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The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing

Thelma A. Crivens

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The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing

*Thelma A. Crivens**

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ is one of the most effective federal antidiscrimination statutes in employment discrimination law. Enforcement of this statute has eliminated discriminatory acts directed at individual victims as well as discriminatory policies and practices directed at groups that traditionally have been victims of discrimination. The effectiveness of Title VII in eliminating employment policies that restrict opportunities for a group or class of employees (referred to as systemic discrimination) has been particularly

* Assistant Professor, New York State School of Industrial and Labor Relations, Cornell University; B.A., Lincoln University, 1970; MLIR, School of Labor and Industrial Relations, Michigan State University, 1972; J.D., George Washington University, 1979. The Author wishes to thank Professors Michael Gold and James Gross for their suggestions and comments after reading drafts of this Article. The Author also acknowledges comments and suggestions from Professor Risa Lieberwitz and from other participants in the Research Seminar in the Department of Collective Bargaining, Labor Law and Labor History. Finally, the Author acknowledges the research assistance of the following students: Cary Burnell, Cynthia Duke, Douglas van den Bergh, and Trina Jones.

1. 42 U.S.C. § 2000e to 2000e-17 (1982). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. *Id.* § 2000e-2(a).

important because of the economic, psychological, and social consequences that this discrimination has on members of the group as a whole. Also, this type of discrimination conflicts with fundamental constitutional principles of equality on which this society is based.

Since enactment of Title VII, private plaintiffs have played a major role in the elimination of systemic discrimination. Class action lawsuits and individual litigation by private plaintiffs have resulted in the elimination of discriminatory tests, seniority systems, height and weight requirements, and other policies and practices that have prevented blacks, Hispanics, women, older workers, and other minorities from achieving their employment potential. Despite the role that private plaintiffs have played in eliminating systemic discrimination, some courts have begun restricting the right to challenge this discrimination by interpreting narrowly the procedural provisions of Title VII, which makes it difficult for private plaintiffs even to file charges alleging systemic discrimination. One procedural issue that threatens to restrict the private plaintiff's ability to challenge systemic discrimination is court interpretation of the continuing violation theory.

The continuing violation theory, considered to be one of the most confusing theories in employment discrimination law,² is a procedural theory developed by courts that modifies the normal statute of limitations when the employer's discrimination exists prior to and during the limitations period.³ This modification affects both the courts' jurisdiction over a charge of discrimination and the remedies courts may impose. Because conflict exists among courts over application of the theory to specific situations, a description of how the theory affects remedies and jurisdiction is problematic. In general, however, the theory allows a court to impose a remedy not only for discrimination that has occurred within the statute of limitations period, but also for discriminatory acts that otherwise would be time barred. In order to receive a remedy for discriminatory acts that occur after the limitations period has expired, the plaintiff first will have to prove that those acts were part of a pattern of discrimination that continued into the statute

2. See *Berry v. Board of Supervisors of La. State Univ.*, 715 F.2d 971, 979 (5th Cir. 1983), *cert. denied*, 107 S. Ct. 232 (1986); *Elliot v. Sperry Rand Co.*, 79 F.R.D. 580, 585 (D. Minn. 1978), *aff'd in part, rev'd in part*, 680 F.2d 1225 (8th Cir. 1982); Brooks, McGinn & Cary, *Second Generation Problems Facing Employers in Employment Discrimination Cases: Continuing Violations, Pendent State Claims and Double Attorneys' Fees*, 49 LAW & CONTEMP. PROBS., Autumn 1986, at 25, 26; Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 819-23 (1979).

3. For historical development of the theory, see generally 2 A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* § 48.13(f) (1987), and B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1042-53 (2d ed. 1983 & Supp. 1983-1984).

of limitations period.⁴ When the continuing violation theory is applied to a series of discriminatory acts against a single individual, the jurisdictional branch of the theory allows a court to assert jurisdiction over a charge of discrimination even though discrimination against the plaintiff began prior to the statute of limitations period.⁵ The plaintiff must

4. See B. SCHLEI & P. GROSSMAN, *supra* note 3, at 1047. Title VII requires that a charge of discrimination be filed within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e) (1982). Charging parties, however, usually have 300 days to file the charge. Prior to filing a charge with the Equal Employment Opportunity Commission, the federal agency that enforces Title VII, an individual first must file the charge with a state or local antidiscrimination agency if the law of that jurisdiction prohibits the type of discrimination alleged. The state or local agency has a maximum of 120 days to process the charge. This requirement extends the filing period to 300 days. *Id.* § 2000e-5(c). An individual filing a charge of discrimination is referred to as the "charging party." See, e.g., EEOC Compl. Man. (CCH) ¶ 2027 (Apr. 1988). For purposes of consistency, charging parties will be referred to as plaintiffs in this Article.

Consider, for example, an employer who posted three job vacancies for promotions over a two year period. A qualified female who applied for each of the vacancies was denied the job each time, twice in 1985 and once in 1986. Because Title VII requires that a charge of discrimination be filed within 180 days of the alleged unlawful employment practice, she filed a charge of discrimination within 180 days of the 1986 promotion denial. She alleged, however, that the 1985 acts of discrimination should be actionable for remedial purposes. Most courts would hold that a remedy to cover the 1985 promotion denials, such as back pay, can be imposed if she can show that those denials were part of a pattern of discrimination against her. See generally O'Keefe, *The Effect of the Continuing Violations Theory on Title VII Back Pay Calculations*, 13 SETON HALL L. REV. 262 (1983). Back pay as a remedy is limited by Title VII's requirement that back pay liability "shall not accrue from a date more than two years prior to the filing of a charge." 42 U.S.C. § 2000e-5(g) (1982). A remedy covering prelimitations violations will not be imposed if the plaintiff knew or should have known that the acts were discriminatory at the time of their occurrence. See B. SCHLEI & P. GROSSMAN, *supra* note 3, at 1431. As with an individual employee, if an employer discriminates against a class of employees, the continuing violation theory allows a court to impose a remedy that covers the entire period that the class was victimized by discrimination, including a remedy for discriminatory practices not within the statute of limitations. See, e.g., *McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982); *Association Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). In both situations, the plaintiffs must prove that the statute of limitations has not expired on a violation before recovery is allowed for time-barred discriminatory acts or policies. See *infra* notes 25-42 and accompanying text.

5. See, e.g., Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119, 122-23 (1978). Consider, for example, an employer who does not post job vacancies, but instead selects individuals for promotion to supervisor on an as needed basis. The plant manager, a white male, has sole discretion in selecting persons for promotion to supervisory positions. A qualified female employee sends a letter to the plant manager in January 1985, informing him of her interest in becoming a supervisor. The plant manager selects two males as supervisors in April 1985, but the female does not file a charge of discrimination within 180 days of either selection. In 1986 the female does not send a letter to the plant manager, but the manager promotes a male to a supervisory position. The female files a charge of discrimination within 180 days of the 1986 selection, alleging that the plant manager is engaging in a pattern of discrimination against her. The employer argues that the plaintiff's charge is time barred because she did not submit a letter requesting a promotion (interpreted as applying for a job) in 1986. Instead, she submitted her letter in 1985, and she did not file charges within 180 days of the 1985 selections. Most courts would hold that failure to submit a letter of request for promotion to a supervisory position in 1986 would not bar plaintiff's charge because she is alleging that continuing failure to consider her for promotion to a supervisory position is a continuing violation, and her charge was filed within

prove that the time-barred act of discrimination was part of a pattern, and that an act which furthered the pattern occurred within the limitations period.

This Article focuses on the jurisdictional issue of what constitutes timely filing when a plaintiff alleges a continuing violation based on the continuing existence of an alleged discriminatory policy or practice. The issue of timely filing in systemic discrimination cases generally is raised in two situations: (1) A female employee files a charge of discrimination alleging that a company policy which excludes women from working in certain jobs discriminates against her as well as against women as a class, but she has not applied for and been denied a job in the excluded categories; and (2) A female employee files a charge of discrimination alleging that a company policy which excludes women from working in certain jobs discriminates against her as well as women as a class, but the statute of limitations expired after she received notification of the policy or was denied a job under the policy. A jurisdictional issue arises in the first example (*i.e.*, no direct injury occurring) because the language of Title VII assumes that a specific act will affect an individual.⁶ Section 706(e) states, in part, that a charge of discrimination must be filed within 180 days "after the alleged unlawful employment practice occurred."⁷ In the second example (*i.e.*, the statute of limitations expired after notification of the policy), the jurisdictional issue arises be-

180 days of the last act that furthered the pattern of discrimination. *Cf. Cajigas v. Banco de Ponce*, 741 F.2d 464 (1st Cir. 1984) (suggesting that the continuing violation theory appropriately may be limited to a situation in which there is no single act of discrimination sufficient to trigger the running of the limitations period).

This Article does not focus on application of the continuing violation theory to a series of single acts of discrimination against a specific individual. Because of the many factual circumstances to which the continuing violation theory applies, courts have not been consistent in determining what constitutes a pattern of discrimination, as opposed to a series of unrelated acts that are not part of a pattern. *Cf. Berry*, 715 F.2d at 981 (5th Cir. 1983), *cert. denied*, 107 S. Ct. 232 (1986). In *Berry* the Fifth Circuit articulated a general standard for resolving these issues. *Id.* at 981-82. The three factors that the Fifth Circuit considered critical in determining whether a pattern of discrimination existed were: (1) whether the alleged acts involve the same subject matter; (2) whether the acts are frequent or infrequent; and (3) whether the acts possess a degree of permanence. The court considered the last standard to be the most critical standard. Thus, if the acts have a degree of permanence, the employee should assert her right to challenge those acts when they occur. Recent court decisions have adopted or cited with approval the *Berry* standards. *See Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988); *Santos v. Rush-Presbyterian St. Luke's Medical Center*, 641 F. Supp. 353, 358 (N.D. Ill. 1986); *Arna v. Northwestern Univ.*, 640 F. Supp. 923, 926 (N.D. Ill. 1986); *Zewde v. Elgin Community College*, 601 F. Supp. 1237, 1242-43 (N.D. Ill. 1984); *see also Brooks, McGinn & Cary, supra note 2*, at 31-32.

6. *Cf. Jackson & Matheson, supra note 2*, at 824-25 (noting that, in pattern or practice suits brought by the EEOC, the focus is not on any single act of discrimination, but on an employer's policy of discrimination, even though the agency is required to comply with the Act's filing requirements).

7. 42 U.S.C. § 2000e-5(e) (1982).

cause notice of the alleged violation normally begins the running of the statute of limitations period,⁸ and a charge filed more than 180 days after notice would be time barred.

In both examples, a policy of discrimination exists within the limitations period, but courts disagree on when a plaintiff can challenge the policy under Title VII. Although courts generally hold that a policy of discrimination is a continuing violation, some have held that a specific act under the policy must occur within the limitations period before the policy can be challenged.⁹ Other courts have held that the ongoing policy is the "occurrence," making a charge of discrimination timely as long as the policy exists.¹⁰ One court distinguishes between a facially discriminatory policy and a facially neutral but discriminatory policy,¹¹ holding that the former can be challenged as long as the policy exists,¹² but the latter must be challenged within 180 days of the date that the plaintiff knew or should have known that the policy was discriminatory.¹³

Application of the continuing violation theory to specific employment policies and practices varies among and within circuits, making it difficult to categorize the approaches used by courts.¹⁴ Considering this limitation, three general standards can be identified to determine timely filing of continuing violations charges that are based on systemic discrimination. The first, the date-of-notification/injury standard, considers the violation to be a single act pursuant to the policy that affects the plaintiff and requires the plaintiff to file a charge within 180 days of that act.¹⁵ The second standard, the manifestation/enforcement standard, considers an alleged policy of discrimination (*i.e.*, systemic discrimination) to be a continuing violation and allows the plaintiff to challenge the policy within 180 days of enforcement or manifestation of the policy against the plaintiff or someone in the plaintiff's class.¹⁶ The

8. *Delaware College v. Ricks*, 449 U.S. 250, 259 (1980).

9. For a description of standards developed by courts, see *infra* notes 15-17 and accompanying text.

10. See *infra* notes 15-17 and accompanying text.

11. *Lorance v. AT&T Technologies*, 827 F.2d 163 (7th Cir. 1987), *cert. filed*, 56 U.S.L.W. 3627 (Feb. 26, 1988) (No. 87-1428).

12. *Id.* at 167.

13. *Id.*

14. See *infra* notes 78-153 and accompanying text.

15. See, e.g., *Lorance*, 827 F.2d 163 (facially neutral but discriminatory seniority system); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 217-20 (3d Cir. 1983) (discriminatory layoff plan), *cert. denied*, 469 U.S. 820 (1984); *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1080-81 (3d Cir. 1981) (discriminatory exam), *cert. denied*, 458 U.S. 1122 (1982).

16. See, e.g., *Furr v. AT&T Technologies*, 824 F.2d 1537 (10th Cir. 1987) (pattern and practice of age discrimination); *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986) (facially discriminatory employment program); *Taylor v. Home Ins. Co.*, 777 F.2d 849 (4th Cir.

third standard, the ongoing policy standard, considers an alleged policy of discrimination to be a continuing violation for which charges are always timely, as long as the plaintiff remains subject to the policy.¹⁷ This Article, which focuses on formal employer policies, written and unwritten,¹⁸ analyzes these standards to determine the appropriate standard in cases alleging a continuing violation based on systemic discrimination.

This Article proposes that the proper standard must be one that effectuates the substantive goals of the laws prohibiting employment discrimination, particularly Title VII. Based on this consideration, the Article posits that Title VII's specific goal of eliminating systemic discrimination requires first that the alleged violation be defined as a systemic discriminatory policy, also referred to as a continuing violation.¹⁹ Because the policy is the present violation, the statute of limitations should be interpreted in a manner that facilitates elimination of the policy. Part II of this Article analyzes the decision of the United States Supreme Court in *United Air Lines, Inc. v. Evans*,²⁰ a Title VII case, to determine whether the Court, in the context of its holding on continuing violation theory, resolved the statute of limitations issue. The Court in *Evans* focused on whether the present effects of past discrimination constitute a continuing violation. Part III analyzes the Supreme Court's

1985) (pattern and practice of age discrimination), *cert. denied*, 476 U.S. 1142 (1986); *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980) (discriminatory test), *aff'd on other grounds*, 463 U.S. 582 (1983).

17. See, e.g., *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.) (pattern and practice of discrimination), *cert. denied*, 459 U.S. 971 (1982); *Roberts v. North Am. Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981) (facially discriminatory hiring policy); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 588 F.2d 235 (8th Cir. 1978) (discriminatory test), *vacated*, 616 F.2d 350 (8th Cir. 1980); *Laffey v. Northwest Airlines*, 567 F.2d 429 (D.C. Cir. 1976) (pattern of discrimination), *cert. denied*, 434 U.S. 1086 (1978); *EEOC v. Home Ins. Co.*, 553 F. Supp. 704 (S.D.N.Y.) (facially discriminatory pension plan), *on remand from* 672 F.2d 252 (2d Cir. 1982).

18. A formal, unwritten policy is one in which the employer communicates orally or by means other than the normal channels for disseminating a policy. See *Serpe v. Four-Phase Sys.*, 718 F.2d 935, 937 (9th Cir. 1983); *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570, 1575 (S.D. Tex. 1984), *aff'd in part, rev'd in part*, 805 F.2d 528 (5th Cir. 1986).

This Article focuses on a single employment policy that is alleged to be discriminatory under the disparate treatment or adverse impact theories of discrimination. It does not discuss "pattern and practice" cases in which a plaintiff proves discrimination by showing that use of several employment policies has created a pattern of discrimination against a protected group. These cases are analyzed under standards established in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). See *infra* notes 42, 113 and accompanying text for a discussion of *Teamsters*.

19. Although the continuing violation theory in employment discrimination law usually is discussed in the context of Title VII, it has been applied to other statutes prohibiting employment discrimination as well. See *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983) (42 U.S.C. §§ 1981, 1983), *cert. denied*, 464 U.S. 1042 (1984); *Home Ins. Co.*, 553 F. Supp. 710 (Age Discrimination in Employment Act of 1967).

20. 431 U.S. 553 (1977).

finding in Fair Housing Act²¹ cases that the discriminatory policy is the continuing violation. The legislative history and court interpretations of Title VII, discussed in Part IV, show that this approach should be applied in Title VII cases. Part V concludes that a challenge to a policy of discrimination should be considered timely as long as the policy exists and the plaintiff remains subject to the policy.²² The statute of limitations should not begin to run until an employee subject to the policy resigns or is discharged, or until the policy is discontinued.²³ For prospective employees rejected from a job or deterred from applying for a job because of a discriminatory hiring policy, a charge should be considered timely as long as the policy exists.²⁴ The statute of limitations for these claims should not begin to run until the policy is discontinued.

II. UNITED AIR LINES, INC. v. EVANS

In *Evans*, United Air Lines hired the plaintiff, Carolyn Evans, as a flight attendant in 1966. She resigned in 1968 because of United's no-marriage policy for female flight attendants, but she did not file a charge of discrimination within ninety days of her resignation.²⁵ United Air Lines rehired Evans as a new employee in 1972. During the period between Evans' resignation and rehiring, United abandoned its no-marriage policy. When the company rehired Evans, it did not give her credit for her prior seniority with United. According to company policy, employees who severed their ties with United for any reason began as new employees for purposes of calculating their seniority. Evans filed a charge of discrimination in 1973, one year after she was rehired, alleging that United's seniority system was a present, continuing violation for two reasons: First, because of her unlawful discharge in 1968, men hired between 1968 and 1972 had achieved greater seniority than she;²⁶ and second, the seniority system perpetuated the past discrimination against her.²⁷

The Supreme Court stated that the issue was whether United was

21. 42 U.S.C. §§ 3601-3631 (1982).

22. Cf. Jackson & Matheson, *supra* note 2, at 828 (supporting liberalization of the statutory filing requirement to effectuate elimination of discriminatory employment policy); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 LAW & CONTEMP. PROBS., Autumn 1986, at 53, 59 (recognizing a discriminatory policy as an ongoing violation causing harm to plaintiff); M. ZIMMER, C. SULLIVAN & R. RICHARDS, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 385-88 (1982 & Supp. 1986).

23. M. ZIMMER, C. SULLIVAN & R. RICHARDS, *supra* note 22, at 385-88.

24. *Id.*

25. Before Congress amended Title VII in 1982, the statute of limitations was 90 days. Pub. L. No. 88-352, § 706(d), 78 Stat. 260 (1964).

26. *Evans*, 431 U.S. at 557.

27. *Id.*

committing a second violation by failing to credit Evans with her pre-1972 seniority.²⁸ The alleged second violation was the present effect on Evans of the time-barred act of discrimination. The Court held that Evans' challenge to her 1968 discharge was time barred. First, the Court stated that the seniority system was an intervening neutral policy that treated all previously terminated employees alike, regardless of why the employees had severed their ties with United.²⁹ Although the system did perpetuate United's past discrimination against Evans, her failure to file a timely charge in 1968 allowed United to treat the past discriminatory discharge as lawful, and to ignore the present effects of the seniority system on her pay and fringe benefits.³⁰ Because no proof existed that the neutral policy (*i.e.*, the seniority system) currently was being applied in a discriminatory manner, Evans could not allege that the neutral policy violated Title VII. The Court explained that "the critical question is whether any present *violation* exists."³¹

The Court's second basis for rejecting Evans' charge was that the present effects of past discrimination theory could not be used to invalidate a bona fide seniority system.³² This reasoning affirmed the Court's holding in the companion case of *International Brotherhood of Teamsters v. United States*,³³ a case interpreting section 703(h) of Title VII. Section 703(h) immunizes bona fide seniority systems from a charge of discrimination.³⁴ The issue in *Teamsters* was whether a seniority system that perpetuates hiring discrimination, which occurred prior to the effective date of Title VII, is a bona fide seniority system. The Court held that "an otherwise neutral, legitimate seniority system does not become unlawful . . . because it may perpetuate pre-Act discrimination."³⁵ The Court in *Teamsters* further held that a seniority system is

28. *Id.* at 554.

29. *Id.* at 557-58.

30. *Id.* at 558. The Court stated:

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.

Id.

31. *Id.* (emphasis in original).

32. *Id.* at 560.

33. 431 U.S. 324 (1977).

34. 42 U.S.C. § 2000e-2(h) (1982). Section 703(h) states, in part:

[I]t 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 . . .

Id.

35. *Teamsters*, 431 U.S. at 353-54.

bona fide unless the employer or union adopted or maintained the system for a discriminatory purpose.³⁶ In *Evans* the Court stated that the plaintiff provided no proof that United's seniority system was not bona fide.³⁷ *Evans* also clarified that the section 703(h) exception applied to discrimination that occurred both before and after the effective date of Title VII, as long as it was perpetuated by a bona fide seniority system.³⁸

Evans resolved one jurisdictional issue related to the continuing violation theory: A neutral seniority system that perpetuates the effects of past discrimination is neither a present nor a continuing violation of Title VII. Most lower courts have interpreted this holding to apply to other employment practices as well as seniority systems.³⁹ Thus, lower

36. *Id.* at 356.

37. *Evans*, 431 U.S. at 560.

38. *Id.*

39. See B. SCHLEI & P. GROSSMAN, *supra* note 3, at 1046-47. The present effects of past discrimination theory was used both as a procedural theory to extend the time limitations for filing a charge of discrimination and as a substantive theory of discrimination. As a procedural theory, it included present effects of past discrimination that were not perpetuated through a neutral employment device. In *Jewett v. International Telephone & Telegraph Corp.*, 653 F.2d 89 (3d Cir.), *cert. denied*, 454 U.S. 969 (1981), for example, the Third Circuit held that a delay caused by psychological reactions to a discriminatory act was not a defense to not filing a timely charge, but instead was nonactionable present effects of past discrimination. In situations in which past discrimination was perpetuated through a neutral employment device, the present effects theory was referred to both as a procedural theory for extending the limitations period and as a substantive theory of discrimination. Although most courts hold that *Evans* applied to any neutral employment device, there is still disagreement over whether the present effects of past discrimination theory is extinct. The Equal Employment Opportunity Commission (EEOC), asserting that *Evans* held that discharges are not continuing violations, considers the theory to be applicable to neutral employment practices other than seniority systems that perpetuate past discrimination. EEOC Compl. Man. (CCH) ¶¶ 2075, 2102 (Apr. 1985); see also *Roberts v. North Am. Rockwell Corp.*, 650 F.2d 823, 827 (6th Cir. 1981).

In a 1986 case in which the Supreme Court addressed the continuing violation theory, *Bazemore v. Friday*, 478 U.S. 385 (1986), the issue of whether the present effects of past discrimination theory still is applicable to neutral employment devices other than seniority systems was raised again. In *Bazemore* several black extension agents at the University of North Carolina's Agricultural Extension Service, which is part of the state's extension program, alleged race discrimination in compensation. Prior to 1965, the effective date of Title VII's application to private employers, the Extension Service divided extension personnel into black and white branches, with employees in the black branch being paid a lower salary than those in the white branch despite performing the same jobs. These branches were merged prospectively in 1965, but the salary disparities were never eliminated completely for those blacks who were hired when the branches were segregated. Thus, the salary disparities continued to exist after the 1972 amendments extending Title VII coverage to state and local governments. The University of North Carolina argued that the plaintiffs' claims of salary discrimination were nonactionable present effects of past discrimination. The Supreme Court, in a unanimous decision on this issue, held that the continuing salary disparities were a present violation of Title VII.

Bazemore can be interpreted two ways. First, the Court was stating that paying disparate salaries within the actionable period is intentional disparate treatment, regardless of when the salary disparities began. Second, the fact that the new salary structure continued the effects of past discrimination may mean that a neutral employment device that perpetuates the effects of

courts generally hold that present effects of past discrimination are neither a present nor a continuing violation of Title VII, even when a neutral employment device or practice perpetuates that past discrimination.⁴⁰ An actionable charge of discrimination must be based on identifying an act or policy of discrimination that directly discriminates within the statute of limitations period.⁴¹ Proof of a discriminatory policy existing within the statute of limitations period can be based on either of the two major substantive theories of discrimination in Title VII law: The adverse impact theory or the disparate treatment theory.⁴²

The Court in *Evans* considered a single act pursuant to a policy of discrimination,⁴³ but failed to resolve a second jurisdictional issue: What constitutes timely filing in systemic discrimination cases. The Court held that *Evans*' charge was time barred because she did not file it within ninety days of her discharge, but the Court did not consider whether or when she could have challenged the policy during her original employment with United. *Evans* possibly could have filed a charge

past discrimination is still actionable discrimination. For a discussion of *Bazemore*, see Florida v. Long, 108 S. Ct. 2354, 2364, 2368-69 (1988); Case Comment, *Bazemore v. Friday: Salary Discrimination Under Title VII*, 99 HARV. L. REV. 655 (1986); *Expansion of Continuing Violation Theory*, 122 Lab. Rel. Rep. Analysis (BNA) 41, 41-44 (July 14, 1986).

40. See generally A. LARSON & L. LARSON, *supra* note 3, § 48.13(g)(1)-(5) (containing a discussion of application of the continuing violation theory to specific employment policies).

41. *Evans*, 431 U.S. at 558; see also Carty, *The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans*, 31 HASTINGS L.J. 929, 935 (1980).

42. Under the adverse impact theory, established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a neutral employment policy, such as a testing or weightlifting requirement for promotions, is discriminatory if it has a disproportionate adverse effect on a group's employment opportunities and is not job related. Proof of past discrimination is not necessary to establish a present violation. Plaintiffs only have to show that a current employment policy has an adverse impact on a protected group.

The second substantive theory of discrimination, disparate treatment, is used to prove intentional discrimination. Plaintiffs can prove either individual disparate treatment or systemic disparate treatment. When a present violation under the systemic disparate treatment theory is based on proving the existence of a pattern or a practice of discrimination, the burden of proof established in the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), is used to prove the violation. In *Teamsters* the Court held that the plaintiff's burden is "to establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure." *Id.* at 336. Statistics alone may prove the existence of the pattern and practice of intentional discrimination; statistics combined with anecdotal evidence can provide this proof as well. *Id.* at 339. When a formal policy already exists, existence of the policy can provide the requisite proof of intent if the policy is facially discriminatory. When the formal policy is apparently neutral, any relevant evidence tending to prove intent is admissible, including statistical evidence of the effects of the policy and testimonial or documentary evidence on the origins of the policy. *Cf. United States Postal Serv. v. Aikens*, 460 U.S. 711, 715-16 (1983). See *infra* note 116 for a discussion of the individual disparate treatment theory of discrimination.

43. See Carty, *supra* note 41, at 947-52; Jackson & Matheson, *supra* note 2, at 826; see also *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1148 (7th Cir. 1978), *rev'd on other grounds sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

at other times. She could have filed within ninety days of being hired, at any time between her hiring and her discharge, or within ninety days of another employee's discharge under the policy. While *Evans* held that discharges pursuant to a policy of discrimination are not continuing violations,⁴⁴ the case did not address the issue of whether Evans could have challenged the policy at any other time.

III. THE FAIR HOUSING ACT AND CONTINUING VIOLATIONS

Conflict over timely filing in the employment context is due to the failure of courts to develop a rationale and a legal standard for interpreting statutes of limitations with respect to systemic discrimination. In *Havens Realty Corp. v. Coleman*,⁴⁵ a case brought under the Fair Housing Act,⁴⁶ the Supreme Court defined the violation in systemic discrimination cases as the policy of discrimination itself and referred to the continuing existence of the policy as a continuing violation of the Fair Housing Act.⁴⁷ The Court then interpreted the statute of limitations in light of the continuing violation. The Court's rationale for this construction was that it effectuated the remedial purpose of the Fair Housing Act: eliminating systemic discrimination.⁴⁸ Based on this rationale for interpreting the statute of limitations, the Court held that an individual victim of housing discrimination could file a complaint of discrimination within 180 days of an "asserted occurrence" of the discriminatory policy, regardless of whether the individual filing the complaint had suffered specific injury prior to the statute of limitations period.⁴⁹

In *Havens*, three individual plaintiffs and a housing counseling and referral service filed individual and class action complaints against Havens Realty, alleging that Havens Realty violated the Fair Housing Act by engaging in racial steering.⁵⁰ Two of the plaintiffs were "tester" plaintiffs (one black and one white), and one was a renter plaintiff (a black male). Each sought housing through Havens Realty. The corporate plaintiff, Housing Opportunities Made Equal (HOME), organized the testers' activities. When the tester plaintiffs inquired about housing at the two apartment units operated by Havens Realty, the black tester

44. See *Taylor v. Bunge Corp.*, 775 F.2d 617 (5th Cir. 1985).

45. 455 U.S. 363 (1982).

46. 42 U.S.C. §§ 3601-3631 (1982).

47. *Havens*, 455 U.S. at 380.

48. *Id.*

49. *Id.* at 380-81.

50. Plaintiffs described racial steering as the practice of deliberately referring prospective buyers or renters to neighborhoods or buildings based on their race or ethnicity in order to preserve the racial or ethnic character of the neighborhood or building. *Id.* at 366 n.1.

plaintiff was told that no apartments were available; the white tester was told that some were available. The black renter plaintiff also was told that no apartments were available. A total of five specific alleged incidents of racial steering occurred. All three individual plaintiffs and HOME alleged that Havens Realty's policy of racial steering deprived them of the benefits that result from living in an interracial neighborhood.

Section 3612(a) of the Fair Housing Act requires that a civil action alleging discrimination under the Act be filed within 180 days "after the alleged discriminatory housing practice occurred."⁵¹ All three plaintiffs and HOME filed complaints of discrimination, but only the renter plaintiff filed his complaint within 180 days of being denied housing. Thus, because the four other alleged incidents of housing discrimination occurred prior to the incident involving the renter plaintiff, they occurred prior to the 180-day statute of limitations period. The district court granted Havens Realty's motion to dismiss the claims of the tester plaintiffs because they did not file their complaints within 180 days of the unlawful housing practice.⁵² HOME and the tester plaintiffs appealed the dismissal to the Court of Appeals for the Fourth Circuit. One of the issues on appeal concerned the definition of "occurrence" for purposes of interpreting the statute of limitations.⁵³ Havens Realty argued that each discrete act of alleged housing discrimination was an occurrence, and that the tester plaintiffs did not file charges within 180 days of each act.⁵⁴ The plaintiffs argued that the occurrence under the statute was Havens Realty's practice of racial steering, and that a charge was timely if it was filed within 180 days of the last act of discrimination pursuant to the practice.⁵⁵ According to the plaintiffs, the last act pursuant to the practice occurred when the renter plaintiff was denied housing.⁵⁶

The Fourth Circuit adopted the plaintiffs' definition that the occurrence under the statute was the alleged practice of racial steering.⁵⁷ The court considered this interpretation to be consistent with the Fair Housing Act's remedial goal of eliminating systemic discrimination.⁵⁸

51. 42 U.S.C. § 3612(a) (1982).

52. *Coles v. Havens Realty Corp.*, 633 F.2d 384, 385 (4th Cir. 1980), *modified*, 455 U.S. 363 (1982).

53. *Coles*, 633 F.2d at 391.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 391-92.

58. *Id.* at 392-93. The court stated:

There is an appealing simplicity equating "occurrence" to a discrete act. Not simple, however, are the social ills targeted by Congress or the actions of putative landlords. It is not isolated

Because the policy continued to occur within the limitations period, the Fourth Circuit held that anyone subject to the policy could file a charge challenging the policy within 180 days of an asserted occurrence of the policy, regardless of when a particular individual was injured by the policy.⁵⁹

The Supreme Court affirmed the Fourth Circuit's interpretation of the statute of limitations. The Court held that the testers' claims that they were denied the benefits of interracial association were not time barred, but were part of the racial steering claim that constituted the continuing violation.⁶⁰ The Court reasoned that continuing violations of the Fair Housing Act warranted treatment different from isolated acts of discrimination. In order to fulfill the "broad remedial intent" of Congress in enacting the Fair Housing Act, the Court held that a claim for a continuing violation is timely when filed "within 180 days of the last asserted occurrence of that practice."⁶¹

Havens resolved several issues relevant to interpreting the statute of limitations in complaints alleging systemic discrimination. First, according to *Havens*, the discriminatory policy (referred to as a "practice" in *Havens*) is characterized as the alleged occurrence. In fact, the Court predicated its interpretation of the statute of limitations on the exis-

instances of discrimination that are the primary focus of the statute—rather it is a generalized practice of housing discrimination.

....

. . . . By the very nature of these offenses, "occurrence" must be thus construed to effect the remedial purposes of the Act.

Id.

59. *Id.* at 393.

60. *Havens*, 455 U.S. at 381. The black tester plaintiff also alleged a violation based on lack of truthful housing information, a violation of § 3604 of the Fair Housing Act. *Id.* The Court held that this claim was not related to the racial steering claims and, thus, was not part of the continuing violation. *Id.* at 381-82.

61. *Id.* at 380-81. The Court stated:

[A] "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in [3612(a)] are intended to keep stale claims out of the courts Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of [3612(a)], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act [W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id. (citations and footnote omitted). In *Havens* the Court cited *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), a Title VII case decided the same day, to support its reasoning that limitations periods in discrimination statutes should be interpreted liberally in order to effectuate the broad remedial intent of Congress to eliminate discrimination. *Havens*, 455 U.S. at 380. *Zipes* held that Title VII's limitations period is not jurisdictional, which would require a court to dismiss an untimely charge, but instead is like a statute of limitations, which allows a court to accept equitable defenses to untimely filed charges. *Zipes*, 455 U.S. at 393.

tence of an alleged policy of discrimination. Second, the fact that a plaintiff's injury occurred prior to the statute of limitations period does not preclude that plaintiff from challenging the policy of discrimination. Third, the statute of limitations must be interpreted in a manner consistent with eliminating a continuing violation. The rationale for construing the policy of discrimination as the alleged occurrence and interpreting the statute of limitations consistent with that construction is that the Fair Housing Act's remedial goal of eliminating systemic discrimination is effectuated. Based on the Court's definition of an occurrence, a plaintiff alleging systemic housing discrimination could file a complaint of discrimination within 180 days of an asserted occurrence of the discriminatory housing policy. Whether this asserted occurrence standard is applicable to Title VII law depends upon whether it effectuates Title VII's remedial goals.

IV. TITLE VII AND CONTINUING VIOLATIONS

A. *Legislative Debate on Title VII*

The legal definition of the violation in *Havens* as well as the rationale for that definition should apply to employment discrimination law as well, because the elimination of systemic discrimination is also a specific goal in employment discrimination law. During the 1972 congressional debates over amendments to Title VII, Congress repeatedly acknowledged its inability to calculate the extent and nature of discrimination.⁶² The original Title VII, enacted in 1964, contemplated that most charges of discrimination would involve single acts of discrimination against a specific individual.⁶³ Congress believed that most charges of discrimination would be enforced through conciliation.⁶⁴ The two other methods of enforcement—pattern and practice suits filed by the Attorney General of the United States⁶⁵ and litigation by private par-

62. See generally H.R. REP. NO. 238, 92d Cong., 1st Sess. 1-11 (1972) [hereinafter H.R. REP. NO. 238], reprinted in LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 61-71 [hereinafter 1972 LEGISLATIVE HISTORY]; S. REP. NO. 415, 92d Cong., 1st Sess. 1-8 (1971) [hereinafter S. REP. NO. 415], reprinted in 1972 LEGISLATIVE HISTORY, *supra*, at 410-17.

63. H.R. REP. NO. 238, *supra* note 62, at 8, reprinted in 1972 LEGISLATIVE HISTORY, *supra* note 62, at 68.

64. *Id.*

65. Under the original version of Title VII, Congress did not give the EEOC the power to sue in federal court to enforce Title VII. The EEOC only had authority to conciliate or to use other informal methods to resolve those charges when it concluded that reasonable cause existed that discrimination had occurred. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 (1964). Only private plaintiffs and the Attorney General were given the authority to file lawsuits. *Id.* § 706(e), at 260. Section 707(a) of the original Act gave the Attorney General the authority to file a civil action when 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 [Title VII] . . ." *Id.* § 707(a), at 261. The 1972 amendments gave EEOC the authority

ties—were not considered to be the primary enforcement tools.⁶⁶ Later experience with Title VII, however, indicated that systemic discrimination was a major problem.

Litigation by private plaintiffs as well as conciliation attempts by the Equal Employment Opportunity Commission (EEOC), the agency created to enforce Title VII, revealed a lack of understanding about the systemic nature of discrimination.⁶⁷ The EEOC's ability to deal with issues of systemic discrimination in part led to proposed legislation giving the agency cease and desist powers.⁶⁸ Although this proposal was defeated, Congress did give the agency the power to file lawsuits on behalf of aggrieved individuals and to file pattern and practice suits, partly for the purpose of eliminating systemic discrimination.⁶⁹

Congress also recognized the critical role played by private plaintiffs in eliminating systemic discrimination through the use of class action lawsuits.⁷⁰ The conference report on the final amendments to Title VII specifically stated that the new amendment giving EEOC the power to file suit in federal court did not prevent the use of class actions.⁷¹ The report noted that "the leading cases . . . have recognized that many Title VII claims are necessarily class action complaints."⁷² Thus, Congress specifically endorsed the use of class actions to end systemic discrimination.

In addition to addressing concerns about systemic discrimination, Congress in 1972 also supported a liberal interpretation of the statute of limitations period in Title VII and endorsed the continuing violation theory. According to the Senate Report to amended Title VII, the statute of limitations begins to run at the time of the last occurrence of discrimination. The Report endorsed other liberal interpretations of the

to initiate a lawsuit on behalf of an aggrieved party and to file pattern and practice suits against private employers. 42 U.S.C. §§ 2000e-4(g)(6), 2000e-6(c) (1982).

66. H.R. REP. NO. 238, *supra* note 62, at 8, *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 62, at 68.

67. *Id.* The House Report on the proposed amendments to Title VII stated:
[In 1964] employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . .

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.

Id.

68. *Id.* at 10, 27, *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 62, at 70, 87.

69. *Id.* at 14, *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 62, at 74.

70. *E.g.*, 117 CONG. REC. H32,096-97 (1971) (statement of Rep. Abzug), *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 62, at 276.

71. S. CONF. REP. NO. 899, 92d Cong., 2d Sess. 26 (March 6, 1972) [hereinafter S. CONF. REP. NO. 899], *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 62, at 1847.

72. *Id.*

continuing violation theory and counseled the courts to construe Title VII broadly so as not to deny claims because of "procedural oversight" or government delay.⁷³ The Report's specific reference to the limitations period as requiring an "occurrence" of discrimination raises but does not resolve the issue presented in this Article. In early cases involving a series of single acts of discrimination against an individual plaintiff, the continuing violation theory always required that a specific act injure the plaintiff within the limitations period.⁷⁴ Thus, an occurrence referred to an act of discrimination directed at a single individual. Litigation challenging discriminatory policies, however, was treated differently.

B. Court Interpretations of Timeliness Under Title VII

Although many of the pre-1972 continuing violation cases concerned single acts of discrimination, some concerned systemic discrimination. In the systemic discrimination cases, some courts did not require that a specific act injure the plaintiff within the limitations period.⁷⁵ These courts construed the discriminatory policy as the occurrence. For example, in *King v. Georgia Power Co.*,⁷⁶ a pre-amendment case, black employees in a class action complaint alleged discrimination based on promotions, testing, and segregated facilities. The employer argued that the charge was not timely because the employees did not allege that they had filed a charge within ninety days of the alleged unlawful employment practice. The district court held that failure to make such an allegation does not deprive a court of jurisdiction over the claim because the alleged violations were "continuing acts."⁷⁷ Simi-

73. *Id.* at 25, reprinted in 1972 LEGISLATIVE HISTORY, *supra* note 62, at 1846. Title VII as amended extended the limitations period for filing a charge of discrimination from 90 to 180 days. The Senate Report to the amended Act stated:

Existing case law which was [sic] 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 . . . that aggrieved individuals, who frequently are untrained laymen and 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. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

Id.

74. See generally B. SCHLEI & P. GROSSMAN, *supra* note 3, at 1047-48.

75. *Id.* at 1050. But see B. SCHLEI & P. GROSSMAN, *supra* note 3, at 236 (Supp. 1983-1984) (discussing recent developments).

76. 295 F. Supp. 943 (N.D. Ga. 1968).

77. *Id.* at 946.

larly, in *Bartmess v. Drewrys U.S.A., Inc.*,⁷⁸ a 1971 case, the Seventh Circuit held that a facially discriminatory pension plan that discriminated on the basis of sex was a continuing violation for which charges were timely as long as the plan existed. Cases in which the existence of a discriminatory policy served as the basis for a charge of discrimination are consistent with the Senate Report's endorsement of case law that granted plaintiffs "maximum coverage under the law" when they filed charges of discrimination.⁷⁹ A 1980 Supreme Court decision⁸⁰ and judicial concern about interpreting the statute of limitations too expansively, however, have caused considerable conflict over the appropriate standard for timely filing in systemic discrimination cases.

Havens Realty Corp. v. Coleman supports the view that resolving the issue of timely filing in charges that allege systemic discrimination requires balancing the substantive goals of the applicable statute and the procedural provisions designed to achieve those goals. When conflict arises over interpretation of a procedural provision, one should adopt an interpretation that furthers the statute's substantive goals, because any specific procedural provision of an act should be interpreted in the context of the act's overall purpose.⁸¹ The elimination of systemic discrimination is a specific goal of Title VII. When plaintiffs have filed charges alleging systemic employment discrimination, however, some courts have failed to analyze the issue of timeliness in light of this goal. These courts, instead, have interpreted narrowly the statute of limitations in Title VII and have required that an act stemming from the discriminatory policy affect the plaintiff. These courts apply the date-of-notification/injury standard.

1. Date-of-Notification/Injury Standard

Under the date-of-notification/injury standard, a charge of discrimination must be filed within 180 days of a plaintiff's being notified of the discriminatory policy or within 180 days of an action affecting the plaintiff under the policy. This standard does not define the policy or the continuing violation as the discriminatory "occurrence." Instead, it defines an act pursuant to the policy that affects the plaintiff as the discriminatory occurrence. Some courts that have adopted this approach have relied on the Supreme Court's decision in *Delaware State*

78. 444 F.2d 1186, 1188 (7th Cir.), cert. denied, 404 U.S. 939 (1971).

79. Cf. B. SCHLEI & P. GROSSMAN, *supra* note 3, at 236 (Supp. 1983-1984).

80. See *infra* notes 82-92 and accompanying text for a discussion of *Delaware College v. Ricks*.

81. See generally Comment, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U.C. DAVIS L. REV. 749 (1985) (authored by Kathryn Doi).

*College v. Ricks*⁸² as precedent.

Under the standard introduced by the Court in *Ricks*, courts should interpret narrowly the statute of limitations when a single act of discrimination injures the plaintiff. In *Ricks* the plaintiff, a Liberian college professor, was denied tenure in February 1973. A reconsideration of the decision in February 1974 affirmed the original denial, and the College Board of Trustees upheld the decision in March 1974. In June 1974 the Board of Trustees offered Ricks a terminal one-year contract, which was to expire on June 30, 1975. Ricks signed the contract in September 1974 and filed a grievance that same month. In April 1975 Ricks filed a charge of discrimination based on national origin. The district court held that his claim was time barred because the alleged unlawful employment practice, the denial of tenure, had occurred more than 180 days prior to the filing of the charge.⁸³ Reversing the district court,⁸⁴ the Court of Appeals for the Third Circuit held that the statute of limitations did not begin to run until Ricks' one-year contract had expired.⁸⁵

The Supreme Court reversed the decision of the Court of Appeals. The Court stated that the first inquiry is to "identify precisely the 'unlawful employment practice' of which [Ricks] complains."⁸⁶ The Court found that the unlawful employment practice had occurred when Ricks was notified that he was denied tenure, not when his contract was terminated.⁸⁷ In response to Ricks' claim that he was suffering from a continuing violation until the date of his termination, the Court noted that Ricks did not allege any acts of discrimination that could constitute a continuing violation between the date he was notified that he was denied tenure and the date of discharge.⁸⁸ The Court stated that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."⁸⁹

The rationale for the Court's decision focused on the primary policy reason for a statute of limitations: To prevent litigation of stale claims.⁹⁰ If stale claims of discrimination are litigated, employers may

82. 449 U.S. 250 (1980).

83. *Id.* at 254-55.

84. *Id.* at 255.

85. *Id.*

86. *Id.* at 257.

87. *Id.* at 258.

88. *Id.* at 257.

89. *Id.*

90. *Id.* at 256-57. The Court stated: "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Id.* The Court also held Ricks' charge to be untimely under 42 U.S.C. § 1981 (1982), another civil rights statute.

suffer prejudice from loss of relevant documents, inability to recall dates and events, and unavailability of witnesses.⁹¹ In a later decision, *Chardon v. Fernandez*,⁹² the Supreme Court affirmed the *Ricks* holding that the date of notification of an alleged unlawful employment practice begins the statute of limitations period.

The Court of Appeals for the Third Circuit adopted the date-of-notification/injury standard in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*.⁹³ In *Bronze Shields*, black and Hispanic plaintiffs alleged that the eligibility roster promulgated and used to hire police recruits for the Newark Police Department was discriminatory because it was based on a test that had an adverse impact on black and Hispanic applicants. The plaintiffs knew that they had failed the test in May 1975, when the eligibility roster ranking employees based on the test was published, but they did not file their charges within 180 days of the roster's publication. Instead, they filed charges in July 1976, more than one year after the eligibility roster had been published. The City intended to use the roster as a basis for selecting new recruits for three years. The Newark Police Department did not use the roster until November 1977, more than one year after the plaintiffs filed their charges. The district court held that the charges were untimely based on its finding that the unlawful employment practice occurred in May 1975, with the promulgation of the roster.⁹⁴ The plaintiffs argued that their charges were not time barred because the eligibility roster would be used to select recruits for three years.⁹⁵ According to the plaintiffs, the defendants' continued use of the results from a discriminatory test was a continuing violation for which charges were timely as long as the roster was in effect.⁹⁶

Relying upon *Ricks*, the Court of Appeals for the Third Circuit affirmed the district court's holding that the charges were untimely. The court stated that the *Ricks* decision required it to "identify precisely the 'unlawful employment practice' of which [plaintiff] complains."⁹⁷ According to the court, the language of Title VII requires that a specific act aggrieve the plaintiffs.⁹⁸ The court stated that the only act which aggrieved the plaintiffs was the promulgation of the eligibility roster.⁹⁹ Because the plaintiffs did not file charges within 180 days of the roster's

91. See Brooks, McGinn & Cary, *supra* note 2, at 29.

92. 454 U.S. 6 (1981).

93. 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982).

94. *Id.* at 1080.

95. *Id.* at 1081.

96. *Id.*

97. *Id.* at 1083.

98. *Id.* at 1084.

99. *Id.*

publication, the court held that the charges were time barred.¹⁰⁰ The court explained that the plaintiffs had not alleged that a specific act of discrimination had occurred after the roster was published, such as an allegation that selections from the neutral eligibility roster were made on a discriminatory basis.¹⁰¹

The date-of-notification/injury standard is inconsistent with the legal standard developed in *Havens Realty Corp. v. Coleman*. Under *Havens*, if the plaintiff alleges that a policy of discrimination exists, the policy, not a specific act, constitutes the alleged violation, and the statute of limitations should be interpreted in a manner consistent with eliminating the policy. Courts following the date-of-notification/injury standard, however, look for a specific act that affects the plaintiff and consider that act to be the violation. Thus, a plaintiff must file a charge within 180 days of the act. Courts focusing on a specific act that aggrieves the plaintiff ignore the alleged discriminatory policy that produced the act of discrimination, even though that policy will continue to affect employment opportunities for the plaintiff and members of the plaintiff's class. In *Bronze Shields*, for example, the court identified the unlawful employment practice as the promulgation of the eligibility roster, not the unlawful test. Although the eligibility roster constituted notice of the test results, the issue of whether the test was discriminatory was never presented to the court. In fact, the Newark Police Department later made hiring decisions based on the alleged discriminatory test by selecting recruits from the eligibility roster after the plaintiffs had filed charges.¹⁰² The plaintiffs had challenged the test in order to eliminate the use of a discriminatory test at any time. Because the court did not focus on the discriminatory policy, the plaintiffs were barred for three years from being selected as police recruits based on an alleged invalid selection procedure.¹⁰³

100. *Id.*

101. *Id.* at 1083; cf. *Zangrillo v. Fashion Inst. of Technology*, 601 F. Supp. 1346 (S.D.N.Y.), *aff'd*, 788 F.2d 2 (2d Cir. 1985). Although the Third Circuit relied upon *Ricks* in *Bronze Shields*, its analysis paralleled *Evans*. The Third Circuit held that the plaintiffs would have to show disparate treatment in selections from the eligibility roster in order for their charges to be timely. This is similar to *Evans'* holding that past discrimination perpetuated by a neutral employment device is not a present violation unless it is alleged that the neutral device is being applied in a discriminatory manner, such as an allegation that the neutral seniority system treats males and females differently. In *Evans*, however, the underlying policy that produced the discrimination (*i.e.*, the no-marriage policy) was eliminated. Thus, any effect from that past discriminatory policy that was not timely challenged was a nonactionable present effect of past discrimination. In *Bronze Shields*, by contrast, the underlying discriminatory policy continued to exist. Thus, the eligibility roster in *Bronze Shields* was not a neutral device that perpetuated past discrimination. Instead, the roster was promulgated and used pursuant to a present policy of discrimination.

102. *Bronze Shields*, 667 F.2d at 1083 n.23.

103. See *id.* at 1089-93 (Higginbotham, J., dissenting).

In *Bronze Shields* the Third Circuit equated notice of the eligibility roster with notice of tenure denial in *Ricks*. The court, therefore, implicitly concluded that the rationale of *Ricks*—to prevent litigation of stale claims—also applied. The *Ricks* rationale, however, is inapplicable to cases in which there exists a continuing violation based on an underlying policy of discrimination. In *Ricks*, a single act of discrimination was directed at a specific individual. The notification of tenure denial was the only alleged act of discrimination. In that situation, delay in filing a charge of discrimination potentially could prejudice an employer defending against a charge of discrimination. In *Bronze Shields* and other cases involving alleged discriminatory policies, the policy that has injured or could injure the plaintiff continues to exist. Thus, while a specific act under the policy may have occurred prior to the limitations period, the policy itself exists within the limitations period. Because the policy exists within the limitations period, the employer will not be prejudiced by a challenge to the policy, for the alleged violation is not stale.¹⁰⁴

In another Third Circuit case applying the date-of-notification/injury standard, *EEOC v. Westinghouse Electric Corp.*,¹⁰⁵ the Court of Appeals clarified its reasoning in *Ricks* by holding that *Ricks* did not apply to continuing violations based on systemic discrimination. The court still required, however, that the plaintiffs suffer actual injury from the policy within the statute of limitations period before the court would establish jurisdiction over the charge. In *Westinghouse*, the Equal Employment Opportunity Commission alleged that Westinghouse's Layoff and Income Benefits Plan (LIB) violated the Age Discrimination in Employment Act (ADEA)¹⁰⁶ because employees who were fifty-five years or older were excluded from the plan. The plan provided benefits to employees who were laid off for business reasons, but employees who were eligible for early retirement were ineligible for LIB benefits. Excluded from this plan, then, were most employees who were fifty-five years of age or older, because they were eligible for early retirement. Paul Meola, a Westinghouse employee who was laid off in April 1977 because of a plant closing, was denied LIB benefits because of his eligibility for early retirement. Meola filed a complaint of discrimination that same month, alleging that the LIB plan violated the ADEA. EEOC eventually initiated a suit on behalf of Meola in 1980, and amended the complaint in February 1981 to include sixty-four

104. *EEOC v. Home Ins. Co.*, 553 F. Supp. 704, 713 (S.D.N.Y. 1982); *Erdmann v. Board of Educ.*, 34 Fair Empl. Prac. Cas. (BNA) 1373, 1375 (D.N.J. 1982).

105. 725 F.2d 211, 218-20 (3d. Cir. 1983), cert. denied, 469 U.S. 820 (1984).

106. 29 U.S.C. § 623 (1982 & Supp. IV 1986).

other Westinghouse employees who were laid off in April 1977 under similar circumstances. Between January and March 1977, Westinghouse had notified all employees who eventually were laid off after the plant closing about their ineligibility for the LIB plan.

Under the ADEA, plaintiffs must file a civil action within two years of an alleged violation; the limitations period is extended to three years for willful violations.¹⁰⁷ Relying on *Ricks*, the district court held that only Meola's charge was filed timely; the charges filed by the other sixty-four employees were time barred under the two or three year statute of limitations.¹⁰⁸ The court found the discriminatory practice to be the denial of LIB benefits and held that the notice to employees in early 1977 constituted notice of that denial.¹⁰⁹ The Third Circuit reversed. The court stated that *Ricks* did not apply because it dealt with "isolated instances of discrimination concluded in the past."¹¹⁰ Instead, the court accepted the plaintiffs' characterization of the policy as a continuing violation and stated that the issue concerned the accrual of a cause of action for a continuing violation under ADEA's three year statute of limitations.¹¹¹ The court held that a cause of action did not accrue until each plaintiff had been injured by the policy of denying LIB claims to those eligible for early retirement.¹¹² The critical aspect of the *Westinghouse* decision is the court's conclusion that an employee did not have an enforceable demand until after she was denied LIB benefits. Although the Third Circuit agreed that *Ricks* was inapplicable to continuing violations, the court's requirement in *Westinghouse* that each person be rejected under the LIB plan before filing a charge is as inflexible as the *Ricks* standard.

If the date-of-notification standard can be criticized for foreclosing too early a plaintiff's right to challenge a policy of discrimination,

107. The ADEA is enforced by the Equal Employment Opportunity Commission. This statute requires a plaintiff to file a charge of discrimination within 180 days of the alleged violation. 29 U.S.C. § 626(d)(1) (1982). After filing a charge, a plaintiff has two years to file a civil suit. This time period is extended to three years in cases of willful violations. *Id.* §§ 626(e)(1), 255(a).

108. *Westinghouse*, 725 F.2d at 216-17.

109. *Id.*

110. *Id.* at 218.

111. *Id.* at 218-20.

112. *Id.* at 219. The court stated:

A denial of LIB benefits could not occur until an employee was eligible to apply for LIB and until the claim was denied due to eligibility for early retirement. *An employee did not have an enforceable demand until the claim was denied. . . .* Although the alleged unlawful practice was the adoption and implementation of the policy, a cause of action could not accrue until the discrimination manifested itself by virtue of the policy actually being applied to individual employees at the time of the plant closing through individual LIB claim rejections. *Id.* (citations omitted) (emphasis added). The court apparently concluded that the plaintiffs did not have standing to challenge the policy until they were injured by it. *Id.* at 220. See *infra* note 157 for a discussion of standing.

Westinghouse's use of the second part of the standard, date of injury, can be criticized for granting too late the plaintiff's right to challenge the policy. Under *Westinghouse*, an employee may have to wait years before challenging an alleged discriminatory policy. If an employee sought to challenge an alleged discriminatory retirement plan, for example, she would have to challenge the plan upon notification of eligibility for the plan, because the continuing existence of an alleged discriminatory retirement plan is a continuing violation. Actual injury under the plan, however, would not occur until the employee was eligible for retirement, perhaps ten to twenty years in the future. The continuing existence of an alleged discriminatory policy, therefore, could produce low morale and productivity, for victims of discrimination suffer psychological harm as well as economic detriment.

The existence of a discriminatory policy also can discourage an individual's pursuit of an employment opportunity, which makes it impossible for that individual to suffer direct injury from the policy. In *International Brotherhood of Teamsters v. United States*¹¹³ the Supreme Court held that black and Hispanic employees did not have to prove that they had applied for a job to establish that they were the victims of an employer's discriminatory hiring policy, because the existence of a discriminatory hiring policy might have deterred or discouraged employees from applying for the job.¹¹⁴ Other policies also can have this effect. In *Abrams v. Baylor College of Medicine*¹¹⁵ two plaintiffs alleged that Baylor College's policy of excluding Jews from a rotational program that allowed doctors to practice medicine in Saudi Arabia constituted religious discrimination. The college argued that the plaintiffs had failed to prove that they had applied for the rotational program.¹¹⁶ The district court, citing *Teamsters*, stated that "where the act of formal application would be futile, the fact that a plaintiff never applied does not preclude recovery."¹¹⁷ No specific act of discrimination that injures the plaintiff can occur in the case of facially discriminatory policies, such as in *Abrams*, because the employer prevents the em-

113. 431 U.S. 324 (1977).

114. *Id.* at 365-66.

115. 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part, rev'd in part*, 805 F.2d 528 (5th Cir. 1986).

116. *Id.* at 1578. The district court analyzed the plaintiffs' charges under the individual disparate treatment theory of discrimination. Under this theory of discrimination, a plaintiff must show that she applied for a job, was qualified, was denied the job despite her qualifications, and that the employer continued to seek applicants with similar qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Courts have modified this standard based upon different factual circumstances. In *Abrams* the district court stated that the plaintiffs *would have applied* but for the overt discriminatory policy. 581 F. Supp. at 1579 (emphasis added). For an extended discussion of *Abrams*, see *infra* notes 119-28 and accompanying text.

117. 581 F. Supp. at 1578.

ployee from pursuing an employment opportunity.¹¹⁸ The second standard, the manifestation/enforcement standard, avoids some, but not all, of these problems.

2. Manifestation/Enforcement Standard

The manifestation/enforcement standard is a variation of the "asserted occurrence" standard developed in *Havens Realty Corp. v. Coleman*. This standard requires the plaintiff to file a charge of systemic discrimination within 180 days of the discriminatory policy being manifested or enforced against the plaintiff or against a member of the plaintiff's class. For example, if a member of the plaintiff's class is denied a promotion based on an alleged discriminatory promotion policy, then the plaintiff can file a charge within 180 days of that promotion denial. Similarly, if an employer makes an employment decision under the policy without specifically rejecting a plaintiff or a member of the plaintiff's class, such as promoting a nonclass member based on an unlawful test, this manifestation of the policy, if within the limitations period, can be the basis for a charge. Allowing a plaintiff to file a charge based on the enforcement of the policy against another or based on the manifestation of the policy distinguishes this standard from the date-of-notification/injury standard, for the latter standard requires that a specific act under the policy injure the plaintiff. *Abrams v. Baylor College of Medicine*¹¹⁹ and *Guardians Association v. Civil Service Commission* illustrate the manifestation/enforcement approach.¹²⁰

In *Abrams* the Baylor College of Medicine provided cardiovascular services for the King Faisal Hospital in Saudi Arabia. The school sent teams of anesthesiologists and other personnel to Saudi Arabia every three months. Because more pediatric cases exhibiting certain medical diseases occurred in Saudi Arabia, doctors chosen for the rotation were able to receive intensive clinical experience by handling these cases. Additionally, salaries for the doctors who went to Saudi Arabia were twice as much as those of the doctors who remained at Baylor. Application to the program was informal. An interested doctor would inform one of the program administrators of her interest. The administrator then listed the doctor on a scheduling sheet and submitted her name to the block entry visa program in order to facilitate entry into Saudi Arabia.

Abrams and *Linde* were Jewish doctors who were interested in participating in the rotation program, but each was told by University or program administrators that Jews were not allowed to participate in the

118. Cf. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980).

119. 805 F.2d 528 (5th Cir. 1986).

120. 633 F.2d 232 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983).

program because of the problems in obtaining visas for them. Abrams was informed of the policy a few days before he was hired in 1978. Linde learned of the exclusion in 1980. Abrams and Linde filed their charges of religious discrimination in 1982, more than 180 days after each had been notified of the hospital's policy. Baylor argued that Abrams' and Linde's charges were not timely. The district court, however, stated that the charges were filed timely, based on the theory that any ongoing policy of discrimination is a continuing violation.¹²¹ The court stated that sending out the rotation teams within 180 days of the charges being filed was a manifestation of the continuing violation.¹²²

On appeal, the Court of Appeals for the Fifth Circuit first examined Abrams' and Linde's timeliness claims under equitable defenses for extending the statute of limitations in order to determine why the plaintiffs had not filed their charges when they were notified of the policy. The court stated that the filing period normally may "not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated."¹²³ The court stated further that an unlawful employment practice that manifests itself over time is a continuing violation that "relieves a plaintiff who makes such a claim from the burden of proving that the entire violation occurred within the actionable period."¹²⁴ After accepting an equitable defense to the plaintiffs' failure to challenge the policy upon notification, the court held that the charges were timely based on its interpretation of the continuing violation theory. In discussing the theory, the Fifth Circuit did not accept the argument that any ongoing policy of discrimination can be the basis for a timely filing.¹²⁵ Instead, the court stated that there must be "some application of the illegal policy to [the plaintiff] (or to his class) within the 180 days preceding the filing of his complaint."¹²⁶ The court stated that an ex-

121. *Abrams*, 805 F.2d at 531-32.

122. *Id.* at 534.

123. *Id.* at 532 (quoting *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560 (5th Cir. 1985)).

124. 805 F.2d at 532-33 (quoting *Berry v. Board of Supervisors of La. State Univ.*, 715 F.2d 971, 979 (5th Cir. 1983)). The court reached the illogical conclusion that the hospital's failure to verify the policy with the Saudi Government obscured the existence of the policy. It interpreted the oral communications regarding the policy as single acts of discrimination. The plaintiffs, however, were told repeatedly by administrators of the program that Jews were not allowed to participate in the rotation program. That was the official position and policy of Baylor Hospital, regardless of the position of the Saudi Government. The Fifth Circuit reached the conclusion that failure to verify the policy obscured the existence of the policy in order to avoid the harsh and unfair conclusion that plaintiffs' actions otherwise would have been time barred. For a discussion of the ongoing policy standard, see *infra* notes 138-57.

125. 805 F.2d at 533.

126. *Id.*; cf. *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980) (stat-

pansive reading of the continuing violation theory "would . . . read the statute of limitations right out of existence."¹²⁷ Because the school had sent out a rotation team within the limitations period, however, the Fifth Circuit held that this manifestation of the policy rendered the charges timely.¹²⁸

In *Guardians Association v. Civil Service Commission*,¹²⁹ the Second Circuit applied the manifestation/enforcement standard to a discriminatory hiring examination. The plaintiffs alleged that a test given for hiring entry level recruits for the police department had an adverse impact on blacks and Hispanics. Although the test was administered and the eligibility list was promulgated prior to the 1972 amendments extending Title VII to state and local jurisdictions, the eligibility list was used until October 1974. The plaintiffs filed their charges within six months of October 1974. The Court of Appeals stated that continuing to use the results from a discriminatory test was a continuing violation, regardless of when the test was instituted.¹³⁰ Such a discriminatory policy did not end until the employer stopped hiring based on the discriminatory test.¹³¹ Because a discriminatory policy did exist, the court stated that "the timeliness of a complaint filed as to such a policy is measured from the last occurrence of an instance of that policy."¹³² Thus, the plaintiffs were not required to file their charges within 180 days of notification of their test results, but within 180 days of the employer's last selection from the eligibility list.

The manifestation/enforcement standard does effectuate Title VII's goal of eliminating systemic discrimination. Under this standard courts consider the nature of the violation and interpret the statute of limitations in light of that violation. Because a discriminatory policy is being challenged, a plaintiff may file a charge based on injury to another person in the plaintiff's class or on some other manifestation of the policy. This standard's deficiencies, however, appear to outweigh its merits. Like the notification/injury standard, under this standard challenges to some discriminatory employment policies might be delayed for several years. For example, in the case of eligibility lists derived from an alleged discriminatory test, a plaintiff would have to wait until selections were made from the list before filing a charge, an event that

ing that "a timely charge can be based on administration of the test during the limitations period or denial of a promotion during the limitations period based on preliminary administration of the test").

127. *Abrams*, 805 F.2d at 534.

128. *Id.*

129. 633 F.2d 232 (2d Cir. 1980).

130. *Id.* at 249.

131. *Id.*

132. *Id.*

may not occur for more than a year with a list that is effective for three or four years. Such a delay could produce economic detriment as well as low morale and productivity. The manifestation/enforcement standard has two additional deficiencies. First, it does not consider the exclusionary effects of systemic discrimination on those discriminated against. Second, the standard unfairly requires a single employee to have extensive knowledge of an employer's business operation.

Systemic discrimination can foreclose a group's knowledge of and participation in an employer's personnel processes. Because of this exclusion, the victim of discrimination is not always aware of when a specific decision occurs pursuant to an alleged discriminatory policy. In *Domingo v. New England Fish Co.*¹³³ minority employees alleged that the company discriminated in hiring and promotions. The company recruited by word of mouth for most of the higher paying skilled jobs and for clerical and technical jobs. Minority employees were unable to learn of the job openings because most of these jobs were held by whites and the work environment was segregated; thus, the employer's discriminatory system was effective in preventing minority participation in the job information network. The Court of Appeals for the Ninth Circuit held that using separate job channels in recruiting for higher skilled jobs, coupled with other evidence, constituted intentional discrimination.¹³⁴ Other hiring and promotion policies, such as nepotism, race- or sex-segregated departments, and promotions based on supervisory recommendations, could produce a similar result.¹³⁵ In these circumstances, to require one to show some manifestation or enforcement of a discriminatory policy would be futile when the policy effectively has precluded participation in the job information network.

The second reason that the manifestation/enforcement standard should not be applied is that it unfairly places the burden of challenging a discriminatory policy on the plaintiff. In large companies, those employees affected by the policy might work in different departments or plants. Because of the expansive business environment in which the policy could be applied, a plaintiff likely will not know when it is being enforced. In individual disparate treatment cases, a plaintiff is expected to know when she was denied a job or a promotion because the decision usually is communicated directly to the individual, or since only one isolated employment decision has been made, the plaintiff easily can ascertain detailed information about the decision. When an employer enacts a policy that affects hundreds or thousands of persons working in

133. 727 F.2d 1429 (9th Cir.), modified on other grounds, 742 F.2d 520 (9th Cir. 1984).

134. 727 F.2d at 1436.

135. See B. SCHLEI & P. GROSSMAN, *supra* note 3, at 191-205, 573-74.

different departments or plants, however, the policy could be enforced or manifested against anyone at the company, and a plaintiff seeking to challenge the policy is not necessarily aware of the enforcement or manifestation. In *Abrams*, for example, Abrams was transferred, over his objections, from the hospital that supplied most of the doctors included in the rotation program to another hospital, increasing the possibility that he would be unaware of decisions regarding selections for the rotation team.¹³⁶ Similarly, in *Bronze Shields*, the plaintiffs would be required to know when selections from the eligibility roster were made, even though the City's failure to hire them meant that they likely would not be aware of internal personnel decisions.¹³⁷ The ongoing policy standard does not have these deficiencies because its primary focus is the nature of the violation.

3. Ongoing Policy Standard

Under the ongoing policy standard, a person subject to an alleged discriminatory policy may file a charge at any time during the policy's existence. A cause of action under this standard does not accrue until a person no longer is subject to the policy. This standard is distinguishable from the prior standards in that it does not require the occurrence of any specific act under the policy before a plaintiff who is subject to the policy may challenge it. *Roberts v. North American Rockwell Corp.*¹³⁸ and *EEOC v. Home Insurance Co.*¹³⁹ are examples of this standard.

In *Roberts* plaintiff Roberts applied for a job with North American Rockwell through the Winchester, Kentucky Unemployment Office. The office refused to give her an employment application, informing her that North American Rockwell did not hire women. Roberts then sent her son-in-law into the office to obtain an application. After he obtained one, she filled it out and mailed it to North American Rockwell in December 1972. Between December 1972 and August 1973, Roberts periodically inquired about her application at the unemployment office, but she was told repeatedly that the company did not hire women. In September 1973 Roberts and two other women went to the unemployment office to fill out applications for jobs at North American Rockwell, but all the women were refused applications. After complaining to the local human rights commission, the women finally received applications, but Roberts did not fill hers out because she already had one on file.

136. 805 F.2d at 531.

137. See *Bronze Shields*, 667 F.2d at 1093 (Higginbotham, J., dissenting).

138. 650 F.2d 823 (6th Cir. 1981).

139. 553 F. Supp. 704 (S.D.N.Y. 1982).

Roberts filed a charge of sex discrimination in hiring on September 17, 1973. The district court held that her charge was time barred because she did not file it within 180 days of December 1972, when she first mailed her application to the company.¹⁴⁰ The Sixth Circuit reversed, holding that an ongoing policy of hiring discrimination is a continuing violation. The court argued that a continuing policy of discrimination would result in the automatic rejection of applicants because of race, sex, or national origin. In that circumstance, the court found no reason for an applicant "to continuously apply, only to be continuously rejected."¹⁴¹

In *EEOC v. Home Insurance Co.*,¹⁴² the Equal Employment Opportunity Commission alleged that Home Insurance Company's policy of mandatory retirement at age sixty-two was an intentional violation of the Age Discrimination in Employment Act (ADEA).¹⁴³ The company adopted its new retirement plan on January 1, 1974, and notified employees of the plan by the latter part of 1974. One hundred and forty-three terminations under the new plan occurred between February 1976 and October 1977. In October 1977 Home Insurance raised the mandatory retirement age to sixty-five. EEOC filed a complaint on behalf of the terminated employees on December 28, 1978.¹⁴⁴

To determine whether monetary relief was available to the 143 plaintiffs, the court first had to determine whether the complaint was timely. Home Insurance argued that the plaintiffs' cause of action accrued in 1974, when they were notified of the retirement policy.¹⁴⁵ Thus, their complaint was not filed within two or three years of the violation, the statute of limitations under the ADEA. EEOC argued, *inter alia*, that a cause of action did not accrue until the 143 persons were due to receive their retirement incomes.¹⁴⁶

140. *Roberts*, 650 F.2d at 825.

141. *Id.* at 827. The court stated:

[I]f there is a continuing violation, the company is continually violating Title VII so long as its discriminatory policy remains in effect. An applicant for employment or promotion will, in many circumstances, be interested in any suitable position which opens up. As job openings become available, the applicant will automatically be rejected because of his/her race, sex or national origin. We see no reason to formalistically require an applicant to continuously apply, only to be continuously rejected. We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well.

Id.

142. 553 F. Supp. 704.

143. 29 U.S.C. § 623 (1982 & Supp. IV 1986).

144. *See* 29 U.S.C. § 626(b), (c) (1982) (stating that EEOC has authority under the ADEA to file complaints on behalf of aggrieved employees).

145. 553 F. Supp. at 709.

146. *Id.* at 711.

The district court held that the plan could be challenged as long as it continued to exist. The court also found that the statute of limitations on a cause of action for an employee alleging termination under an unlawful retirement plan does not begin to run until the last day of employment or until the unlawful provision is discontinued, whichever occurs earlier.¹⁴⁷ The court stated that the date of notification test developed in *Delaware College v. Ricks* should not be used because the continued existence of a discriminatory policy rendered inapplicable the justification for the statute of limitations—to prevent litigation of stale claims.¹⁴⁸

Because the ongoing policy standard does not require that specific acts of discrimination occur before a plaintiff may challenge an alleged policy of discrimination, it provides plaintiffs with maximum flexibility in filing their charges. Prior discussions of the less flexible date-of-notification/injury and manifestation/enforcement standards have shown that waiting for an act to occur under the policy could result in unduly delaying or restricting challenges to alleged discriminatory policies. By focusing on the nature of the violation, the ongoing policy standard avoids procedural obstacles to the elimination of systemic discrimination. Under this standard, determining when a plaintiff may challenge systemic discrimination is secondary to determining whether systemic discrimination exists. Thus, this standard best effectuates Title VII's goal of eliminating such discrimination.

In addition to best effectuating the goals of Title VII, the ongoing policy standard also promotes consistency in application of the continuing violation theory. The lack of a consistent judicial standard in cases applying the continuing violation theory to systemic discrimination has been a major problem in employment discrimination law.¹⁴⁹ This Article has discussed conflicting standards among the circuits, such as application of the theory to discriminatory tests, but conflicting standards also exist within the same circuit. A New York District Court, for example, applied the ongoing policy standard to a facially discriminatory

147. *Id.* at 712-13. The court stated:

[A]doption and maintenance of an unlawful mandatory retirement policy [is] a continuing violation in the sense of a discriminatory "condition of employment" . . . [A] suit—or an EEOC charge—against the maintenance of Home's mandatory retirement policy would be timely filed so long as the provision was maintained at least into the applicable limitations period prior to the filing. . . . Such a suit could be brought by either the EEOC, a newly hired employee, or . . . any then-employed individual, for injunctive and, if available, monetary relief.

Id. at 712 (citations omitted).

148. *Id.* at 712-13.

149. See B. SCHLEI & P. GROSSMAN, *supra* note 3, at 1047.

pension plan,¹⁵⁰ but, in a later case, the Second Circuit applied the date-of-notification/injury standard to an apparently neutral pension plan.¹⁵¹ The Seventh Circuit applied the ongoing policy standard to a facially discriminatory pension plan,¹⁵² but applied an equivalent of the date-of-notification/injury standard to a "facially-neutral but discriminatory seniority system."¹⁵³ The rationale for the different standards is not always clear; nor is a given rationale always logical.¹⁵⁴ The ongoing policy standard provides a consistent judicial standard that will allow plaintiffs to know with a greater degree of certainty whether their charges are filed timely.

Since an employer may be engaging in a continuing violation, why should there be any restriction on the plaintiff's right to challenge the violation? This question necessarily results from the reasoning in *Havens Realty Corp. v. Coleman* that the policy constitutes the present violation; therefore, the rationale for a narrow interpretation of the statute of limitations no longer exists. *Havens* did restrict a plaintiff's right to challenge a continuing violation, but this restriction related more to proving the existence of a present violation than to restricting the right to challenge that violation.

In *Havens* proof of an alleged policy of discrimination was based on an accumulation of several specific incidents of discrimination. Even when proof of an alleged policy of discrimination is based on several discrete events, though, plaintiffs first must show that at least one of those discrete events has occurred within the limitations period, for the Supreme Court still requires the existence of a present alleged violation.¹⁵⁵ Under this view the discrete event or asserted occurrence constitutes proof of the present alleged violation. Thus, any plaintiff affected by the policy may file a complaint within 180 days of the event that proved the existence of a present violation. By contrast, when employees challenge formal employer policies as continuing violations, the existence of the formal policy is proof of the existence of a present alleged violation. Because the policy is the present alleged violation, the only remaining issue is whether that policy is in fact discriminatory.

The holding in *Havens* related to how one proves a present viola-

150. *Home Ins. Co.*, 553 F. Supp. at 704.

151. *O'Malley v. GTE Serv. Corp.*, 758 F.2d 818 (2d Cir. 1985). The Second Circuit cited with approval the holding of *Home Insurance* in this case. *Id.* at 821.

152. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

153. *Lorance v. AT&T Technologies*, 827 F.2d 163, 167 (7th Cir. 1987), *cert. filed*, 56 U.S.L.W. 3627 (Feb. 26, 1988) (No. 87-1428).

154. See *Jackson & Matheson*, *supra* note 2, at 822-23.

155. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); see also *supra* notes 39-42 and accompanying text.

tion; thus, the manifestation/enforcement standard must be analyzed in light of whether it effectuates the remedial purpose of Title VII. The prior discussion of the deficiencies of the standard leads to the conclusion that it does not effectuate that purpose. Because Title VII requires that a charge of discrimination be filed within 180 days of the alleged unlawful employment practice, a plaintiff always should be allowed to challenge a continuing violation based on systemic discrimination, for that constitutes the unlawful employment practice. The statute of limitations should not begin to run until an employee subject to the policy resigns or is discharged, or until the policy is discontinued.¹⁵⁶ For prospective employees rejected from a job or deferred from applying because of a discriminatory hiring policy, a charge should be considered timely as long as the policy exists. The statute of limitations for these claims should not begin to run until the policy is discontinued.

V. CONCLUSION

In *Havens Realty Corp. v. Coleman*,¹⁵⁷ the Supreme Court concluded that an allegation of systemic discrimination under the Fair Housing Act is serious enough to warrant redefining the violation as a continuing violation and interpreting the statute of limitations in a manner that facilitates elimination of continuing violations. This interpretation effectuates the Fair Housing Act's goal of eliminating systemic discrimination. This goal, also expressed in Title VII, is aimed at eliminating those policies and practices that affect not just an individual, but an entire class of persons. For the Fair Housing Act, the manifestation/enforcement standard facilitates achievement of that goal. Only the ongoing policy standard, however, facilitates achievement of that goal under Title VII.

Despite the fact that Title VII is over twenty years old, employers continue to use discriminatory policies that deny employment opportunities to blacks, women, Hispanics, older workers, and other minority groups, with resulting economic, social, and psychological consequences.

156. Whether a person is subject to the policy, that is, whether a person has standing to challenge a policy, has been interpreted broadly by courts. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court stated that an aggrieved party does not have to be injured specifically (*i.e.*, rejected from a job) by an allegedly discriminatory policy, because the policy may deter a person from pursuing an employment opportunity. *Id.* at 363. In the case of allegedly discriminatory tests, courts have held that an individual challenging a test must be affected adversely by the test. Similarly, with an educational qualification, such as a college degree, the aggrieved party must be one who is disqualified because of the requirement. In general, determining who has standing to challenge a policy depends upon the policy being challenged. Compare *Walls v. Mississippi Dep't of Pub. Welfare*, 730 F.2d 306, 314-15, 318-19 (5th Cir. 1984) with 2 A. LARSON & L. LARSON, *supra* note 3, §§ 49.12, 49.51(a).

157. 455 U.S. 363 (1982).

Litigation by private plaintiffs has been a major means of eliminating these policies. The future role of private litigation depends, in part, upon judicial recognition of the importance of eliminating systemic discrimination. This recognition should lead courts to construe liberally the procedural provisions of Title VII. Plaintiffs who challenge this discrimination should not be burdened with "procedural labyrinths"¹⁵⁸ that allow employers to escape or delay legal challenges to arguably discriminatory policies.

In 1975 the Supreme Court stated that the prospect of back pay liability should provide a catalyst for employers and unions to examine their employment policies for effects on groups that traditionally have been excluded from participating fully in the American society.¹⁵⁹ Based on the continuing existence of arguably discriminatory policies, the prospect of back pay liability has failed to provide that catalyst. Filing charges and litigation continue to be the primary catalysts for examining possibly discriminatory employment policies, and courts should facilitate challenges to these policies by allowing plaintiffs maximum flexibility in filing charges of systemic discrimination.

158. *Bethel v. Jefferson*, 589 F.2d 631, 643 (D.C. Cir. 1978).

159. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

