VII enforcement. It furthers the elimination of discrimination in employment by allowing employees to file untimely claims and obtain redress. As long as it furthers the policies underlying Title VII, it should be retained in at least some form.

The Court's evident conclusion in *Evans,* however, was that to deem the particular violation alleged in that case to be continuing in any way would *not* promote the policies of Title VII but instead would frustrate them. It is not a policy of the Act that an employer remain liable for a discriminatory act that occurred years in the past. In order to fully evaluate the continuing violation doctrine, therefore, it is necessary to examine the balance that it achieves between the substantive policies of the Act and the policies that underlie the limitations period.

IV. EXTENSION OF EMPLOYER LIABILITY

Once a present violation has been found there are two possibilities: either the employer may be held liable for only that portion of his discriminatory conduct that is present,[97] that is, within 180 days prior to the filing of the complaint, or he may be liable for his entire "continuous" discriminatory conduct.[98]

It is not entirely clear which of these possibilities the courts have chosen because the procedural context in which the continuing violation doctrine is usually applied precludes, for the most part, an ex-

97. *See* notes 14-17 *supra* and accompanying text.

98. In areas of the law other than Title VII, courts do not allow recovery for actions that occurred beyond a limitations period, even when regularly repeated violations clearly forming a "pattern" exist. A separate cause of action arises with each repetition of a wrongful act, *see, e.g.,* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 777, 795 (3d Cir. 1967), *aff'd in part and rev'd in part on other grounds,* 392 U.S. 481 (1968), and each cause of action expires when the applicable limitations period runs. *See, e.g.,* Baum Assocs., Inc. v. Society Brand Hat Co., 447 F.2d 255 (8th Cir. 1973) (installments on commissions not recoverable past the limitations period); Hazeltine Research, Inc. v. Zenith Radio Corp., 418 F.2d 21, 26 (7th Cir. 1969); Titcomb v. Norton Co., 208 F. Supp. 9 (D. Conn. 1959), *aff'd* 307 F.2d 253 (2d Cir. 1962) (statute of limitations bars recovery only for breaches occurring beyond the statutory period); Hitchcock v. Union & New Haven Trust Co., 134 Conn. 246, 56 A.2d 655 (1947) (recovery for employment on a week-to-week basis barred for employment more than six years prior to bringing of the action). *But see* Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (in mother's suit for the wrongful abduction of her child, it was for the jury to decide whether acts over a period of nine years constituted only one continuous wrong, so as to bypass the statute of limitations and permit recovery for the full period).

plicit discussion of remedies.[99] The extent of employer liability has been directly addressed, however, in cases in which defendants have moved to strike, as outside the courts' jurisdiction, allegations of past violations. In several instances, the continuing violation doctrine has been used to hold the employer liable for the whole of a discriminatory pattern and effectively render the limitations period a nullity.[100]

If the Title VII limitations period is without effect in this context, employers may be liable for actions occurring five years, ten years, or even longer in the past. The position taken by the courts in cases concerning discriminatory retirement plans illustrates this

99. The question of whether or not a continuing violation exists typically arises in response to an employer's motion to dismiss for lack of subject matter jurisdiction because the employee failed to file his charge with the EEOC within the applicable limitations period. The court considers only the motion to dismiss in its opinion. If a continuing violation is found, the motion is denied, but the plaintiff, of course, still must prove his allegations of discrimination at trial. Only if he is successful at trial does the question of the scope of the remedy arise. *See, e.g.*, Mixson v. Southern Bell Tel. & Tel. Co., 334 F. Supp. 525, 526-27 (N.D. Ga. 1971).

100. *See, e.g.*, Tarvesian v. Carr Div. TRW, Inc., 407 F. Supp. 336, 339 (D. Mass. 1976) ("[W]here there is a mixture of timely and untimely claims, the issue to be decided is whether the facts constitute a continuing pattern of discrimination, commencing more than three hundred (300) days prior to the filing of the complaint with the E.E.O.C., yet progressing uninterruptedly into that time frame. If plaintiff can prove such an integrated pattern of discrimination, the defendants become liable for the whole of it."); Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397, 1399 (M.D.N.C. 1975); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974) (untimely claim of representative of class of employees is properly considered by court as part of overall pattern of discrimination practiced by employer); Fekete v. United States Steel Corp., 353 F. Supp. 1177, 1185 (W.D. Pa. 1973) ("Although a number of the incidents alleged to be discriminatory were not shown to have occurred within the statutory period . . . we find that plaintiff has sufficiently alleged the existence of a pattern of discrimination occurring throughout the course of his employment to require us to consider these incidents on the merits."); Tippet v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970).

But see Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974), where four untimely acts (general harassment, denial of transfer requests, demeaning work assignments, and malicious intent) and one timely act (a discriminatory discharge) were alleged. The court declined to find that these acts formed a pattern of discrimination and thus a continuing violation. The plaintiff seemed to argue only that the unlawful practices had " 'continuing effects' into the present," and the court rejected this as a basis for Title VII liability: "Once a disparaging remark is made, or a transfer is denied, or a demeaning work assignment is given, it is, without more, a completed and isolated act: such practices do not give the Plaintiff a perpetual right to file charges before the EEOC." *Id.* at 1340.

The court viewed each discriminatory act as isolated and having no connection to the others. It is possible, however, that the outcome of this case would have been different had the plaintiff argued that the employer's repeated acts constituted a pattern of discrimination. *See* notes 31 & 33 *supra* and accompanying text. This argument would have been justified on the facts of the case.

problem. In *American Finance System, Inc. v. Harlow*,[101] for example, an employer had a pension plan under which a female employee who voluntarily terminated employment before her retirement date could receive an immediate payment of her accrued interest in the pension fund, while a male employee was ineligible for payment until his fiftieth birthday. On January 1, 1970, the employer voluntarily eliminated any difference between males and females and sued for a declaratory judgment that it was not compelled immediately to distribute funds to those male employees who voluntarily terminated employment—whether before or after the effective date of Title VII (July 1, 1965)—but had not yet reached the age of fifty. To the evident surprise of the employer,[102] the employees counterclaimed as a class, alleging that the pension plan as operated before January 1, 1970 violated Title VII. The court included in the class all males who had retired prior to January 1, 1970, and who were ineligible to receive payments because they still were less than fifty years old.[103] The result was that, since the pension plan was a continuing violation, the employer was faced with potential liability to ex-employees on claims that originated almost twenty years in the past. Given the bona fide attempt by the employer to eliminate the discriminatory elements of its pension plan, this extension of liability seems unjust. The court stated, however, that because of the continuing link between the employer and the employee, the violation—and liability—could continue.[104]

It has been recognized that an employer is entitled to the traditional protections afforded by a statute of limitations.[105] He should not be exposed to the prejudice that can surround the bringing of stale claims but should be able to rest easy, without fear of " 'surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.' "[106] Certainly, the employer in *Harlow* was

101. 65 F.R.D. 94 (D. Md. 1974).

102. *Id.* at 98.

103. *Id.* at 105, 108-09.

104. *Id.* at 103.

105. *See, e.g.*, Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975)("to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations . . . . "); McCarty v. Boeing Co., 321 F. Supp. 260, 261 (W.D. Wash. 1970) (acts held not continuing in nature because of purposes behind statute of limitations).

106. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965)(quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)). Although *Burnett* dealt with the Federal Employers' Liability Act and not Title VII, courts considering the proper role of the limitations period in the Title VII context have used it as authority. *See, e.g.*, Culpepper v. Reynolds Metals Co., 421 F.2d 888, 892 (5th Cir. 1970); Kennan v. Pan Am. World Airways, Inc., 424 F. Supp. 721, 727 (N.D. Cal. 1976).

in need of this traditional protection against prejudice. After twenty years, some difficulty in resurrecting potentially exculpatory records would be inevitable. Unexpected and unbudgeted expenses from an adverse judgment might create financial difficulties. Old complaints and the threat of extensive liability could reduce employer flexibility in operation and planning and even might have an adverse effect on the labor market.[107]

Another factor to be considered in determining the propriety of extending employer liability is that strict enforcement of the limitations period promotes the congressional policy of conciliation between the employer and the aggrieved employee.[108] Extending liability will increase the amount of any judgment. An employer may be more inclined to litigate than settle when his potential liability is increased, at least when the allegation of an employee is of doubtful validity.[109]

By extending employer liability beyond the limitations period, the courts have implicitly determined that any prejudice that might accrue to employers, or any other policies furthered by strict adherence to the limitations period, are outweighed by the fact that the

107. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 892 (5th Cir. 1970). It should be noted, however, that this liability is limited by statute. *See* note 75 *supra*.

108. The Commission "shall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b)(1970 & Supp. V 1975). This argument, however, ignores the fact that because of the great number of claims filed each year with the EEOC, many employees become eligible to sue without any conciliation effort by the EEOC. *See* Tippet v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 296 (M.D.N.C. 1970).

109. It may be argued, *per contra*, that the continuing violation doctrine, as presently used to extend liability, is an added deterrent that keeps employers from discriminating and helps to eliminate discrimination. The Supreme Court has recognized, specifically in the area of remedies, that strong deterrent measures further the goals of Title VII. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court stated that an award of retroactive seniority to the victims of illegal hiring discrimination was not barred because that would "undermine the mutually reinforcing effect of the dual purposes of Title VII; it reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetuated in violation of the law." *Id.* at 767 n.27 (1976). Furthermore,

> [b]ackpay forces the employer to account for economic benefits that it wrongfully has denied the victim of such discrimination. The statutory purposes and equitable principles converge, for requiring payment of wrongfully withheld wages deters further wrongdoing at the same time that their restitution to the victim helps make him whole.

Id. at 786 (Powell, J., dissenting in part, concurring in part)(footnote omitted).

However, since a violation can continue only if there is a present act of discrimination for which the employer will be liable whether or not liability is extended beyond the limitations period, it is at best uncertain whether added liability actually serves as an additional deterrent.

extension of liability furthers the substantive policies of Title VII:[110] eliminating discrimination in employment and "making whole" the victims of discrimination.[111] Unfortunately, this balancing process seems to be almost entirely subconscious in most cases. At present, the finding of a continuing violation requires only the finding of a pattern of discrimination, not a balancing of the policies behind the limitations period against Title VII's substantive policies. In cases in which an employment relationship is ongoing and an employer commits more than one discriminatory act, the finding of a pattern and thus a continuing violation seems almost certain and the liability of the employer may be extended.[112] Whether the employer will suffer great prejudice from the finding of a continuing violation is rarely directly considered.

It is not suggested that, even from the perspective of the traditional purposes behind the statute of limitations, a pattern analysis is totally irrelevant. The repetition of violations over time, the continuation of an employment relationship, and the perpetuation of past effects do indicate a certain awareness by an offending employer of the relationship between his current discriminatory acts and his past ones. In many cases, this awareness may lessen the equitable urgency of protecting the employer from the prejudice inherent in litigation of stale claims. The employer's continual discrimination may be considered as a conscious waiver of limitations period protection.

This rationale makes sense as a general matter inasmuch as it is the employer who determines whether a violation will continue. If an

---

110. At least one court has explicitly recognized that "[t]he 'continuing violation' doctrine constitutes judicial recognition of the overriding importance of Title VII's substantive policies when compared with the Act's 'statute of limitations'. . . ." Kennan v. Pan Am. World Airways, Inc., 424 F. Supp. 721, 727 (N.D. Cal. 1976)(footnote omitted).

111. "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

In Franks v. Bowman Transp. Co., 421 U.S. 747, 764 (1976), the Court stated that "the Act is intended to make the victims of unlawful employment discrimination whole . . . persons aggrieved by the consequences and effects of the unlawful employment practice should be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." (quoting Section-By-Section Analysis of H.R. 1746, accompanying The Equal Employment Opportunity Act of 1972— Conference Report, 118 CONG. REC. 7166, 7168 (1972)).

Title VII is also specially directed toward the elimination of discrimination carried on in a systematic manner by the employer. *See* note 10 *supra*; *see, e.g.*, Grohal v. Stauffer Chem. Co., 385 F. Supp. 1267, 1269 (N.D. Cal. 1974) (quoting Ogletree v. McNamara, 449 F.2d 93, 98 (6th Cir. 1971)).

112. *See* text accompanying notes 68-71 *supra*.

illegal practice immediately stops, the employer receives the full protection of the statute of limitations.[113] But if, after 180 days have elapsed, the employer repeats the practice, or commits a discriminatory act sufficiently related to the original practice, the courts treat the employer as if he had carried on the practice in a continuous manner.

The continuing violation doctrine, by looking only at the linking themes of repetition of violations, continuation of employment relationship, and continuation of past effects, does not adequately ensure that an employer will not be prejudiced. It was concern for this undue employer prejudice that was at the root of the Supreme Court's reservations about applying the continuing violation doctrine in *United Air Lines, Inc. v. Evans*.[114] In order to be responsive to *Evans*, courts using the continuing violation doctrine in the future should take into account, more directly than they now do, the prejudice that may accrue to an employer from a finding of a continuing violation. The future viability of the doctrine may depend on whether courts adequately balance the need to strengthen the substantive goals of the Act with the need to avoid this prejudice.

V. A PROPOSED CHANGE IN THE CONTINUING VIOLATION DOCTRINE

It is not possible to separate the question of whether a "pattern" exists from the question of whether a continuing violation of Title VII exists. Clearly, before any violation can be called continuing, it must be shown that the discriminatory practices of an employer amount to something more than one isolated act and, in most cases, that the practices occurred within an employment relationship. When these two "themes" are present, a continuing violation usually will be found.[115] The change in the continuing violation doctrine suggested by this Note is simply that a finding that a continuing violation exists does not automatically follow from a showing that one or more linking themes exist. Rather, a continuing violation should be found only when, in addition, it can be said that such a finding would further the policies of the Act.

The use of the continuing violation doctrine in its first sense—to establish federal jurisdiction for an aggrieved employee despite an untimely filing—seems perfectly consonant with the policies of the Act. The Act is largely enforced by layperson employees who might

113. *See* Campbell v. A. C. Petersen Farms, Inc., 69 F.R.D. 457, 463 (D. Conn. 1975) (complaint alleging continuing violation dismissed upon proof that employer phased out discriminatory policy); note 30 *supra* and accompanying text.

114. 431 U.S. 553 (1977).

115. *See* notes 31-34 and 68-70 *supra* and accompanying text.

not readily understand that their Title VII rights must be asserted within 180 days. To recognize that such an employee's complaint alleging more than one act or an ongoing discriminatory policy states a valid cause of action therefore aids in furthering the "private attorney general" enforcement function of the Act. Moreover, in many cases, dismissal by the court would be futile because, if the employer is continually discriminating the employee could simply refile his grievance. In short, this use of the continuing violation doctrine should remain unchanged.

The second use of the continuing violation doctrine—to extend employer liability beyond the limitations period to encompass both timely and untimely acts of discrimination—does not so clearly further the policies of the Act. Although such an extension of liability furthers the substantive policies of Title VII, it may contravene the policies underlying the short limitations period imposed by Congress.[116] These latter policies will be frustrated in every case where an employer suffers undue prejudice from an extension of liability. Therefore, the change suggested in the continuing violation doctrine is that courts should find a continuing violation for purposes of extending liability only when assured that the employer will not suffer undue prejudice.

At least one court has adopted this suggested approach, and directly considered the possibility of prejudice in a continuing violation determination. In *Kennan v. Pan American World Airways, Inc.*,[117] a California district court made the following observations:

> In the instant case, the valuable statute of limitations policy of guarding against stale complaints is barely threatened. Here we have original discriminatory acts of forced resignation pursuant to a blanket, facially discriminatory policy of terminating pregnant women. There are few, if any, individual circumstances which might require proof at trial; in fact, at oral argument, defense counsel was unable to describe any "statute of limitations"—related prejudice that might accrue. Because there is little or no visible prejudice to Pan Am by virtue of the lapse of time since its original act of discrimination, defendant's need for statute of limitations protection is minimized here.[118]

116. *See* notes 105-08 *supra* and accompanying text.

117. 424 F. Supp. 721 (N.D. Cal. 1976).

118. *Id.* at 727-28. There is additional precedent for an inquiry into prejudice. In Love v. Pullman Co., 404 U.S. 522 (1972), the Court dispensed with another, more technical, filing requirement of Title VII, partly because the employer failed to show that it would suffer any prejudice. The Court stated, "We see no reason why further action by the aggrieved party should be required . . . . The respondent makes no showing of prejudice to its interests. To require a second 'filing' by the aggrieved party . . . would serve no purpose other than the creation of an additional procedural technicality." *Id.* at 526.

As *Kennan* demonstrates, the suggested technique is a simple means of effecting the policies underlying the short limitations period of the Act. It is essential to guarantee fairness to the employer.

As an attractive by-product, it also eliminates some of the confusion that otherwise arises from trying to decide when an employer's acts constitute a pattern of discrimination. For example, to find a continuing violation in the first sense of establishing jurisdiction, it generally is necessary that the employment relationship be ongoing. Thus, if the untimely act of discrimination complained of by an individual is a termination, no present discriminatory act exists and there is no continuing violation. On the other hand, if there has been a discriminatory layoff rather than termination, the employment relationship still will be ongoing, and a present violation may be inferred. In the second use of the continuing violation doctrine, however, there will be no operative distinction between a layoff and a termination if the suggested approach is used. The court will have before it *past* and *present* acts of discrimination. It will decide only whether to extend the liability of the employer to the past act, and termination of the employment relationship between the past and present acts should not be determinative. Liability should be extended unless the employer can show he will suffer prejudice as a result.

The best procedure for implementing the suggested approach is as follows: If the employee states facts from which it may be inferred (1) that the employer has committed more than one violation of Title VII (several distinct acts indicating systematic repetition of the same policy), and (2) that at least one of the alleged acts is a present violation, that is, that it occurred within the applicable limitations period, a continuing violation will be considered to exist. The employer then will have an opportunity to raise as a defense any possible prejudice that may accrue from such a finding. Finally, the court, after considering the particular facts of the case, will decide if the prejudice cited by the employer is significant enough to counterbalance the need to make the aggrieved employee "whole." If the existing prejudice warrants a dismissal of the continuing violation allegation, the consideration of the court will be limited to the alleged present violation. If not, the total pattern of employer misconduct will be considered and liability will be extended accordingly.

The burden to come forward with evidence of prejudice is placed on the employer for two reasons. First, an employer is much more likely to have access to facts tending to show prejudice than an employee is to have evidence showing an absence of prejudice. For example, the potential costs if liability is found, the difficulty of producing records, and conflicts concerning planned changes in employment practices all are likely to be known only by the employer. Second, and more important, placing the burden on the employer reflects the

favorable approach taken toward employees by the courts and subsequently approved by Congress and therefore furthers the substantive policies of the Act.

The burden placed on the employer is not an onerous one. There are several ways prejudice could be shown from an extension of liability.[119] First, the employer could show that an inordinate amount of time had passed between the alleged discriminatory acts. Such a showing would be indicative of prejudice and seem to warrant relief analogous to that accorded under the common law doctrine of laches.[120] If a past act is so far removed in time from a present violation that to extend liability would result in injustice, a continuing violation should not be found even if other factors are present indicating the absence of prejudice. Such would have been the case in *American Finance Systems, Inc. v. Harlow,*[121] where the employer was asked to account for claims arising almost twenty years in the past.

Second, it should be relevant to any determination of employer prejudice that, as in *United Air Lines, Inc. v. Evans,*[122] the employer practice complained of had been adjudicated by another court.[123] In such a situation, the employer should be allowed to rest easy without threat of future complaints concerning the same practice. Any recovery against him should be limited to what is necessary to remedy a present violation.

Finally, there are a number of miscellaneous factors that an employer could point to in showing prejudice. Perhaps the most persuasive of these would be the availability of records to disprove em-

---

119. It always should be open for the employer to limit his liability by showing that the alleged discriminatory practice has stopped. Of course, he still would be liable for the practice for 180 days.

120. [Cases discussing laches] proceed on the assumption that the party to whom laches is imparted has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

Galliher v. Cadwell, 145 U.S. 368, 372 (1892). Laches generally is invoked when a plaintiff's lack of diligence in asserting rights in a timely fashion is combined with prejudice to the defendant. *See* Costello v. United States, 365 U.S. 265, 282 (1961); Rouse v. Underwood, 242 Cal. App. 2d 316, 323, 51 Cal. Rptr. 437, 442 (1966). Some courts, however, have recognized "stale demand" as a species of laches whereby a delay in asserting a claim is so lengthy as to create a presumption that injustice would be done to the defendant if the court granted the claim. *See, e.g.*, Sullivant v. Sullivant, 239 Ark. 953, 956, 396 S.W.2d 279, 281 (1965).

121. 65 F.R.D. 94 (D. Md. 1974). *See* text accompanying notes 101-104 *supra.*

122. 431 U.S. 553 (1977).

123. *See* note 72 *supra* and accompanying text.

ployee allegations. In addition, if the employer can show that he legitimately has been surprised by the possibility of an extension of liability and that the effects of a large, unexpected judgment would have disruptive business effects, he also may succeed in showing prejudice.[124]

The procedure suggested in this Note will improve on present law in at least two ways. First, it will shift the main focus of the courts' continuing violation inquiries from the search for a "pattern" to a determination of possible employer prejudice whenever extension of liability is at issue. This will eliminate much of the confusion and conflict that permeates current continuing violation doctrine case law. Second, by concentrating on whether the employer is unduly prejudiced, the suggested approach takes directly into account the conflicting policies of the Act, and more equitable and principled outcomes should result.

124. It is unlikely that adoption of this proposal will produce radical change in current law. In retirement cases, where employers presently face suit from employees for so long as the employees are connected with the retirement fund, the proposal probably will produce a change favoring employers. In most other cases, however, employers who carry on discriminatory policies of hiring, firing, transferring, and promoting, will still be held liable, because the employer will be unable to show undue prejudice.