"If at First You Don't Succeed . . .": An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court

Major Steven M. Ranieri[*]

I. Introduction

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.[1] The Equal Employment Opportunity Commission (EEOC) enforces these prohibitions against federal agencies through a comprehensive regulatory scheme[2] that expressly includes the power to award remedies, such as reinstatement, hiring (with or without back pay), and other equitable relief.[3]

Neither the originally enacted nor the amended versions of Title VII provide a mechanism for federal agencies to challenge the EEOC's award of remedies in federal court. The Title VII and the EEOC implementing regulations act in concert to make EEOC decisions regarding both liability and remedies binding upon federal agencies. Thus, the EEOC's determination is final, unless a complainant is dissatisfied with the decision and seeks a trial de novo in federal court.[4]

Congress amended Title VII with the Civil Rights Act of 1991 (1991 CRA).[5] The 1991 CRA permits, among other things, victims of intentional discrimination to recover compensatory damages and permits any party to demand a jury trial when the alleged victim seeks compensatory damages.[6] Unfortunately, the 1991 CRA does not explicitly state whether the EEOC could award compensatory damages in administrative proceedings or whether compensatory damages were a remedy available only to employees suing in federal court. Notwithstanding this uncertainty, the EEOC began to grant compensatory damages in federal-sector employment discrimination cases shortly after the passage of the 1991 CRA.[7]

In *West v. Gibson*, the Supreme Court held that the EEOC possessed the legal authority to require federal agencies to pay compensatory damages.[8] In doing so, the court determined that the 1991 CRA constituted a waiver of the federal government's sovereign immunity and that this waiver applied not only to litigation in federal court but also to administrative proceedings.[9] Thus, *Gibson* permits the EEOC to award compensatory damages to federal complainants as an administrative remedy.

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[*] Judge Advocate, U.S. Army. Presently assigned as a Brigade Judge Advocate, 1st Brigade, 3d Infantry Division, Fort Stewart, Ga. LL.M., 2008, The Judge Advocate General's Sch., Charlottesville, Va.; J.D., 1998, Case Western Reserve University School of Law, Ohio; B.B.A., *summa cum laude*, 1995, Kent State University, Ohio. Previous assignments include Student, 56th Judge Advocate Officer Graduate Course, Charlottesville, Va.; Special Assistant U.S. Attorney, District of Columbia, 2006–2007; Special Assistant U.S. Attorney, Eastern District of Virginia, 2006; Litigation Attorney, Litigation Division, U.S. Army Legal Services Agency, 2004–2006; OIC, Trial Defense Service, Fort Belvoir, Va., 2002–2004, Trial Defense Attorney, 3d Infantry Division, Baghdad, Iraq, 2003; Senior Trial Counsel, I Corp and Fort Lewis, Fort Lewis, Wash., 2001–2002; Trial Counsel, Administrative Law Attorney, Legal Assistance Attorney, 1st Brigade, 25th Infantry Division, Fort Lewis, Wash., 1999–2001. Member of the bars of Ohio, the Court of Appeals for the 4th Circuit, the Court of Appeals for the D.C. Circuit, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[1] 42 U.S.C. § 2000e (2000).

[2] *Id.* § 2000e-16(b).

> [T]he Equal Employment Opportunity Commission [EEOC] shall have authority to enforce the provisions of subsection (a) of [42 U.S.C. § 2000e] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

Id.

[3] *Id.* § 2000e-5(g).

[4] As explained in more detail in Section II, *infra*, a complainant can also seek to enforce an EEOC's determination of liability and remedy against an alleged non-compliant federal agency.

[5] 42 U.S.C. § 1981a.

[6] *See id.*

[7] *See, e.g.*, Jackson v. U.S. Postal Serv., E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

[8] West. v. Gibson, 527 U.S. 212, 223 (1999).

[9] *Id.* at 222.

This article extends the reasoning of the Supreme Court's decision in *Gibson* and makes the argument that adverse EEOC decisions are not binding against federal agencies when complainants seek compensatory damages. Since the 1991 CRA permits any party to demand a jury trial in compensatory damages cases, it should also permit federal agencies to challenge adverse EEOC rulings in federal court. In other words, if the waiver of sovereign immunity applies to awards of compensatory damages in administrative hearings, and if an award of compensatory damages is conditioned upon a request for trial by jury, such administrative awards must be subject to judicial review if the federal agency decides to challenge the adverse decision.

Amending Title VII to allow federal agencies to challenge adverse EEOC rulings furthers the purpose of Title VII. The purpose of Title VII is to remedy discrimination in federal employment, which it does in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action. This system encourages quicker, less formal and less expensive resolutions of disputes within the federal government and outside of court. The current dispute resolution system, however, provides no incentive to complainants to settle their complaints because they can obtain a trial de novo in federal court if they lose in the administrative process. Complainants would be encouraged to enter into binding administrative settlements if federal agencies could challenge adverse administrative findings in federal court.

To discuss this issue the article is divided into four parts. Part I provides a detailed explanation of the federal equal employment opportunity (EEO) complaint process. Part II provides a statutory and regulatory interpretation of the 1991 CRA and the Supreme Court's decision in *Gibson*. Part III presents the argument that existing law provides authority for federal agencies to challenge adverse EEOC decisions in federal court. Lastly, Part IV states the case for changing Title VII to create a procedure for judicial review of adverse EEOC decisions.

II. The Federal Equal Employment Opportunity Complaint Process

Through statutes and regulations, Congress created an elaborate remedial system that is the exclusive and preemptive means for handling federal sector discrimination complaints.[10] Specifically, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, as amended, prohibits discrimination based on race, color, religion, sex, or national origin.[11] Acting under the authorization of Title VII, the EEOC promulgates regulations to provide a mechanism to enforce the statute's anti-discrimination prohibitions.

A. Title VII of the Civil Rights Act of 1964

1. Applying Title VII to Federal Sector Employment

When enacted, Title VII specifically excluded the federal government from the definition of "employer" and, consequently, its provisions did not protect federal sector employees and applicants.[12] Congress extended Title VII's anti-discrimination prohibitions to executive agencies of the federal government in 1972, with the addition of § 2000e-16 to Title 42.[13]

Section 2000e-16 states "[a]ll personnel actions affecting employees or applicants for employment [in executive agencies][14] shall be made free from any discrimination based on race, color, religion, sex, or national origin."[15] While §

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[10] *See* Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976).

[11] *See supra* note 1.

[12] 42 U.S.C. § 2000e-(b)(1).

[13] Federal employees were relegated to the protections of executive orders until the enactment of the Equal Employment Opportunity Act of 1972, which amended Title VII by, among other things, extending antidiscrimination prohibitions to the federal sector. *See id*. § 2000e-16 (corresponds to the Equal Employment Opportunity Act of 1972, § 11).

[14] The term "federal agencies" is used throughout this article for simplification and, unless otherwise noted, refers generally to all departments, agencies, and units of the federal government covered by Title VII and the EEOC's antidiscrimination regulations. 29 C.F.R. § 1614.103(b) (2007).

> This part applies to: (1) Military departments as defined in 5 U.S.C. 102; (2) Executive agencies as defined in 5 U.S.C. 105; (3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; (4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act; (5) The National Oceanic and Atmospheric Administration Commissioned Corps; (6) The Government Printing Office; and (7) The Smithsonian Institution.

2000e-16 applies Title VII to federal sector employees, there is not a complete statutory overlap in applying Title VII in the private and state government sectors with the federal sector. Specifically, § 2000e-16, which applies to federal government employees, incorporates by reference only the remedies sections of 2000e-5, which applies to employees in the private sector.[16]

Thus, it would appear that § 2000e-16 prohibits discrimination in the federal sector solely to "personnel actions" effecting federal employees. However, courts have historically interpreted § 2000e-16 to incorporate by inference the provisions applicable to the private sector.[17] Thus, Courts have routinely interpreted Title VII to prohibit retaliation against federal sector employees who engage in protected activity even though § 2000e-16 does not explicitly prohibit it.[18]

2. Civil Actions under Title VII

Section 2000e-16 provides the statutory framework for aggrieved persons to file civil actions in federal district court alleging Title VII violations. The statute provides that "an employee or applicant for employment, if aggrieved by the final disposition of his [administrative] complaint, or by the failure to take final action on his [administrative] complaint, may file a civil action as provided in § 2000e–5."[19] Notably absent, however, is a reciprocal provision authorizing federal agencies to initiate a civil action against the federal sector employee or applicant for employment. This "one sided" access to federal district court is reinforced by the EEOC's implementing regulations. As a result, federal agencies are bound by the factual and legal determinations of the EEOC.

B. The Regulatory Framework Created by the EEOC

The federal-sector employment discrimination complaint process[20] is delineated in Part 1614, of Title 29 of the Code of Federal Regulations (CFR).[21] It is a segmented process beginning with informal counseling and extending, in some circumstances, to a formal complaint, an agency investigation, a hearing before an EEOC administrative judge, and an appeal to the EEOC.

The process begins with informal counseling. Aggrieved persons who believe they have been discriminated against must contact an agency EEO counselor within forty-five days of the alleged discriminatory matter or, in the case of personnel action, within forty-five days of the action's effective date, prior to filing a complaint in order to try to resolve the matter informally.[22] The EEO counselors explain the federal sector EEO process to the aggrieved individual and attempt to resolve the complaint informally.[23] At the initial counseling session, counselors must advise individuals in writing of their rights and

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Id.; *see also* 42 U.S.C. § 2000e-16(a).

[15] 42 U.S.C. § 2000e-16(a).

[16] *Id.* § 2000e-16(d) ("The provisions of section 2000e–5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.").

[17] *See, e.g.*, Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008). The Age Discrimination in Employment Act, unlike Title VII, does not specifically incorporate anti-retaliation protections provided to private sector employees; nonetheless, the Supreme Court held that the ADEA provides a federal sector employee a cause of action for retaliation in the same manner in which it provides this cause of action to a private sector employee. *See also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[18] *Compare* 42 U.S.C. § 2000e-16 (requiring all personnel actions affecting employees or applicants for employment to be free from discrimination), *with* 42 U.S.C. § 2000(e)-2(a)(1) (forbidding discrimination based on "race, color, religion, sex, or national origin"), *and* 42 U. S. C. §2000e-3(a) (forbidding discrimination against an employee or job applicant who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation).

[19] *Id.* § 2000e-16(c).

[20] This article examines individual federal sector complaints and does not cover class complaints.

[21] 29 C.F.R. § 1614 (2007).

[22] *Id.* § 1614.105(a). This time limit must be extended by the agency if the complainant

> shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits . . . .

Id. § 1614.105(a)(2).

[23] *Id.*

responsibilities in the EEO process, including the right to request a hearing before an EEOC administrative judge or the right to an immediate final decision from the agency following its investigation of the complaint.[24] Furthermore, counselors must inform aggrieved persons of their right to elect between pursuing the matter in the EEO process under Part 1614 or the Merit Systems Protection Board (MSPB) appeal process, if applicable.[25] The counselor must also inform aggrieved persons of their duty to mitigate damages and that only claims raised in pre-complaint counseling may be alleged in a subsequent formal complaint filed with the agency.[26]

The agency must complete the counseling within thirty days of the initial date the aggrieved person contacted the agency's EEO office to file her informal complaint.[27] If the aggrieved person's informal complaint is not resolved within that time, the counselor must inform the individual in writing of the right to file a formal complaint of discrimination.[28] The notice must inform the individual that a formal complaint must be filed within fifteen days of receiving the notice, identify the agency official with whom the complaint must be filed, and explain the individual's duty to inform the agency if he is represented by legal counsel.[29]

A formal complaint is a signed statement from the aggrieved person or his attorney and must be sufficiently precise to identify the complainant and the agency, and to generally describe the action or practice which forms the basis of the complaint.[30] The complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims similar to those raised in the complaint.[31] When an aggrieved person subsequently files a formal complaint, the EEO counselor must submit a written report to the agency's EEO office concerning the issues discussed and the actions taken during counseling.[32]

The responding agency[33] is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the deadline.[34] The agency is then required to develop an impartial and appropriate factual record upon which to make findings on the claims raised by the complaint.[35] At the conclusion of the investigation, the agency must provide a copy of the investigative file to the aggrieved person and notify him that, within thirty days of receipt of the file, he has the right to request a hearing and a decision from an EEOC administrative judge[36] or he may request an immediate final decision from the agency.[37] The complainant may also request a hearing before an EEOC administrative judge at any time after 180 days have elapsed from the filing of the formal complaint

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[24] *Id.*

[25] "A mixed case complaint is a complaint of employment discrimination filed with a Federal agency . . . related to or stemming from an action that can be appealed to the [MSPB]. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address." *Id.* § 1614.302(a)(1). "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of [illegal] discrimination . . . ." *Id.* § 1614.302(a)(2). Mixed case complaints and appeals are a distinct concept from the mixed motive theory of intentional discrimination. *See* note 90 *infra*.

[26] 29 C.F.R. § 1614.105(b)(1).

[27] *Id.* § 1614.105(d). The aggrieved person may agree to extend the thirty-day counseling period, however, for an additional sixty days. *See id.* § 1614.105(e).

[28] *Id.*

[29] *Id.*

[30] *Id.* § 1614.106(c).

[31] *Id.* § 1614.106(d).

[32] *Id.* § 1614.105(c).

[33] *Id.* § 1614.108(a).

[34] *Id.* § 1614.106(e)(2).

> When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

Id.

[35] *Id.* § 1614.108(b) ("An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.").

[36] *Id.* § 1614.108(f).

[37] *Id.* § 1614.110 ("When an agency . . . receives a request for an immediate final decision . . . under § 1614.108(f), the agency shall take final action by issuing a final decision.").

if the agency has not concluded their investigation and met their obligation.[38] Upon the complainant's request, the EEOC will then appoint an administrative judge to conduct a hearing.[39]

The parties may conduct discovery prior to the hearing.[40] The administrative judge conducts the hearing and receives relevant information and documents as evidence.[41] The rules of evidence are not strictly applied; however, the administrative judge must exclude irrelevant or repetitious evidence.[42] The administrative judge is required to issue a decision on the complaint within 180 days of receipt of the complaint file from the agency and, where discrimination is determined, order appropriate remedies and relief.[43] When an administrative judge has issued a decision, the agency must take final action on the complaint by issuing a final order within forty days of receipt of the hearing file and the administrative judge's decision.[44] The agency's final order must notify the complainant whether or not the agency will fully implement the decision of the administrative judge and must contain, among other things, notice of the complainant's right to appeal the decision to the EEOC Office of Federal Operations (EEOC OFO) and the right to file a civil action in federal district court.[45] If the complainant chooses to appeal the final order, he must do so within thirty days of receipt of the final order.[46] If the complainant chooses to file a civil action, he must do so within ninety days of receipt of the final order.[47]

Alternatively, there are circumstances in which the administrative judge will not have issued a decision. For example, the administrative judge will not issue a decision when an agency dismisses the entire complaint, receives a request for an immediate final decision, or does not receive a reply to the notice it provided to the complainant regarding the right to either request a hearing or an immediate final decision.[48] In these circumstances, the agency will issue a final decision.[49] The final agency decision must include findings by the agency on the merits of each issue in the complaint, the rationale for dismissing any claims in the complaint, and appropriate remedies and relief, if the agency finds discrimination.[50] Similar to the final agency order, the final agency decision must contain notice of the complainant's right to appeal to the EEOC OFO or to file a civil action in federal district court and the same timelines apply.[51]

If a federal agency disagrees with the administrative judge's decision, the agency may avoid fully implementing the decision pending an agency appeal. The agency must appeal the administrative judge's decision to the EEOC OFO simultaneously with the issuance of the final agency action to the complainant.[52] The EEOC OFO's decision on appeal from an agency's final action is based on a de novo review. However, the EEOC OFO reviews factual findings in a decision by an administrative judge based on a substantial evidence standard of review.[53]

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[38] *Id.* § 1614.108(g).

[39] *Id.* §§ 1614.108(g), 1614.109(a).

[40] *See id.* § 1614.109(d).

> The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. . . . Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery.

Id.

[41] *Id.* § 1614.109(e).

[42] *Id.*

[43] *Id.* § 1614.109(i).

[44] *Id.* § 1614.110(a). The administrative judge's decision that triggers the agency's final order can be a dismissal of the complaint, a summary judgment decision, or a decision following a hearing. *See id.* § 1614.109(b), (g) and (i), respectively.

[45] *Id.*

[46] *Id.* §§ 1614.401(a), 1614.402(a).

[47] *See infra* note 55.

[48] E.g., dismissal is proper if a complainant refuses to accept an offer of "full relief" from the agency. *See* 29 C.F.R. §§ 1614.107, 1614.108(f).

[49] *Id.* § 1614.110(b).

[50] *Id.*

[51] *Id.* §§ 1614.110(b), 1614.401(a), 1614.402(a).

[52] *Id.* §§ 1614.401(a), 1614.402(a); *see also id.* § 1614.403.

[53] *Id.* § 1614.405(a).

The EEOC OFO's decision on an appeal requested by either party is final unless the EEOC OFO reconsiders the case.[54] Either the complainant or the agency may request the EEOC OFO to reconsider its decision within thirty days of receipt of the decision.[55] Reconsideration is discretionary and granted only when the previous EEOC decision involved a clearly erroneous interpretation of material fact or law, or when the decision will have a substantial impact on the policies, practices or operations of the agency.[56]

A dissatisfied complainant may only proceed to federal district court if the civil action is properly filed within one of the following deadlines:

> (1) within ninety days of receipt of the final action where no administrative appeal has been filed;
> (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken;
> (3) within ninety days of receipt of EEOC's final decision on an appeal; or
> (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.[57]

"Mixed" cases involve a personnel action that is otherwise appealable to the MSPB under the Civil Service Reform Act (CSRA) and an allegation that the basis for the action was discrimination prohibited by Title VII, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), or the Rehabilitation Act (RA).[58] Specifically, a mixed case complaint is a complaint of employment discrimination filed with a federal agency related to or stemming from an action that can be appealed to the MSPB.[59] The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.[60]

Mixed case complaints are processed similarly to other complaints of discrimination; however, there are three exceptions. First, the agency has only 120 days from the date of filing the mixed case complaint to issue a final decision and the complainant may appeal the matter to the MSPB or file a civil action any time thereafter.[61] Second, the complainant must appeal the agency's decision to the MSPB, not the EEOC, within 30 days of receipt of the agency's decision.[62] Third, at the completion of the investigation, the complainant does not have the right to request a hearing before an EEOC administrative judge, and the agency must issue a decision within 45 days.[63]

On the other hand, a mixed case appeal is an appeal filed with the MSPB alleging that an appealable agency action was effected, in whole or in part, because of discrimination.[64] Mixed case appeals brought before the MSPB must stem from one of the conditions enumerated in § 1201.3, Title 5 of the CFR.[65] For example, a federal employee may appeal a reduction in grade or removal for unacceptable performance or a removal, reduction in grade or pay, suspension for more than fourteen days, or furlough for thirty days or less for cause that will promote the efficiency of the service.[66]

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[54] *Id.* § 1614.405(b).

[55] *Id.*

[56] *Id.*

[57] *Id.* § 1614.407.

[58] 5 U.S.C. § 7702 (2000); *see* Meehan v. U.S. Postal Serv., 718 F.2d 1069 (Fed. Cir. 1983).

[59] 29 C.F.R. § 1614.302(a)(1).

[60] *Id.*

[61] *Id.* § 1614.302(d).

[62] *Id.*

[63] *Id.*

[64] *Id.* § 1614.302(a)(2); *see also* 5 U.S.C. § 7702 (2000).

[65] *See* 5 C.F.R. § 1201.3 (2008).

[66] *Id.*

Where either avenue of redress is available, the aggrieved person must either elect to proceed with a complaint as a mixed case complaint through the procedures outlined above, or pursue a mixed case appeal before the MSPB.[67] Upon filing of a new appeal, the administrative judge will issue an acknowledgment order to both the appellant and the agency.[68] This order transmits a copy of the appeal to the agency and directs the agency to submit a statement as to its reason for taking the personnel action or decision being challenged, together with all documents contained in the agency record of the action.[69] The parties will submit pleadings and the administrative judge will issue an initial order following a hearing on the merits of the appeal.[70] When appellants or agencies are dissatisfied with an initial decision, they may file a petition for review with the MSPB, which issues a final decision.[71]

Aggrieved individuals who have filed either a mixed case complaint or a mixed case appeal, and who have received a final decision from the MSPB, may petition the EEOC to review the MSPB final decision.[72] Complainants may file a civil action from a mixed case complaint or mixed case appeal within thirty days of receipt of: (1) the agency's final decision, (2) the MSPB's final decision, or (3) the EEOC's decision on a petition to review.[73] Alternatively, a civil action may be filed after 120 days from the date of filing the mixed case complaint with the agency or the mixed case appeal with the MSPB if there has been no final decision on the complaint or appeal, or 180 days after filing a petition to review with EEOC if there has been no decision by EEOC on the petition.[74]

III. Compensatory Damages in Federal Sector Employment Discrimination

A. The Civil Rights Act of 1991

1. History

Congress enacted Title VII in order to promote a discrimination-free workplace in both the public and private sectors. The federal courts initially interpreted Title VII liberally; however, as discussed in this section, this view became more restrictive with the issuance of several Title VII decisions by the Supreme Court in the late 1980's. Congress interpreted the Supreme Court's progression toward limiting employee rights under Title VII as a threat to Title VII's goal of eliminating workplace discrimination.

Exacerbating this tension between Congress and the Court, the Supreme Court issued a decision significantly limiting the anti-discrimination protections provided to racial minorities by Civil Rights Act of 1886, commonly referred to as "Section 1981."[75] Section 1981 is a Reconstruction Era statute passed by Congress to counteract the attempts by state and local government, primarily in the South, from infringing on the civil liberties granted to African Americans following passage of the Thirteenth Amendment.

These Supreme Court decisions were not the only impetus for the 1991 CRA. Commentators have identified at least three other factors prompting the congressional debate surrounding amending Title VII: (1) the difference in remedies between § 1981 and Title VII,[76] (2) society's heightened sensitivity to sexual harassment in the workplace,[77] and (3) the trend

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[67] Federal employees may file a mixed case complaint as a complaint of discrimination with the agency's EEO department or as a mixed case appeal to the MSPB, but not both. *Id.* § 1614.302(b); *see also* 5 U.S.C. § 7702; 5 C.F.R. § 1201.154; McAdams v. Reno, 64 F.3d 1137, 1142 (8th Cir. 1995); Tolbert v. United States, 916 F.2d 245, 248 (5th Cir. 1990).

[68] 5 C.F.R. § 1201.

[69] *Id.*

[70] *Id.*

[71] *Id.* Appellants who are dissatisfied with an initial decision have the alternative of filing a petition with the United States Court of Appeals for the Federal Circuit. *Id.*

[72] 29 C.F.R. § 1614.310.

[73] *Id.*

[74] *Id.*

[75] 42 U.S.C. § 1981 (2000).

[76] *See* Douglas M. Staudmeister, *Grasping The Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U.L. REV. 189, 197 (1996) (citing Govan, *infra* note 79, at 57) (supporters of 1991 Act argued that "it was a matter of simple equity to eliminate the preferential status of race discrimination cases and provide to victims of gender, religious, national origin, and disability discrimination the remedies long available to victims of race discrimination").

in state statutes toward fashioning legal and equitable relief for employment discrimination.[78] The issue of Title VII remedies, however, dominated the debate that culminated in the passage of the 1991 CRA.

a. Supreme Court Decisions Set the Stage for Legislation

The major impetus for the 1991 CRA was a series of decisions handed down by the Supreme Court in 1989.[79] Three of those decisions had a major impact on the debate in Congress: *Wards Cove Packing Co. v. Antonio*,[80] *Price Waterhouse v. Hopkins*,[81] and *Patterson v. McLean Credit Union*.[82]

The first significant Title VII case rejected by the 1991 CRA, *Wards Cove Packing Co.*, made it harder for plaintiffs to prove disparate impact discrimination under Title VII.[83] *Wards Cove Packing Co.* partially overturned *Griggs v. Duke Power Co.*,[84] a 1971 Supreme Court decision that firmly established disparate impact as a viable theory upon which to litigate discrimination cases. In *Griggs*, the Court ruled that if an employment practice has a disparate impact on members of minority groups and there is no proven "business necessity" for the practice, Title VII was violated even without a showing of discriminatory intent.[85] The *Griggs* decision was controversial since it raised the danger of requiring employers to hire by quotas, because of the fear that employees could easily show a statistical imbalance in their hiring practices.[86]

In *Wards Cove Packing Co.*, plaintiffs alleged employment discrimination in Alaskan salmon canneries by attempting to show a high percentage of nonwhite workers in low paying jobs and a low percentage of nonwhite workers in high paying jobs.[87] The nonwhite workers relied on this statistical evidence to establish a disparate impact.[88] The Supreme Court held that the comparison between the racial compositions of the high and low paying jobs was flawed because the data failed to take into account the pool of qualified job applicants.[89]

The Court's decision reduced the perceived quota pressure on employers by redefining the evidentiary burdens amongst the litigants. The Court held that, in Title VII disparate impact cases, plaintiffs must show which specific employment practice led to the statistical disparity.[90] Further, the Court held that when the employer supplies a business justification for the practice, the ultimate burden of persuading the decision maker that discrimination occurred rests with the plaintiffs, even if plaintiffs present statistical evidence of a disparity.[91] Lastly, the Court lessened the standard employers must meet when

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[77] *See* Staudmeister (citing Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 397 (1993)) (growing hostility toward minorities, women, and disabled persons in workplace influenced Congress to expand scope of remedies available to victims of employment discrimination).

[78] *See id.* at 400.

[79] Roger Clegg, *The Civil Rights Act of 1991: A Symposium: Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994). Clegg argues that that the following cases moved congress to enact the 1991 CRA: Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Lorance v. AT&T Techs., Inc. 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755(1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and Independent Fed'n of Flight Attendants v. Zipes. 491 U.S. 754 (1989). Clegg, *supra*; *see also* Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the 1991 CRA*, 46 RUTGERS L. REV. 1 (1994) (providing a background for the enactment of the 1991 CRA). Clegg and Govan also credit the Senate confirmation hearings of Clarence Thomas prior to his appointment to the Supreme Court as placing a spotlight on sexual harassment and softening the Republican opposition to a Democratic push for a civil rights bill. Clegg, *supra* at 1469; Govan, *supra* at 214.

[80] 490 U.S. 642 (1989).

[81] 490 U.S. 228 (1989).

[82] 491 U.S. 164 (1989).

[83] *See* Clegg, *supra* note 79.

[84] 401 U.S. 424 (1971).

[85] Clegg, *supra* note 79, at 1460.

[86] *Id*.

[87] Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 646–47 (1989).

[88] *Id.* at 650.

[89] *Id.* at 650–51.

[90] *See id.* at 654.

[91] *Id*. at 659.

arguing a challenged business practice was "necessary."[92] The Court held that the employer need not show that the practice was essential to the business but only that it served a legitimate employment goal.[93]

Congress perceived the *Wards Cove Packing Co.* decision as placing an onerous and unjustified burden on plaintiffs.[94] It rejected *Wards Cove Packing Co.* with the passage of the 1991 CRA, by enacting language that shifted the burden of proof back to the employers and returning the concept of business necessity to the state of the law prior to *Wards Cove Packing Co*.[95]

Price Waterhouse v. Hopkins, in which the Supreme Court laid out the standards for deciding "mixed motive" cases,[96] was the second significant Title VII case rejected by the 1991 CRA. Ann Hopkins was an accountant who sued her employer, Price Waterhouse, for sexual discrimination because they refused to make her a partner in the firm.[97] Price Waterhouse admitted that Hopkins was qualified for the promotion; however, they claimed they did not select her because she lacked interpersonal skills, e.g., they felt she was too masculine and needed to walk and talk more femininely.[98] Hopkins made a prima facie case on a disparate treatment theory before the trial court.[99] The question before the court was whether Price Waterhouse's disqualification of Hopkins based on her perceived lack of interpersonal skills constituted a legitimate nondiscriminatory basis on which to deny her partnership, or merely a pretext to disguise illegal discrimination.[100]

The trial court required Price Waterhouse to show that the denial of partnership would have occurred *but for* the discrimination.[101] Price Waterhouse failed to meet this burden and on appeal challenged the trial court's burden-shifting framework on appeal.[102] Specifically, Price Waterhouse claimed that Hopkins should have been required to show that impermissible discrimination was the *predominant motivating* factor in the adverse partnership decision.[103] The appellate court affirmed and Price Waterhouse petitioned the Supreme Court for certiorari.

The Supreme Court concluded, in a plurality opinion, that if a plaintiff satisfied the evidentiary threshold necessary to obtain mixed-motive treatment, she became entitled to a shift in the burden of persuasion.[104] The employer could then avoid

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[92] *Id.* at 660.

[93] *Id.*

[94] 136 CONG. REC. H6756 (daily ed. Aug 3, 1990) (statement of Rep. Hawkins).

> Wards Cove changed the Griggs standard which was put on the statute books by a unanimous Supreme Court decision back in 1971. Wards Cove, by a 5-to-4 split, would change it. Griggs provided that qualified women and minorities cannot be excluded unless for job-related performance on the basis of qualifications. Wards Cove placed on the victims, in contrast, the burden of proving business necessity, a sophisticated process that the average victim of discrimination cannot even define, knows nothing about, has not even the information to prove their case.

Id.; *see also* 1991 CRA, Pub. L. No. 102-166, § 2, 105 Stat. 1071 ("The Congress finds that . . . the decision of the Supreme Court in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections.").

[95] The 1991 CRA amended section 703 of Title VII by adding subsection "(k) Burden of proof in disparate impact cases." *See* 42 U.S.C. 2000e-2(k) (2000). The congressional record reflects significant debate and disagreement regarding how to define "business necessity." *See* 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991). Ultimately, Congress simply decided not to define it. Thus, section k does not define business necessity, but the congressional record reflects congress' intention to return to the status quo ante. *See id.* ("The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).").

[96] Plaintiff's attempting to prove intentional discrimination may proceed under two distinct theories: the pretext theory or the mixed-motive theory. Under the pretext theory, a plaintiff seeks to prove that the defendant's proffered non-discriminatory reason for an adverse employment action was, in reality, a pretext for illegal discrimination. Under the mixed-motive theory, a plaintiff does not have to disprove the employer's non-discriminatory reason. Instead, a plaintiff must show that both legitimate and illegitimate reasons motivated the employment decision. The mixed motive theory of intentional discrimination is a separate concept from mixed case complaints or mixed case appeals. *See supra* note 24.

[97] 490 U.S. 228 (1989).

[98] *Id.* at 235.

[99] *Id.* at 246.

[100] *Id.*

[101] *Id.* at 236–37.

[102] *Id.* at 237.

[103] *Id.* at 237–38.

[104] *Id.* at 261.

liability only by demonstrating that it would have reached the same decision absent any discrimination.[105] Justice O'Connor, expressing the opinion of the Court, reasoned that the burden would shift only where the plaintiff could show by "direct evidence" that an illegitimate criterion was a substantial factor in the employment decision.[106] Consequently, even though Hopkins showed that gender was a consideration in the denial of her promotion, the Supreme Court ruled in defendant's favor.[107]

Congress was dissatisfied that employers could use illegal factors in employment decisions and avoid liability by showing they would have made the same decision without considering the unlawful factor.[108] Thus, it amended Title VII to modify the *Price Waterhouse* scheme, making mixed-motive treatment more favorable to plaintiffs.[109] As amended, an employer could no longer avoid liability by proving it would have made the same decision for nondiscriminatory reasons.[110] Instead, liability would attach whenever an unlawful motive was a motivating factor for any employment practice, even though other factors also motivated the practice.[111] Additionally, Congress limited the remedies available to the plaintiff in cases in which the employer would have reached the same determination without any discriminatory animus.[112] Notably, plaintiffs are not entitled to compensatory damages in these cases.[113]

The third and final significant Title VII case rejected by the 1991 CRA was *Patterson v. McLean Credit Union*, a racial discrimination suit decided under § 1981.[114] Section 1981 grants to all persons, inter alia, the right to make and enforce contracts.[115] Prior to *Patterson*, courts interpreted § 1981 to cover victims of on-the-job racial or ethnic discrimination.[116] In those instances, § 1981 provided equitable as well as compensatory relief and, in particularly egregious cases, punitive damages.[117] This protection extended to both public and private contractual relations and applied to all employers regardless of the number of their employees.[118]

In *Patterson*, the plaintiff sued her employer alleging harassment, failure to promote, and wrongful discharge because of her race.[119] The Court strictly interpreted the so-called "make and enforce contracts" clause of § 1981, declaring that the statute applied only to racial discrimination in the "formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment."[120] Consequently, the Court held that racial harassment engendering a hostile work environment was not actionable under § 1981.[121]

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[105] *Id.* at 278–79.

[106] *Id.*

[107] *Id.* at 279.

[108] 136 CONG. REC. S9328 (daily ed. July 10, 1990) (statement of Sen. Kennedy).

> In a fourth objectionable decision, *Price Waterhouse v. Hopkins*, the Supreme Court opened a hole in the fabric of our civil rights laws by saying that an employment decision motivated in part by prejudice does not violate title VII, as long as the employer would have made the same decision for nondiscriminatory reasons. As one of our legal experts testified, the decision sent a message to employers that 'a little discrimination is OK.'

Id.

[109] The 1991 CRA amended section 703 of Title VII by adding subsection "(m)." *See* 42 U.S.C. 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[110] *Id.*

[111] *Id.*

[112] The 1991 CRA amended section 706(g) of Title VII by adding new subsection "(B)." *See* 42 U.S.C. 2000e-2(m) (limiting plaintiffs to declaratory relief, injunctive relief, attorney's fees, and costs, but not compensatory damages).

[113] *Id.*

[114] 491 U.S. 164 (1989).

[115] *See* 42 U.S.C. § 1981 (2000).

[116] *See* Staudmeister, *supra* note 76, at 196.

[117] *Id.*

[118] *Id.*

[119] *Patterson*, 491 U.S. at 169.

[120] *Id.* at 166.

[121] *Id.* at 189.

b. Political Battles Shape the Compensatory Damages Provisions

In 1990, Representative Hawkins and Senator Kennedy introduced the legislative initiative that laid the foundation for the 1991 CRA. The Kennedy-Hawkins bill was the subject of intense controversy for several reasons, including a belief that it would lead to hiring quotas and a "bonanza" for plaintiff's attorneys.[122] The most troubling component for the business community, however, was the bills compensatory and punitive damages provisions, because of the increased litigation costs.[123]

During the debate over the bill, Congress articulated its concern that there was a disparity between the remedies available in race discrimination suits brought under § 1981 and suits brought under Title VII alleging other forms of discrimination, such as religion or sex.[124] Prior to the 1991 CRA, Title VII only provided for remedies such as reinstatement, hiring with or without back pay, and other equitable relief.[125] Conversely, § 1981, which prohibits racial discrimination, permitted for the recovery of damages.[126] The Congressional debate exposed this disparity and the CRA reflects Congress' attempt to make the remedies available under Title VII and § 1981 equivalent. By doing so, Congress concluded that discrimination based upon other characteristics, such as religion, sex, or disability, were as wrong as racial discrimination, and victims of such discrimination should have similar remedies.[127]

Second, Congress expressed its concern that anti-discrimination laws that provided only equitable relief and not damages fell short of properly compensating plaintiffs. Specifically, they concluded that reinstatement and back pay do nothing for a victim of harassment or other such on-the-job mistreatment that stops short of loss of job or pay.[128] Congress believed that Title VII was inadequate to remedy the full range of workplace discrimination.[129] Therefore, the Kennedy-Hawkins bill sought not only to reject the Supreme Court civil rights cases of 1989, it also sought to amend the damages provisions of Title VII by adding damages as a form of relief available to plaintiffs.

Congress passed the Civil Rights Act of 1990, which authorized unlimited compensatory damages while limiting punitive damages to the greater of either $150,000 or the amount awarded as compensatory damages.[130] Worried that businesses would react to increased liability by implementing hiring practices based on quotas, President George H. W. Bush vetoed the bill.[131] After failing to muster the votes necessary to sustain an override, Congress set out to pass a modified version of the bill early the next session.[132] Ultimately, Congress and the White House forged a compromise: a bill that responded to the Supreme Court's civil rights decisions and expanded legal relief for victims of workplace discrimination within statutory limits on compensatory damages designed to placate employers' fear of costly litigation.[133] On 21 November 1991, President Bush signed the Civil Rights Act of 1991.[134]

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[122] *See* Govan, *supra* note 79.

[123] *Id.* at 71.

[124] *See* 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990) (statement of Rep. Geren).

[125] 42 U.S.C. § 2000e (1988).

[126] *Id.* § 1981.

[127] *Id.*

[128] 42 U.S.C. § 1981 (1994).

[129] Moreover, as stated in the preceding section, Congress believed that the Supreme Court had made it harder for aggrieved persons to bring successful discrimination lawsuits. This belief applied equally to Section 1981 suits as it did to Title VII. *See* 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990) (statement of Rep. Geren, reading an excerpt from the *Washington Post*, 25 June 1990).

> Under old law, the most that the typical winning plaintiff could get was to be made whole in the limited sense of being awarded the job or promotion and back pay found to have been wrongly denied. That was all that a judge was empowered to order, and the law did not provide for jury trials. Only in one class of cases could plaintiffs seek more. Under a post-Civil War statute plaintiffs charging intentional racial discrimination were entitled to ask for jury trials and seek not just lost rank and pay but compensatory and punitive damages. The Supreme Court last year narrowed the application of this Reconstruction Era statute, called Section 1981.

Id.

[130] *See* Staudmeister, *supra* note 76, at 202.

[131] *Id*.

[132] *Id.*

[133] *Id.*

[134] *Id.*

2. 1991 CRA's Compensatory Damages Provisions

The 1991 CRA[135] authorizes compensatory and punitive damages in cases brought under Title VII, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. Damages are available only to victims of unlawful intentional discrimination, not disparate impact discrimination.[136] Punitive damages are not recoverable against the federal government.[137] The 1991 CRA caps compensatory and, in actions brought by private sector employees, punitive damages.[138] The limits are indexed in relation to the size of the employer.[139] Notably, the 1991 CRA recognizes the right to a jury trial: "If a complaining party seeks compensatory or punitive damages under this section . . . (1) any party may demand a trial by jury . . . ."[140]

3. The EEOC's Implementation of the 1991 CRA's Compensatory Damages Provision in Federal Sector Cases

The legislative history and language of the 1991 CRA are silent as to the availability of legal remedies in the administrative process. Thus, the EEOC decided whether a complainant was able to recover compensatory damages from a federal employer during the administrative process based on its own interpretation of the 1991 CRA.

The EEOC first addressed this issue in *Jackson v. United States Postal Service*.[141] Jackson alleged a hostile work environment based on sex, race, age, and disability.[142] He further alleged that the U.S. Postal Service's harassment aggravated his existing medical condition.[143] Consequently, Jackson sought damages from the U.S. Postal Service for his medical expenses.[144] The U.S. Postal Service offered Jackson equitable relief, but denied his demand for compensatory damages.[145] When Jackson refused what he considered to be only partial compensation, the EEOC administrative judge dismissed his claim for refusing the relief that the U.S. Postal Service offered.[146]

Jackson appealed to the EEOC and asserted the Postal Service's offer was inadequate because it failed to compensate him for the aforementioned compensatory damages.[147] The EEOC relied on its interpretation of Title VII as a remedial statute, the purpose of which was to make aggrieved persons whole by providing relief necessary to restore them to the same status they would have been in had the discrimination not taken place.[148] The EEOC determined that the U.S. Postal Service could not make Jackson whole absent an award of compensatory damages.[149] Therefore, they had to resolve whether the 1991 CRA empowered them to award compensatory damages during the administrative process or whether Jackson would have to take his case to federal court.

The EEOC determined that the 1991 CRA made compensatory damages available not only in federal district court, but also in administrative hearings.[150] Specifically, the EEOC analyzed §102 of the 1991 CRA, which states that "[i]n an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination . . .

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[135] 42 U.S.C. § 1981a (2000).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* § 1981a(c).

[141] E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* The EEOC OFO adjudicated Jackson's appeal. *See* Section I.B, *supra* (providing a discussion on appeals to the EEOC OFO).

[148] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[149] *See id.*

[150] *See id.*

the complaining party may recover compensatory . . . damages."[151] The EEOC determined that Congress's use of the term "an action" implied an intention to include administrative as well as judicial proceedings.[152]

Additionally, the EEOC determined that the definition of "complaining party," found later in § 102, also supported this inference.[153] A "complaining party" is defined by the 1991 CRA as "a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964 . . . ."[154] In the judgment of the EEOC, Congress recognized the difference between an administrative action and a judicial action (i.e., a "proceeding") when they listed them separately. Thus, the EEOC determined that Congress intended compensatory damages to be available during the administrative process and granted Jackson's appeal.[155]

B. *West v. Gibson*

1. The Federal Courts of Appeal Interpret the 1991 CRA Differently, Creating a Split Regarding the EEOC's Authority to Award Compensatory Damages

It should be no surprise that the 1991 CRA ambiguous treatment of the EEOC authority to award compensatory damages during federal sector administrative process caused differing results in various jurisdictions. Two prominent cases are illustrative of the courts' differing analysis: *Fitzgerald v. Secretary, U.S. Dep't of Veterans Affairs*[156] and *Crawford v. Babbit*.[157]

Fitzgerald, a black male, was employed as a pharmacy technician at a Department of Veterans Affairs medical center in Shreveport, Louisiana.[158] In the spring of 1992, Fitzgerald was allegedly harassed at work by a white female pharmacist.[159] Fitzgerald claimed that the pharmacist uttered racial slurs about him; ordered him to perform job-related tasks that had already been completed; and falsely accused him of putting his hands around her throat, threatening to kill her, and shooting another co-worker's house with a firearm.[160] Similar to *Jackson*,[161] the agency offered what it considered "full relief." The offer, however, did not include compensatory damages.[162] The agency dismissed the complaint when Fitzgerald declined the offer.[163] On appeal, Fitzgerald asserted that the agency's dismissal was unwarranted because the putative offer of full relief did not include compensatory damages for emotional injuries that allegedly led to his hospitalization.[164]

The Fifth Circuit undertook a similar textual analysis of the 1991 CRA as the EEOC had in *Jackson*, and concluded that compensatory damages were authorized in the administrative process.[165]

> [The 1991 CRA] provides that a party may recover compensatory damages against an employer in an "action" brought pursuant to 42 U.S.C. §§ 2000e-5 or 2000e-16. Nowhere does Title VII define whether the term "action" refers to a district court suit, an administrative proceeding, or both. Regardless, the text

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[151] 42 U.S.C. § 1981a(a)(1) (2000).

[152] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[153] *See id.*

[154] 42 U.S.C. § 1981a(d)(1).

[155] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[156] 121 F.3d 203 (5th Cir. 1997).

[157] 148 F.3d 1318 (11th Cir. 1998).

[158] *Fitzgerald*, 121 F.3d at 205.

[159] *Id.*

[160] *Id.*

[161] *See* Section III.A.3, *supra*.

[162] *Fitzgerald*, 121 F.3d at 205.

[163] *Id.*

[164] *Id.* at 206.

[165] *See id.* at 207–08.

of Title VII's remedial provisions demonstrates that compensatory damages are available in administrative proceedings.[166]

The court continued their analysis by explaining that Title VII was a broad anti-discrimination statute meant to eliminate illegal discrimination from the workplace.[167] Further, the court reasoned that Congress granted the EEOC a broad mandate to enforce the remedial nature of Title VII in the federal sector in order to accomplish this broad goal.[168] Additionally, the court took a pragmatic approach to analyzing the compensatory damages provisions in the context of the already existing federal sector complaint process promulgated by the EEOC.[169] Specifically, the court suggested that one of the goals of the administrative process—to resolve disputes without the need for litigation—would be frustrated if a plaintiff could recover compensatory damages only by filing a lawsuit.[170] The court concluded that aggrieved persons would be reluctant to settle during the administrative process if they were denied damages that they could otherwise recover in court.[171]

The second seminal case interpreting the EEOC's ability to award compensatory damages under the 1991 CRA was *Crawford v. Babbit*.[172] Crawford worked for the Fish and Wildlife Service, a Division of the Department of the Interior, during the latter part of 1993.[173] She filed an administrative complaint alleging that her supervisors had sexually harassed her and then retaliated against her when she complained.[174] She also informed her employer that she had developed physical and emotional problems from the stress of the sexual harassment.[175] Following the agency's investigation, Crawford requested an administrative hearing before the EEOC.[176] Ultimately, the agency admitted that it had subjected Crawford to sexual harassment and retaliation in violation of Title VII and awarded her injunctive relief, costs, and attorney's fees.[177] The agency did not award her compensatory damages.[178] Crawford sued to obtain the equitable relief the agency had admitted she was due, as well as to obtain the compensatory damages the agency had denied her.[179] The district court granted her motion for summary judgment and ordered the agency to issue Crawford her equitable relief.[180] However, the court dismissed her claim for compensatory damages and Crawford appealed the dismissal.[181]

The concept of sovereign immunity is notably absent from the Fifth Circuit's analysis in *Fitzgerald*; however, this is not so in the Eleventh Circuit's analysis of *Crawford*. The court began its analysis by acknowledging that Congress waived the federal government's sovereign immunity for violations of Title VII when it passed the Equal Employment Opportunity Act of 1972.[182] The court then recognized that Congress widened the scope of the waiver with the passage of the 1991 CRA, entitling plaintiffs who sue their federal-sector employers the right to compensatory damages.[183] Additionally, the court cited

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[166] *Id.* at 207.

[167] *Id.* at 207–08.

[168] *Id.*

[169] *See id.*

[170] *Id.*

[171] *Id.*

[172] 148 F.3d 1318 (11th Cir. 1998).

[173] *Id.* at 1319–20.

[174] *Id*.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 1320–21.

[180] *Id.*

[181] *Id.* The district court relied on two grounds in dismissing Crawford's claim for compensatory damages. First, the court determined that she failed to exhaust her administrative remedies, because she failed to raise the claim for compensatory damages during the administrative process. *Id.* Second, court determined that her use of the agency's final decision in her motion for summary judgment precluded her from litigating de novo the issue of compensatory damages. *Id.* ("The magistrate judge observed that, in essence, Crawford was seeking to enforce the favorable parts of the Agency's final decision (the finding of discrimination and the award of equitable relief) while at the same time litigating de novo the unfavorable parts (the failure to award her compensatory damages.")); *see also* Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc). Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the remedy was insufficient. Rather, the employee must place the employing agency's discrimination at issue.

[182] *See Crawford*, 148 F.3d at 1323–24; *see also infra* note 11.

[183] *Id.* at 1324.

the 1991 CRA for the proposition that the waiver of sovereign immunity was conditioned on the government's ability to seek a jury trial:

> Congress expressly conditioned the expanded waiver by providing that the government has a right to a jury trial on the issue of its liability for compensatory damages. *See* 42 U.S.C. § 1981a(c) ("If a complaining party seeks compensatory . . . damages under this section[,] any party may demand a trial by jury."). The effect of that condition is a government agency may not be held liable for compensatory damages unless it has the opportunity to have a jury trial on the issue of its liability for those compensatory damages.[184]

Importantly, the court met the rationale used by the EEOC in *Jackson* and the Fifth Circuit in *Fitzgerald*, and dismissed it. Specifically, it concluded that *Jackson* and *Fitzgerald* were wrongly decided because the EEOC's concept of awarding "full relief" in the administrative process negates the government's right to a jury trial if the complainant seeks compensatory damages.[185]

An underpinning of the *Crawford* court's analysis was its reliance on the language of the 1991 CRA that granted *any party* the right to a jury trial.[186] The court made two significant conclusions regarding this language. First, it determined that Congress intended the *any party* provision to apply to both the aggrieved plaintiff and the defendant agency.[187] Unfortunately, the congressional record is silent regarding what Congress intended. Nevertheless, it seems reasonable that a pure textual analysis supports the conclusion that *any party* meant both the plaintiff-employee as well as the defendant-agency.

Second, the Court acknowledged that Title VII provides only the aggrieved employee, not the federal agency, the right to challenge the outcome of the administrative process.[188] As the Court stated:

> [U]nless the employee challenges the disposition of his complaint in the administrative process by filing a claim in federal court, the agency is bound by the terms and relief ordered in the agency's or the EEOC's final decision. . . . The Agency argues that Congress' awareness of the one-way appealability rule when it made compensatory damages available in the Civil Rights Act of 1991 means Congress, in conditioning the waiver of sovereign immunity on an agency having a right to a jury trial, must have recognized that an agency would be unable to exercise its right to a jury trial if compensatory damages were awarded in the administrative process.[189]

The Court found it easy to dismiss this argument, because it determined that the basis of the argument rested on the presumption that Congress intended for compensatory damages to be awarded in the administrative process.[190] Absent this presumption (and any evidence in the congressional record of their intent) there is no rationale for concluding that Congress contemplated this "one-way appealability" when it waived sovereign immunity. As discussed below, the Supreme Court also found it easy to dismiss this argument, but with the opposite outcome.

2. The Supreme Court Allows the EEOC to Award Compensatory Damages

a. Procedural History

In 1992, Michael Gibson, an accountant employed by the Department of Veterans Affairs (VA), was denied a promotion.[191] The position instead went to a woman and Gibson filed a complaint with the agency, alleging sex

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[184] *Id.* (citing the 1991 CRA, 42 U.S.C. § 1981a(c) (2000)).

[185] *See id.*

[186] *Id.* at 1324.

[187] *Id.* at 1324–25.

[188] *Id.* at 1325.

[189] *Id.*

[190] *See id.*

[191] *See* Gibson v. Brown, 1996 U.S. Dist. LEXIS 14583, at *1 (N.D. Il. 1996).

discrimination in violation of Title VII.[192] In his administrative complaint, Gibson sought back pay and a transfer to another VA hospital, but did not seek compensatory damages.[193] The VA issued a decision finding no discrimination.[194] Gibson appealed the decision to the EEOC, which found that the VA had discriminated against him.[195] The EEOC ordered the VA to promote Gibson with back pay.[196] When the VA failed to timely comply with the EEOC's order, Gibson filed a compliance suit in federal district court.[197] He also sought compensatory damages, which he had not sought in the administrative process.[198] The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies by not presenting that claim to the VA and the EEOC.[199]

The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims.[200] The court asserted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'"[201] The court then concluded that the EEOC did not have the authority under Title VII to award compensatory damages against federal agencies.[202] The court principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory . . . damages under this section," then "any party may demand a trial by jury."[203] The court then recognized that a "trial by jury" cannot occur in an administrative proceeding.[204]

Notably, the court also recognized that § 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court.[205] However, the court rejected this alternate construction, reasoning that a federal agency, in accordance with the language of Title VII and the EEOC's interpreting regulations, is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and that employee may seek relief de novo in district court.[206] Thus, a federal agency could not demand a jury trial to review an EEOC award of compensatory damages to an employee. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims.[207]

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1), which provides for compensatory damages awards in "an action brought by a complaining party" under, among other things, the statutory provision allowing Title VII claims against the federal government.[208] The court declined to defer to the EEOC's own construction of § 1981a(a)(1) as encompassing administrative as well as judicial proceedings.[209] The court concluded that Congress generally used the term "actions" throughout Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC."[210] Finally, the court of appeals invoked the principle that any waiver of the federal

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[192] *Id.* at *1–2.

[193] *Id.* at *3.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at *7–12.

[200] Gibson v. Brown, 137 F.3d 992 (7th Cir. Ill. 1998).

[201] *Id*. at 995 (quoting McCarthy v. Madigan, 503 U.S. 140, 148 (1992)).

[202] *Id.* at 995–98.

[203] *Id.* at 996.

[204] *Id.*

[205] *Id.*

[206] *See id*. (citing 29 C.F.R. 1614.504(a) (1991)).

[207] *Id.* at 996.

[208] *Id.*

[209] *Id.* at 997.

[210] *Id.*

government's sovereign immunity should be strictly construed.[211] The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII.[212] Nevertheless, the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial."[213] The court of appeals remanded Gibson's compensatory damages claim to the district court so a jury would consider it.[214]

b. The Majority Opinion

The VA petitioned the Supreme Court for certiorari, which the Court granted and then ultimately held that the EEOC possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII.[215] The Court's four part analysis started with a literal reading of Title VII, the Equal Employment Opportunity Act of 1972 (making Title VII applicable to federal agencies), and the 1991 CRA.[216] First, the Court turned to the 1972 Act, which stated that the EEOC shall enforce Title VII "through appropriate remedies, including reinstatement or hiring of employees with or without back pay."[217] The Court determined that the 1991 CRA added compensatory damages to the list of appropriate remedies available to the EEOC.[218] The fact that the list of remedies included only equitable relief and compensatory damages were not part of the available remedies until 1991 did not trouble the court. Instead, they determined that Congress provided a non-exhaustive list, which was later modified by the 1991 CRA.[219] The Court decided that the 1991 CRA added a category of damages—compensatory damages—that are "appropriate" and that were not so previously.[220]

Second, the Court found that the purpose of Title VII supported their interpretation of the statute. Here, the Court stated:

> [Title VII's] general purpose is to remedy discrimination in federal employment. It does so in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court.[221]

The Court believed that the remedial purpose of Title VII would be thwarted if the EEOC was without the power to award compensatory damages in the administrative process, because it would force aggrieved persons to go to court in order to pursue compensatory damages.[222]

Third, the Court found solace in the congressional record. Although Congress was silent regarding this specific issue, the record reflected the supporters of the 1991 CRA intended for the act to make victims of discrimination whole.[223] The Court reasoned that the "make whole" provisions of Title VII would have to include all available remedies, including compensatory damages, or the provisions would be ineffective.[224]

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[211] *Id.* (citing Lehman v. Nakshian, 453 U.S. 156, 161 (1981)).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] West v. Gibson, 527 U.S. 212 (1999).

[216] *Id.* at 217.

[217] *Id.* (citing 42 U.S.C. § 2000e-16(b) (1994)).

[218] *Id.*

[219] *Id.* at 217–18.

[220] *Id.*

[221] *Id.* at 218–19.

[222] *Id.*

[223] *Id.* at 219–20.

[224] *Id.*

Of note for the purposes of this article, the Court addressed Gibson's argument that the 1991 CRA's jury trial provisions would be frustrated if the EEOC could award compensatory damages without the government getting a jury trial.[225] The Court disposed of this argument easily:

> This argument, however, draws too much from too little. One easily can read the jury trial provision in § 1981a(c) as simply guaranteeing either party a jury trial in respect to compensatory damages *if* a complaining party proceeds to court under § 717(c). The words "under this section" in § 1981a(c) support that interpretation, for "this section," § 1981a, refers primarily to court proceedings. And there is no reason to believe Congress intended more.[226]

Lastly, the Court rejected the argument that the sovereign immunity barred the EEOC from awarding compensatory damages. The Court acknowledged that it was undisputed that the 1991 CRA waived sovereign immunity for compensatory damages.[227] The Court then determined that the issue of the EEOC authority was nothing more than a matter of how the waiver was administered.[228]

c. Sovereign Immunity

The doctrine of sovereign immunity bars suits against the federal and state governments in most circumstances.[229] There must be an explicit waiver of sovereign immunity for claims brought against and judgments paid by the United States.[230] Even when the basic grant of legislative permission is sufficiently unambiguous, the Supreme Court has directed the contours of a statutory waiver of sovereign immunity be construed strictly and narrowly.[231] Only Congress grants waivers of sovereign immunity. Courts, therefore, interpret the statutory terms of such waivers to define the jurisdiction of the courts to entertain an action against the government.[232] Thus, the Supreme Court has refused to extend the scope of a sovereign immunity waiver when the language of the statute leaves any ambiguity and declined to look beyond the text to legislative history or statutory purpose.[233] In other words, doubts about the extent of a putative statutory waiver, or even the existence of said waiver, result in decisions preserving the federal government's immunity from suit.

d. The Supreme Court's Dissenting Opinion

Justices Kennedy, Scalia, and Thomas dissented in *Gibson*. The crux of their dissent was their belief that Congress did not waive sovereign immunity for the EEOC to award compensatory damages when it waived the same for federal courts.[234] Not surprisingly, the dissenting and more judicially conservative justices cited to the established Supreme Court sovereign immunity jurisprudence to support their conclusions. For example, the dissent acknowledged "relief may not be awarded

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[225] *Id.* at 221–22.

[226] *Id.* at 221.

[227] *Id*. at 222.

[228] *Id.*

[229] The Constitution does not refer to sovereign immunity. Rather, it is a doctrine from English law that the Court has assumed was silently imported into American law. *See* United States v. Lee, 106 U.S. 196 (1882). For a historical analysis of the sovereign immunity doctrine, see also GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT ch. 2 (4th ed., ALI-ABA 2006). Sisk argues that three landmark Supreme Court decisions lay the framework for sovereign immunity jurisprudence. *Id.* The first decision is *United States v. Lee*, 106 U.S. 196, which arose from seizure of the Arlington estate of Confederate General Robert E. Lee by federal forces during the Civil War and the establishment of a military cemetery on the site. *Id.* at 80. The second case is *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which arose after World War II, when the War Assets Administration allegedly reneged on a contract to sell coal to the Domestic & Foreign Commerce Corp. *Id.* at 84. The third case is *Malone v. Bowdoin*, 369 U.S. 643 (1962), in which plaintiffs claimed proper title to land occupied by the government brought an ejectment action against a Forest Service officer to recover the property. *Id.* at 87.

[230] *See Gibson*, 527 U.S. at 224; United States v. Testan, 424 U.S. 392, 399 (1976).

[231] *See* Library of Cong. v. Shaw, 478 U.S. 310, 318 (1986).

[232] *See* United States v. Testan, 424 U.S. 392, 399 (1976).

[233] *See, e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992).

[234] *Gibson*, 527 U.S. at 224–28.

against the United States unless it has waived its sovereign immunity,"[235] and the waiver "must be expressed in unequivocal statutory text and cannot be implied."[236] Moreover, the dissent recognized that a waiver must be "strictly construed, in terms of its scope, in favor of the sovereign,"[237] and the "waiver of sovereign immunity in one forum does not effect a waiver in other forums."[238] The dissent then succinctly rejected the majority opinions approach to deciding the case:

> In all events, [the majority opinion's] speculation [that awarding compensatory damages in the administrative process is more efficient] does not suffice to overcome the rule that waivers of sovereign immunity must be clear and express. An unequivocal waiver of the United States' sovereign immunity to administrative awards of compensatory damages cannot be found in the relevant statutory provisions. To the extent the majority relies on textual analysis, it establishes at most (if at all) that the statutes might be read to authorize such awards, not that that the statutes must be so read. To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text."[239]

Based on this established jurisprudence, it is easy to see why the dissenting Justices in *Gibson* easily determined that the 1991 CRA did not waive the federal government's immunity from administrative awards of compensatory damages.

e. Criticism of the Supreme Court's Decision

The Supreme Court's decision in *Gibson* received mixed reviews. The decision provided a mandate for the EEOC to award compensatory damages, with the explicit language that Congress neglected to write into the 1991 CRA. The EEOC's influence in enforcing federal anti-discrimination laws increased. Many saw the decision as "a triumph for federal sector employment discriminatees because it arms the EEOC with a complete arsenal of remedies with which to combat employment discrimination in the federal sector."[240] Others, however, saw the Court's decision as endorsing a flawed system whose damage caps fail to make aggrieved persons whole and deter employers from discriminating, and whose cumbersome administrative process deters aggrieved persons from pursuing their claims.[241]

Notably absent from the discussion, however, are complaints about the majority opinion's apparent departure from established sovereign immunity principles. This is not surprising, since this is a scholarly issue and not one invoking the passion of civil rights violations. Moreover, it is understandable if there is little sympathy for the federal government, as most would agree the government is capable of taking care of itself. For example, Congress is more than capable of reestablishing whatever degree of sovereign immunity it desires in this context by amending the 1991 CRA. Nonetheless, *Gibson* is a sharp departure from previously established sovereign immunity jurisprudence.

It is plausible that the dissent's reasoning in *Gibson* regarding sovereign immunity is more compelling than the majority's argument, because it seems to adhere more closely to Supreme Court precedent.[242] According to precedent, the majority never should have considered anything beyond the statute.[243] There is no *explicit waiver* of sovereign immunity in the 1991 CRA allowing the EEOC to award compensatory damages. However, in *Gibson* the majority looked at the statute

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[235] *Id.* at 224 (citing *Blue Fox*, 525 U.S. 255).

[236] *Id.* (citing *Blue Fox*, 525 U.S. at 687; *Lane*, 518 U.S. at 192).

[237] *See id.*

[238] *Id.* at 226 (citing McElrath v. United States, 102 U.S. 426 (1880) ("[The Government] can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits."); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 n.6 (1944) ("The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court."); Case v. Terrell, 78 U.S. 199 (1871) (The United States' consent to suit in the Court of Claims does not extend to other federal courts.).

[239] *Id.* at 228 (citing *Lane*, 518 U.S. at 192).

[240] Christina M. Royer, West v. Gibson*: Federal Employees Win the Battle, But Ultimately Lose the War for Compensatory Damages under Title VII*, 33 AKRON L. REV. 22 (2000).

[241] *See id.*

[242] *See supra* note 233.

[243] *See id.*

as a whole and determined that the waiver of sovereign immunity pertaining to federal court was also applicable in the administrative process.[244]

The most troubling aspect of the majority's reasoning is the provision of the 1991 CRA that conditioned the award of compensatory damages on either party's ability to seek a jury trial.[245] Gibson argued what appeared obvious: parties cannot receive a jury trial before the EEOC and may only receive one in court.[246] To Gibson this meant the EEOC could not award compensatory damages, because the EEOC could not meet a required condition of the damages provision, i.e., provide the government with a jury trial if it demanded one.[247]

The government conceded that the EEOC was without the power to grant jury trials. However, it interpreted the jury trial provision differently. Namely, it asserted that if a federal-sector employee was dissatisfied with either the administrative agency's or the EEOC's award and subsequently sought a trial ne novo in district court, either party could *then* request a jury trial.[248] In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action. The administrative process occurs prior to the aggrieved making that decision. Thus, there is no right to a jury trial. This is the same argument the Government made unsuccessfully in *Crawford*.

IV. The Basis for Federal Agencies to Assert Claims to Challenge an EEOC's Compensatory Damage Award

A. An Alternative Interpretation of the 1991 CRA's Jury Trial Provision

While the positions taken by the Petitioner and Respondent before the Supreme Court in *Gibson* are plausible, the difficulty with both is that the congressional record is silent regarding the 1991 CRA's jury trial provision. As the government conceded to the Court:

> It's important to recognize that the jury trial provision is a general provision. It was not directed specifically at the Federal Government. It's part of a provision that applies to all Title VII cases whether against the Government or against private employees. This provision is already in the legislation that became section 1981a before Senator Warner offered his amendment to extend compensatory damages to Federal employees as well.[249]

Moreover, the Government's approach is arguably contrary to established sovereign immunity jurisprudence,[250] and Gibson's approach leaves federal employees with only partial remedies in the administrative process. Alternatively, there is a third approach that is without these shortcomings; the one suggested in dicta by the Seventh Circuit in *Gibson.* Namely, the 1991 CRA's jury trial provision modified Title VII to allow federal employers to initiate civil actions against aggrieved employees.[251]

Title VII states when an aggrieved employee may file a civil action in federal district court. Specifically, "an employee or applicant for employment, if aggrieved by the final disposition of his [administrative] complaint, or by the failure to take final action on his [administrative] complaint, may file a civil action."[252] Title VII is silent, however, regarding the right of federal agencies to initiate a civil action against the federal sector employee or applicant for employment. This "one sided" appealability rule regarding access to federal district court is reiterated in the EEOC's implementing regulations.

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[244] *Gibson*, 527 U.S. 212.

[245] *Id.* at 221.

[246] *Id.*

[247] *See* Oral Argument of Timothy M. Kelly, Esq., on Behalf of the Respondent, West v. Gibson, 1999 WL 270048, at *14–17 (Apr. 25, 1999).

[248] *See* Oral Argument of Barbara B. McDowell, Esq., on Behalf of the Petitioner, West v. Gibson, 1999 WL 270048, at *10 (Apr. 25, 1999).

[249] *Id.* at *11.

[250] *See Gibson*, 527 U.S. at 228.

[251] Gibson v. Brown, 137 F.3d 992, 997–98 (7th Cir. Ill. 1998).

[252] *See* Section II.A.2, *supra* (citing 42 U.S.C. § 2000e-16(c) (2000)).

Consequently, the factual and legal determinations of the EEOC are binding on federal agencies because they cannot initiate a civil action, unless the aggrieved employee is also dissatisfied and initiates the civil action.[253]

Nevertheless, the 1991 CRA guarantees both parties a right to trial by jury if an aggrieved employee seeks compensatory damages. What if demanding a jury trial was read to be synonymous with initiating a civil action (albeit one with a jury)? In this way, the 1991 CRA jury trial provisions would grant authority to federal agencies to initiate civil actions.

This is precisely the argument the Seventh Circuit proposed in their appellate decision in *Gibson.* Specifically, the court speculated that § 1981a(c)(1) of the 1991 CRA could be read as giving "the EEOC . . . the right to issue compensatory damages in the first instance, and the losing party [the right to] seek de novo review of the damages by demanding a jury trial" in district court.[254] In other words, the 1991 CRA's jury trial provision modifies the one-sided appealability rules recognized by the Supreme Court in *Gibson*.

The Seventh Circuit ultimately rejected this alternate construction, reasoning that a federal agency, in accordance with the language of Title VII and the EEOC's interpreting regulations, is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and that employee may seek relief de novo in district court.[255] The problem with this reasoning is that it assumes away the issue it purports to resolve. The argument assumes that only aggrieved persons may initiate civil actions. It further presumes that Congress must have recognized this one-sided rule when they enacted the jury trial provisions in the 1991 CRA and, therefore, Congress must have conditioned the right to a jury trial on the aggrieved person initiating the civil action (i.e., the Government's argument in *Gibson*).

However, there is no incongruity if Title VII and the 1991 CRA are read in unison. The EEOC may award compensatory damages in the administrative process.[256] The 1991 CRA does not specifically limit the initiation of a civil action to the aggrieved employee. Thus, if the aggrieved employee or the federal agency is dissatisfied with the EEOC's decision, either should be able to initiate a civil action and a jury trial in federal district court.[257] Thus, 1991 CRA's jury trial provisions may be considered to modify Title VII by allowing the EEOC to award compensatory damages *and* allows the government to receive a jury trial if the aggrieved employee seeks those damages.

B. Compensatory Damages Against a Federal Employer without Damaging the Doctrine of Sovereign Immunity

The question of whether the 1991 CRA waives sovereign immunity for the award of compensatory damages in the administrative process is not a concern under the aforementioned alternative approach. Specifically, the dissent in *Gibson* was concerned that the waiver of sovereign immunity had to be expressed in unequivocal statutory text and strictly construed in favor of the sovereign.[258] This requirement is met by affording the sovereign, i.e., the federal agency, the ability to challenge the EEOC's compensatory damages award.

The Court was also concerned with the principle of sovereign immunity that states that a waiver in one forum does not affect a waiver in other forums.[259] Under the proposed alternative approach, there is no waiver of sovereign immunity in the administrative process unless the federal agency determines not to pursue their right to initiate a civil action and jury trial in federal district court. Thus, the federal agency would be in control of whether to pursue fully the rights guaranteed to it by Congress. This situation is analogous to a federal agency deciding to settle a claim included a demand for compensatory damages because there was the possibility that the aggrieved employee could be awarded these damages in court.

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[253] *See* Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc). The court held that Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the EEOC OFO's remedy was insufficient. *Id.* Rather, in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue. *Id.*; *see also* Morris v. Rumsfeld, 420 F.3d 287, (3d Cir. Pa., 2005), *cert. denied*,; Ellis v. England, 432 F.3d 1321, 1325 (11th Cir. 2005); Scott v. Johanns, 409 F.3d 466, 469 (D.C. Cir. 2005); Timmons v. White, 314 F.3d 1229, 1232 (10th Cir. 2003).

[254] *Gibson*, 137 F.3d at 996.

[255] *See id* at 997–98.

[256] 29 C.F.R. § 1614.501 (2008).

[257] 42 U.S.C. § 1981a.

[258] *See* West v. Gibson, 527 U.S. at 224 (citing Dep't of Army v. Blue Fox, Inc., 525 U.S. 255 (1999)).

[259] *Id.* at 226 (citing McElrath v. United States, 102 U.S. 426 (1880)).

V. Time for a Change to Title VII

Gibson was decided almost a decade ago and its precedent is now well established. Certainly, had Congress disagreed with the proposition that the EEOC could award compensatory damages or if it wished to remove the binding nature of compensatory damage awards on federal agencies, it could have done so.

Amending Title VII to allow federal agencies to challenge adverse EEOC rulings would further the purpose of Title VII, to remedy discrimination in federal employment, which it does in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action. This proposed modified system encourages quicker, less formal, and less expensive resolution of disputes within the federal government and outside of court. The current dispute resolution system, however, provides an incentive to complainants to pursue their complaints through the entire administrative system without settling their complaints because they can always get a second bite at the apple in federal court (in the form of a trial de novo) if they lose in the administrative process. Complainants would be encouraged to enter into binding administrative settlements if federal agencies could challenge adverse administrative findings in federal court.

Additionally, there is a benefit from providing accurate determinations of whether or not an agency discriminated against its employee. The EEOC compiles statistics regarding discrimination complaints filed by federal sector employees.[260] The statistics indicate that the federal sector complaint processing system would be improved by allowing federal agencies to challenge the EEOC's findings of discrimination in federal court. For example, in fiscal year 2006, over 15,000 individuals filed nearly 17,000 complaints alleging employment discrimination against the federal government.[261] Government agencies appealed over 40% of these cases in which an EEOC Administrative Judge found the agency liable for discrimination.[262] Based on the same report, nearly one in every five of these agency appeals was successful.[263]

Hence, federal agencies believed that EEOC administrative judges were wrong 40% of the time. Moreover, the EEOC OFO agreed with the federal agencies and overturned their own administrative judges in 20% of the cases appealed.[264] In other words, the EEOC OFO found that nearly one in every ten cases decided by an EEOC administrative judge warranted overturning. This is a staggering rate of error, especially given the fact that the EEOC provides substantial deference to the factual findings of the administrative judge.[265] There is no way of guessing what percentage of the remaining cases were wrongly decided, but affirmed by the EEOC, other than to say it would be significant by any measure.

VII. Conclusion

The federal EEO complaint process is a complex system that is further complicated by the fact that Congress has twice amended it. With the last amendment, the 1991 CRA, Congress sought, among other things, to provide to aggrieved employees the ability to receive full compensated for the discriminatory acts of their employers through the award of compensatory damages. Unfortunately, the 1991 CRA was silent regarding its applicability to the administrative process.

Arguably, the Supreme Court discarded its well-established doctrine of sovereign immunity when it determined in *Gibson* that the EEOC could award compensatory damages. The article explained that the Court could have reached the same result without abandoning its sovereign immunity jurisprudence, by recognizing that the 1991 CRA allows federal-sector employers to initiate a civil action and receive a jury trial when an aggrieved employee seeks compensatory damages and these damages are awarded by the EEOC.

Regardless of how *Gibson* and the 1991 CRA are interpreted, there is still significant evidence supporting the need for changing Title VII to allow federal-sector employers to challenge EEOC's findings. Even recognizing that there is a benefit from the finality of administrative determinations of liability by the EEOC against federal agencies, it is difficult to accept that federal-sector employment would not benefit by the added accuracy that could be obtained by judicial proceedings.

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[260] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE FOR FISCAL YEAR 2006, *available at* http://www.eeoc.gov/federal/fsp2006/index.html (last visited June 16, 2008).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *See* 29 C.F.R. § 1614.405(a) (2008).