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NOTES

The Charge-Filing Requirement of the Age Discrimination in Employment Act: Accrual and Equitable Modification

Jim Beall

INTRODUCTION

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA or "the Act") to protect elderly Americans from discrimination in the workplace. The Act's procedures, however, have been a significant obstacle to workers seeking its relief. One of these procedures is embodied in section 7(d), which requires a claimant to file a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) as a first step toward bringing a federal court suit.¹ The claimant must file the EEOC charge within either 180 or 300 days "after the alleged unlawful practice occurred."²

Courts have developed differing approaches to two charge-filing period issues. Initially a court must determine when an ADEA cause of action accrues, thus beginning the filing period. Next, it must find if it should equitably modify, or extend, the filing period after the period has started running. The confusion over section 7(d) accrual and equitable modification problems requires resolution for two reasons. First, the stakes in section 7(d) cases are high; the provision has been a significant bar to ADEA claims.³ Second, as the workforce ages⁴ and as ADEA filings correspondingly increase,⁵ courts will face a growing

1. ADEA, § 7(d), 29 U.S.C. § 626(d) (1988).

2. ADEA, §§ 7(d)(1)-(2), 29 U.S.C. § 626(d)(1) and (2). Plaintiffs in "deferral states," or states that have their own age discrimination law, have 300 days in which to file their EEOC charges, or 30 days following receipt of notice that state proceedings have been terminated. Plaintiffs in states without such laws have only 180 days.

Prior to the 1991 Civil Rights Act, age discrimination plaintiffs also had to file a court suit within two years of the alleged discriminatory act's occurrence (within three years if the alleged violation was "willful"). ADEA, § 7(e), 29 U.S.C. § 626(e) (1988). Congress eliminated the two/three-year suit filing limitation period in the 1991 Civil Rights Act, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079. Now a claimant has 90 days after he receives notice of EEOC's termination of its proceedings in which to file a court suit.

3. For example, four of the five most recent cases cited in this Note all held that § 7(d) barred the plaintiff's claim. *McBrayer v. City of Marietta*, 967 F.2d 546 (11th Cir. 1992); *Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600 (7th Cir. 1992); *Jackson v. Richards Medical Co.*, 961 F.2d 575 (6th Cir. 1992); *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992). The fifth was remanded to the district court for a finding of timeliness. *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75 (7th Cir. 1992).

4. See, e.g., Beatrice Motamed, *U.S. Adjusts to Older Population*, S.F. CHRON., Oct. 7, 1991, at B1.

5. See, e.g., Melinda Wilson, *Kmart Ex-managers: If You're Old, You're Out*, DETROIT

number of accrual and equitable modification disputes.

This Note argues that ADEA causes of action should accrue when the plaintiff discovers, or reasonably should have discovered, that she has been injured by an adverse employment action such as discharge, demotion, denial of a position or promotion, or receipt of pay lower than employees doing the same job. Courts should equitably modify the filing period for the time in which the plaintiff reasonably failed to file a charge even though she already knew of the adverse employment action. Such a situation arises largely in two contexts: (1) when an employer engages in active misconduct that keeps the plaintiff from filing timely, or (2) when through no fault of her own the plaintiff did not acquire facts that would indicate that the decision may have been the result of unlawful discrimination. The approach proposed furthers the policy balance suggested by the Act's legislative history, relevant U.S. Supreme Court decisions, and practical policy considerations. Ultimately, ADEA should protect victims of age discrimination in the workplace unless defendants would suffer unfairly from the pursuit of stale claims.

Part I analyzes ADEA's legislative history and concludes that a sound approach to section 7(d) accrual and equitable modification issues must adhere to the balance Congress struck between a worker's civil rights and an employer's interest in putting past decisions to rest. Part II explores U.S. Supreme Court decisions on accrual and equitable modification in the employment discrimination area. These cases suggest that lower courts should hold that an ADEA cause of action accrues when the plaintiff has notice of the adverse employment action. They also indicate a number of instances in which equitable modification is appropriate. Part III examines the current confusion in the circuits on accrual and equitable modification of the charge-filing period and critically evaluates the major arguments for and against this Note's proposed approach. This Note concludes that courts should hold that an ADEA cause of action accrues when a plaintiff discovers or should have discovered that she has suffered an adverse employment action, and should extend the filing period for the time a plaintiff reasonably failed to file a charge.

I. THE LEGISLATIVE HISTORY OF SECTION 7(D)

This Part analyzes the legislative history of ADEA section 7(d). Section I.A describes how the filing requirement first became part of ADEA. Section I.B examines the Senate's 1978 attempt to eliminate the filing requirement and the resulting compromise which authorized

NEWS, Jan. 10, 1993, at 10A (reporting that some 30,000 workers filed EEOC charges of age discrimination in 1992, up from 17,000 in 1991). See generally John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

equitable modification of the ADEA filing period. Section I.C explores the failed attempts to modify section 7(d)'s accrual language in the 1990 Civil Rights Bill and the 1991 Civil Rights Act. This Part concludes that the filing requirement represents Congress' attempt to balance a worker's right to be free from age discrimination and an employer's interest in repose. Furthermore, because Congress left accrual and equitable modification issues largely to the courts, any proposed approach to these issues must work within the existing framework of case law.

A. *The Genesis of Section 7(d)*

Congress enacted ADEA in 1967⁶ in response to evidence that older Americans, who comprised a growing element of the labor force, suffered discrimination in the workplace.⁷ The stated purposes of the new law were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁸ Neither the Johnson administration's version of the bill nor the final House bill included the 180/300-day charge-filing period. The filing provision first appeared in the bill reported by the Senate Committee on Labor and Public Welfare which essentially became the current law:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed — (1) within one hundred and eighty days after the alleged unlawful practice occurred, or (2) [in a deferral state] within three hundred days after the alleged unlawful practice occurred or within thirty days of the individual receiving notice of termination of proceedings under state law, whichever is earlier.⁹

The committee added the charge-filing period so that defendants could receive prompt notice of possible litigation and the Secretary would be able to initiate conciliation shortly after the alleged discrimination took place.¹⁰

6. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (1988 & Supp. II 1990)).

7. See generally REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, 2-3 (1965), reprinted in EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16, 20-21 (1981) [hereinafter LEGISLATIVE HISTORY].

8. 29 U.S.C. § 621(b).

9. S. 830, 90th Cong., 1st Sess. § 2(d) (1967), reprinted in LEGISLATIVE HISTORY, *supra* note 7, at 130-31.

10. See *infra* text accompanying note 154.

The Senate¹¹ and House¹² each passed different versions of ADEA, but ultimately the Senate approved the House bill with a few amendments. Among the amendments adopted was the reinstatement of the 180/300 day filing period as reported out of the Senate Labor Committee.¹³ In explaining the amendments to the full Senate, Senator Javitz, a key sponsor and floor manager for the bill, stated:

[T]he substance of the amendments . . . is that they are intended to answer some of the disquiet in American business

....

This bill, which deals with age discrimination in employment, deals with some of the concerns of American business that the legislation would be open ended. These amendments are expressly designed to fix reasonable standards for regulations . . . so that there may be assurance that the bill will be tight and well considered, keeping also in mind the practical problems of administration, and will answer some of the concerns which have been expressed about it.¹⁴

Senator Williams, the other chief sponsor and floor manager for the bill, agreed that the amendments "tighten[ed] the bill up and improved it."¹⁵ The full Congress incorporated these amendments when it enacted ADEA in 1967.¹⁶

The 1967 legislative history suggests Congress did not want to burden defendants unfairly with its new discrimination law. As part of this effort, the Senate added a short filing period and mandatory conciliation to limit enforcement of the Act. At its very inception, ADEA thus represented a balance between eliminating age bias in the workplace and protecting employers from ancient claims. As the following sections in this Part demonstrate, the balance established in 1967 remains largely the law today.

B. Section 7(d) and the 1978 Amendments

Congress revisited section 7(d) in the ADEA Amendments of 1978, when the Senate proposed to eliminate the 180/300-day charge-filing requirement it had inserted in 1967. Congress used the 1978 amendments primarily to increase the maximum age for ADEA protection from sixty-five to seventy, thereby delaying the impact on older workers of mandatory retirement programs.¹⁷ As the amendments

11. 113 CONG. REC. 31,257 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 148.

12. 113 CONG. REC. 34,752-53 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 163-64.

13. A related amendment put a cap on spending for enforcement of the Act. 113 CONG. REC. 35,055 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 169.

14. 113 CONG. REC. 35,056 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 170.

15. *Id.*

16. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(d), 81 Stat. 602, 605 (1968) (amended 1978).

17. H.R. REP. NO. 527, 95th Cong., 1st Sess. 1 (1977), *reprinted in* LEGISLATIVE HISTORY,

made their way through Congress, the Senate also proposed some procedural reforms.¹⁸ Senator Church proposed to eliminate section 7(d)'s requirement that plaintiffs give notice of their intent to sue within 180 or 300 days of the discriminatory act's occurrence.¹⁹ Church noted the Department of Labor's estimates that courts dismissed two thirds of private age discrimination suits on procedural grounds.²⁰ Church argued, "[o]ne of the most troublesome [procedures] is the 180[/300]-day notice of intent to sue provision, which has proved to be a trap for the unwary or unsophisticated."²¹ Church suggested that the shortness of the filing period thwarted the policy behind ADEA: to decide discrimination claims on their merits so as to foster employment of the elderly and eliminate age bias in the workplace.²² He also pointed out that workers may need more time than that allowed by the filing period to reach agreements with their employers or to decide whether to bring suit.²³

The Labor and Human Relations Committee and full Senate adopted Church's amendment. The committee offered the following reasons for its decision:

In the committee's view, [there are] compelling argument[s] for removing the 180[/300]-day notice requirement entirely. Age discrimination is often much more subtle and less well understood than other forms of discrimination and therefore is often not discovered by the victim until long after the alleged act has occurred. Furthermore, under this amendment, neither the complainant who fails to file a notice within 180[/300] days nor the prospective defendant will have to go through the prolonged uncertainty they now experience in waiting for the court to rule whether or not the failure to file the notice within 180[/300] days may be excused.²⁴

The Senate thus sought to adjust the balance struck between plaintiff and defendant interests in 1967 by widening the window for timely ADEA suits. The House version, however, did not contain any modifications of section 7(d).²⁵

supra note 7, at 361; S. REP. NO. 493, 95th Cong., 1st Sess. 1 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504, 504.

18. See S. REP. NO. 493, 95th Cong., 1st Sess. 12-13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504, 515-16.

19. See 123 CONG. REC. S34,299 (1977), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 486.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. S. REP. NO. 493, 95th Cong., 1st Sess. 12-13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504, 515-16; *see also* 123 CONG. REC. S34,296 (1977), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 483.

25. H.R. 5383, 95th Cong., 1st Sess. (1977) *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 392.

The bills proceeded to a conference committee. There, the drafters developed a compromise between the Senate and House proposals that echoed the balance established in 1967. The conferees agreed to maintain the 180/300-day filing requirement, but they also expanded the opportunity for timely charges when they stated the filing requirement would be subject to equitable modification.²⁶ In addition, the conference bill altered the filing from a "notice of intent to sue" to a "charge."²⁷ By reducing the substance of the filing requirement from a "notice of intent to sue" to a "charge" of discrimination, the conferees intended to encourage potential ADEA claimants to initiate the statute's remedial procedures, even though they were not yet certain they would sue.²⁸ The Senate²⁹ and House³⁰ both adopted the conference report and bill, and President Carter signed the bill into law on April 6, 1978.³¹

Although the final bill expanded the availability of ADEA relief to plaintiffs who failed to file timely charges because of equitable considerations, Congress rejected the Senate's proposed elimination of the filing period. It thereby clearly demonstrated its desire to preserve "the basic purpose of the notice requirement [—] to provide the Department with sufficient information [to] notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation."³² The 1978 amendments to section 7(d) therefore continued Congress' policy of balancing private and government pursuit of the statute's remedial goals with the defendant's interest in repose, slightly shifting the balance in favor of claimants.

C. *The 1990 Civil Rights Bill and the 1991 Civil Rights Act*

The next round of amendments, in the 1990 Civil Rights Restora-

26. H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 534 ("The conferees agree . . . that . . . equitable modification for failing to file within the time period will be available to plaintiffs under this Act.").

27. H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 534. A notice of intent to sue was just that. The ADEA claimant would fill out a form at EEOC which stated her intent to sue her employer (or union). A charge, on the other hand, merely states the claimant's accusations of discrimination.

28. *See* 124 CONG. REC. H2272 (1978) (comments of Mr. Quie), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 530.

29. 124 CONG. REC. S4452 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 541.

30. 124 CONG. REC. H2278 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 536.

31. Pub. L. No. 95-256, 92 Stat. 189 (1978). Later, the filing requirement of § 7(d) was amended to insert "the EEOC" in place of "the Secretary." Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 590. Congress approved of this administrative change in the Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (giving congressional approval to all reorganization plans enacted pursuant to 5 U.S.C. §§ 901-912 before Oct. 19, 1984).

32. H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 12 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 523.

tion Act, would have significantly altered ADEA section 7(d). If enacted, the section and its counterpart in Title VII would have read:

No civil action may be commenced . . . until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—(1) within 2 years after the alleged unlawful practice occurred or has been applied to affect adversely the person aggrieved, whichever is later . . .³³

The proposed language would thus have more than doubled the charge-filing period from six/ten months to two years. It would have also allowed for claims to accrue upon the application of a company-wide discriminatory policy, rather than only upon the initial adoption of such a policy by the employer.

The committee and conference reports reveal three reasons behind the proposed amendments. First, the drafters wanted a filing period arrangement that would minimize the dismissal of meritorious claims.³⁴ Second, the drafters sought to impose a more uniform limitations period for civil rights statutes.³⁵ Third, Congress wanted to reverse *Lorance v. AT&T Technologies, Inc.*,³⁶ which held that a Title VII cause of action against an allegedly discriminatory seniority system accrued when the defendant first adopted the system instead of when the plaintiffs suffered demotions from its application. The drafters wanted to ensure that employees who suffered layoffs, for example, because of a discriminatory policy adopted long before they began work could nonetheless file timely charges both after the adoption of the policy and after their layoffs.³⁷

The bill did not, however, enjoy universal support. Critics of the filing period amendments in the 1990 Civil Rights Bill stressed two major themes. Initially, they argued that the new filing period com-

33. H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 12 (1990).

34. H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 72 (1990). The House Committee on Education and Labor report stated:

This longer limitations period is necessary to ensure that discrimination victims are not precluded from bringing meritorious claims, or from enforcing their rights, by an unreasonably short procedural limitation. The two-year period is designed to permit such victims sufficient time to educate themselves as to the federal remedies available for employment discrimination, to find and retain an attorney to represent them, to have the attorney investigate the facts of their claims and research applicable law, and to prepare and file such claims.

Id.

35. Under current law, claims arising from intentional racial discrimination enjoy a two- to six-year statute of limitations under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988), whereas the 180/300-day charge-filing period governs Title VII (governing discrimination on the basis of sex, religion, and national origin, as well as race), and ADEA. See H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 37 & n.26.

36. 490 U.S. 900, 911 (1989). For an analysis of *Lorance*, see Michael S. Vogel, *The Remains of Title VII After Lorance v. AT&T Technologies*, 22 COLUM. HUM. RTS. L. REV. 73 (1990).

37. See H.R. CONF. REP. NO. 856 at 24-25; H.R. CONF. REP. NO. 755, 101st Cong., 2d Sess. 19 (1990); H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 2, at 31, 46-47 (1990); H.R. REP. NO. 644, pt. 1, at 36-37, 73-74; S. REP. NO. 315, 101st Cong., 2d Sess., at 27-28, 53-54.

promised a longstanding tenet of employment discrimination law: disputes should have prompt and inexpensive resolution for the sake of the claimant, employer, and other employees.³⁸ Extending the period to bring claims to two years would hardly further this policy. Opponents also believed the "adverse effects" language of the bill would overrule Supreme Court cases other than *Lorance*.³⁹ These cases held, like *Lorance*, that discrimination suits accrue when the discriminatory act "occurs" and not when the plaintiff first feels its effects.⁴⁰ The difference between these cases and *Lorance*, however, was that only *Lorance* involved an allegedly discriminatory companywide policy, which the drafters indicated was the target of the "adverse effects" language.⁴¹ The accrual of an ordinary Title VII or ADEA case, where a single plaintiff brings a discriminatory discharge, demotion, pay or benefits claim, would be unaffected.

President Bush found these criticisms persuasive, and he cited "unreasonable new statutes of limitations" among his reasons for vetoing the bill.⁴² Ultimately, the 1990 bill failed to become law when the Senate fell one vote shy of overriding the veto.⁴³ Congress resurrected the bill in 1991, however, and resubmitted the new form for the ADEA and Title VII charge-filing requirement.⁴⁴ The 1991 drafters offered the same reasons for the amendment as found in the 1990 reports: ensuring courts heard meritorious claims, establishing more uniform employment discrimination filing periods, and overturning *Lorance*.⁴⁵ Critics of the bill repeated the stale claims argument: "This unwarranted expansion of the statute of limitations will allow charges of discrimination to fester and back pay to accrue even if the

38. H.R. REP. NO. 644, pt. 2, at 65-66; H.R. REP. NO. 644, pt. 1, at 129; S. REP. NO. 315, at 100-01; see also 136 CONG. REC. S15,405 (daily ed. Oct. 16, 1990) (comments by Sen. Hatch).

39. H.R. REP. NO. 644, pt. 1, at 130; S. REP. NO. 315, at 100; 136 CONG. REC. S15,405-06 (daily ed. Oct. 16, 1990) (comment by Sen. Hatch).

40. The opponents were referring to *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (finding that "act" of notice of denial of tenure began Title VII filing period, not "effect" of ending work a year later) (see *infra* Part II for a full discussion of this case) and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977) (finding that "act" of discharge began filing period; lower seniority as a result of neutral seniority system upon reinstatement did not constitute a continuing violation). For the *Lorance* Court, the "act" triggering a claim arising from a seniority system was the adoption of the system itself, not the discharges and demotions that followed. 490 U.S. at 911 (1989).

41. See S. REP. NO. 315, *supra* note 37, at 27-28.

42. President Bush's Veto of the Civil Rights Act, reprinted in 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990). The primary reason for the veto, however, was the President's characterization of the proposed statute as a "quota bill." *Id.*

43. *Id.* at S16,589.

44. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 14 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 552.

45. *Id.* at 60-62, 96, reprinted in 1991 U.S.C.C.A.N. at 598-600, 634; H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 22-24, 40-41 (1991), reprinted in U.S.C.C.A.N. 694, 715-17, 734-35.

employee was aware of the problem when it first occurred."⁴⁶ Opponents of the bill also reiterated their fears that it would overturn Supreme Court cases other than *Lorance*,⁴⁷ despite assurances from the bill's sponsors that the "adverse effects" language applied only to *Lorance* situations in which the employer adopted a companywide discriminatory policy.⁴⁸

Although the bill the House finally passed responded in part to its critics by shortening the proposed filing period from two years to 540 days,⁴⁹ opponents to the amendment won an almost complete victory in the end. The compromise bill worked out by the Bush administration and Congress did not alter the basic 180/300 day filing requirement for ADEA section 7(d) or its Title VII equivalent. The bill did, however, specifically overturn *Lorance*.⁵⁰ The bill's sponsors were quick to add, though, that they supported other Supreme Court cases which applied to challenges of individual discriminatory decisions rather than discriminatory companywide policies.⁵¹ The compromise bill passed both Houses with large majorities, and barely a word was spoken about the rejected filing period amendments in the House bill.⁵²

As in 1978, the 1990 and 1991 Congresses essentially preserved ADEA section 7(d) and the balance it established between eliminating age discrimination and limiting the number of claims. Overturning *Lorance* aided ADEA plaintiffs who were challenging companywide discriminatory policies; but the usual ADEA claimant⁵³ did not receive any new relief from the 1991 Act. In fact, Congress' rejection of further modifications to the charge-filing period suggests an implicit indorsement⁵⁴ of the accrual and equitable modification rules for such

46. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 67, reprinted in 1991 U.S.C.C.A.N. 682-83.

47. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 153-54, reprinted in 1991 U.S.C.C.A.N. 682-83.

48. See H.R. REP. NO. 40, pt. 2, at 23-24 & n.38, reprinted in 1991 U.S.C.C.A.N. 716-17.

49. H.R. 1, 102d Cong., 1st Sess. § 117 (1991).

50. Now plaintiffs challenging allegedly discriminatory seniority systems under Title VII may file charges with the EEOC up to 180/300 days after the defendant adopts the system, after the system first includes the employee, or after the system adversely affects the employee, whichever is latest. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078-79. The bill's sponsors also stated that courts should not apply *Lorance*'s rationale to other companywide policies and rules. Sponsors' Interpretive Memorandum on Issues Other Than *Wards Cove* — Business Necessity/Cumulation/Alternative Business Practice, reprinted in 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991).

51. *Id.*

52. The Senate voted 93-5 for the measure, 137 CONG. REC. S15,503 (daily ed. Oct. 30, 1991); the House, 381-38, 137 CONG. REC. at H9557-58 (daily ed. Nov. 7, 1991). Representative Oakar noted with regret that the compromise bill "went backward" with respect to extending the filing periods. *Id.* at H9539.

53. See *supra* text following note 41.

54. See NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION §§ 22.29, 48.18 (5th ed. 1992).

customary employment discrimination claims, which this Note's subsequent Parts will explore. The legislative history of ADEA, then, indicates that any proposed approach to section 7(d) timeliness problems must fit within the existing framework of case law, a framework constructed to preserve the balance of interests Congress has forged since ADEA's enactment.

II. SUPREME COURT DOCTRINE

This Part analyzes Supreme Court doctrine with respect to limitation periods in other discrimination-based causes of action. It first examines the Court's approach to accrual and then discusses instances in which the Court has found equitable modification appropriate. This Part concludes that any proposed approach to section 7(d) timeliness problems should reflect the Court's doctrine in analogous contexts.

The Supreme Court's clearest statement on when actions for employment discrimination accrue was in *Delaware State College v. Ricks*.⁵⁵ The plaintiff in *Ricks* brought suit under Title VII and section 1981 alleging that the college discriminated against him on the basis of national origin when it denied him tenure.⁵⁶ On March 13, 1974, the college's board of trustees voted to withhold tenure from Ricks and to extend to him a one-year terminal contract. Ricks initiated internal grievance proceedings shortly thereafter. On July 26, 1974, the board sent to Ricks an official notice of its decision. This notice also acknowledged that the results of the grievance procedure might overturn the board's ruling. The board informed Ricks on September 12, 1974, that it had denied his grievance. His one-year terminal contract expired on June 30, 1975. Ricks filed an EEOC charge on April 28, 1975, and brought his Title VII and section 1981 suits two-and-a-half years later.⁵⁷

The District Court dismissed both claims as untimely. It held that the alleged discriminatory event occurred on June 26, 1974, when Ricks received official notice of his tenure denial. His EEOC filing ten months later thus fell outside the 180/300-day period, and his section 1981 suit was not brought within the three-year statute of limitations for that cause of action.⁵⁸ The court of appeals reversed, holding that the cause of action accrued on June 30, 1975, the date Ricks' employment ended. The court argued that an employer may reverse termination decisions, and that forcing a plaintiff to file suit while still employed by the defendant would engender hostility in the workplace. The court also stated that its accrual-at-termination rule had the bene-

55. 449 U.S. 250 (1980).

56. 449 U.S. at 254.

57. 449 U.S. at 252-55.

58. 449 U.S. at 254-55.

fit of being a "bright line guide" to courts and employers alike.⁵⁹

The Supreme Court reversed. Justice Powell, writing for the majority, found "the only alleged discrimination occurred — and the filing limitations periods therefore commenced — at the time the tenure decision was made *and communicated* to Ricks."⁶⁰ Rejecting the termination date as the time of accrual, the Court quoted from another Title VII tenure case with approval: "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful."⁶¹ The Court also rejected the accrual date which corresponded with final action on Ricks' grievance. In the Court's view, grievance procedures could overturn allegedly discriminatory decisions, but they could not influence their original, illegal making. Thus, an accrual inquiry should focus on when the plaintiff had notice of the alleged discriminatory act, not when he had exhausted all internal remedies for it.⁶²

Turning to policy, the Court acknowledged that "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."⁶³ But the Court also stated that "limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."⁶⁴ In this case, Ricks was not sufficiently diligent in asserting his rights, and lost his case because of his procedural error.

A subsequent case confirmed the Court's position that discrimination causes of action accrue when the plaintiff has notice of the adverse employment action. In *Chardon v. Fernandez*,⁶⁵ the Court upheld the district court's dismissal of a section 1983 suit alleging discriminatory discharge for exercising First Amendment rights. The Court held, as in *Ricks*, that the plaintiffs' causes of action accrued when they first learned of their pending discharges, not when they actually ceased working.⁶⁶

Ricks and *Chardon* provide support for the notion that the ADEA

59. 449 U.S. at 255-56.

60. 449 U.S. at 258 (emphasis added).

61. 449 U.S. at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added by the Court).

62. *Ricks*, 449 U.S. at 260-61. The Court also denied the plaintiff's request to toll the filing period for the time in which the grievance was pending, following earlier precedent. 449 U.S. at 261 (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 238-40 (1976)) (holding grievance proceedings do not toll EEOC filing requirement because they arise from contract rights which are completely independent of Title VII).

63. *Ricks*, 449 U.S. at 262 n.16.

64. 449 U.S. at 256-57.

65. 454 U.S. 6 (1981) (per curiam).

66. 454 U.S. at 8.

charge-filing period begins to run when the plaintiff has notice that she has suffered an adverse employment action. Because the Court has often relied on Title VII precedent in resolving ADEA disputes, and vice versa,⁶⁷ *Ricks* is especially persuasive. A valid approach to accrual of ADEA claims should thus reflect *Ricks* and *Chardon's* reasoning. Though the adverse employment actions in these two cases "occurred" before the plaintiffs received official word, the Court refrained from beginning the filing period until the plaintiffs *knew* their employers had reached harmful decisions. The Court believed this approach best balanced an employer's interest in protection from old claims and a worker's civil rights.⁶⁸

The Court also has offered guidance on how equitable modification should affect this balance. In analyzing equitable modification in employment discrimination cases, the Supreme Court has stated repeatedly that equitable relief should lie where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."⁶⁹ The Court also has embraced equitable modification for filing employment discrimination suits⁷⁰ in the following circumstances: (1) when the plaintiff timely files a defective pleading;⁷¹ (2) when the EEOC did not provide proper notice to

67. The Court has twice recognized the usefulness of Title VII analysis in ADEA cases. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-24 (1988) ("[T]he filing provisions of the ADEA and Title VII are 'virtually *in haec verba*,' the former having been patterned after the latter [Similarly, both Acts are] remedial scheme[s] in which laypersons, rather than lawyers, are expected to initiate the process."); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979) (ADEA and Title VII share a common purpose, language, and legislative history). The Court has also used ADEA as a source for Title VII decisionmaking. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982) (analyzing legislative history of ADEA as part of holding that Title VII filing period is subject to equitable modification).

68. See *Ricks*, 449 U.S. at 256-58.

69. *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 458 (1990) (holding plaintiff's complaint untimely because he failed to file within required period after his attorney's receipt of the EEOC's notice-to-sue letter); see also *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam) (refusing to toll 90-day suit-filing period for private Title VII actions for plaintiff who had sought appointment of counsel, and who had timely filed both her right-to-sue letter from the EEOC and a letter of her own alleging the basis of her suit); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely [Title VII] charge of discrimination with the EEOC . . . is subject to waiver, estoppel, and equitable tolling.").

70. The Supreme Court has considered equitable modification in the employment discrimination context largely with respect to the 30- or 90-day suit filing requirements of Title VII, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-16(c), which apply after the government has attempted to conciliate the case following the filing of a charge. See, e.g., *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990) (construing § 2000e-16(c)); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984) (construing § 2000e-5(f)(1)). Nonetheless, the suit-filing cases indicate the Supreme Court's willingness to modify employment discrimination limitation periods for worthy plaintiffs. They are therefore a useful analogy for equitable modification of the ADEA charge-filing requirement.

71. *Irwin*, 111 S. Ct. at 458; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) ("[C]ommencement of a [Title VII] class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.") (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

plaintiff that she could sue and must file suit within so many days;⁷² (3) when "a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon";⁷³ (4) when "the court has led the plaintiff to believe that she had done everything required of her";⁷⁴ (5) when the plaintiff has acted diligently;⁷⁵ and (6) when there is an absence of undue prejudice to the defendant.⁷⁶ The Court has therefore indicated that equitable modification can and should benefit employment discrimination plaintiffs who fail to file timely through no fault of their own. In considering equitable modification problems in the ADEA charge-filing context, courts should adopt an approach that accommodates the equitable modification policy the Court has identified.

In addition to noting the balance Congress struck in section 7(d) evident in its legislative history, lower courts facing accrual and equitable modification problems should pay attention to analogous Supreme Court cases. The Court has used *Ricks* and related decisions to indicate that employment discrimination actions should accrue when there is notice of an adverse employment action, and filing periods should be tolled when the plaintiff reasonably fails to bring her claim. The next Part examines how lower courts have applied the legislative history and Supreme Court analysis in resolving section 7(d) conflicts.

III. APPROACHES TO ADEA TIMELINESS

This Part focuses on the conflicting approaches federal circuits have taken on the accrual and equitable modification issues that arise in interpreting ADEA's charge-filing requirement. Section III.A examines and critiques *Cada v. Baxter Healthcare Corp.*,⁷⁷ to date the most thorough analysis of section 7(d) timeliness problems. Section III.B explores an alternative approach to accrual developed in *Hamilton v. 1st Source Bank*,⁷⁸ a pay discrimination case under ADEA. Section III.C evaluates the *Cada* and *Hamilton* approaches to accrual, and concludes that the notice of adverse employment action analysis

72. See *Baldwin County*, 466 U.S. at 151.

73. 466 U.S. at 151.

74. 466 U.S. at 151.

75. *Irwin*, 111 S. Ct. at 458; *Baldwin County*, 466 U.S. at 151.

76. *Baldwin County*, 466 U.S. at 151-52. The Court will not apply the "prejudice" factor unless another basis for tolling exists. 466 U.S. at 152. In addition, tolling the Title VII EEOC filing period will not lie for filing labor grievances. See *supra* note 62 and accompanying text. The Court has also been reluctant to toll the filing period for one civil rights statute when the plaintiff filed timely under another statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465-67 (1975) (pursuit of Title VII remedies does not toll limitation period for 42 U.S.C. § 1981).

77. 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991).

78. 928 F.2d 86 (4th Cir. 1990) (en banc).

in *Cada* is more consistent with ADEA's legislative history, Supreme Court doctrine, and sound public policy. Section III.D compares *Cada*'s equitable modification approach with treatment of the issue by other courts. Finally, section III.E proposes a workable framework for equitable modification that fulfills the goals and interpretation of ADEA.

A. *A Framework for Understanding Accrual and Equitable Modification*

Cada v. Baxter Healthcare Corp. provides the most exacting consideration of ADEA accrual and equitable modification issues and, with some exceptions, states the law that virtually all courts apply.⁷⁹ In *Cada*, a panel of the Seventh Circuit confronted the question of when the ADEA charge-filing period should begin to run. On May 5, 1987, the plaintiff, sixty-four year-old Joseph Cada, learned from one of his supervisors, Mr. Becks, that his employer would fire him as part of a departmental reorganization. After his meeting with Becks, Cada went to the personnel office and picked up some out-placement forms and benefit information. Cada also approached his official supervisor, Mr. Stauner, who formally confirmed Cada's termination in a meeting between the two on May 22. On July 7, Cada's replacement, a young woman, began work. Cada's employment with defendant Baxter Healthcare ended three weeks later. Cada did not file an EEOC charge until March 4, 1988, which was more than 300 days after the May 5 meeting but less than 300 days after his meeting with Stauner and his final discharge from work.⁸⁰ The district court granted defendant's motion for summary judgment and dismissed Cada's suit on timeliness grounds. It held the filing period began to run on May 5, 1987, the date Cada learned from Becks of his termination. Because Cada failed to file an EEOC charge within 300 days of this date, his charge was untimely.⁸¹

The Seventh Circuit affirmed.⁸² The court began its analysis by identifying two lines of reasoning which apply to section 7(d) limitation problems: accrual and tolling. Accrual "is the date on which the statute of limitations begins to run."⁸³ By contrast, "[t]olling doctrines stop the statute of limitations from running even if the accrual date has passed."⁸⁴ Elaborating on accrual, the opinion stated:

[Accrual] is not the date on which the wrong that injures the plaintiff

79. See *infra* note 113 and accompanying text.

80. *Cada*, 920 F.2d at 448-49. Illinois is a "deferral state," so the applicable filing period is 300 days. See *supra* note 2 and accompanying text.

81. 920 F.2d at 448-49.

82. 920 F.2d at 453.

83. 920 F.2d at 450.

84. 920 F.2d at 450.

occurs, but the date — often the same but sometimes later — on which the plaintiff discovers he has been injured. The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the “discovery rule” of federal common law, which is read into statutes of limitation in federal-question cases⁸⁵

The *Cada* court thus asserted that ADEA claims accrue on the date the plaintiff has notice of injury, specifically notice of the “adverse personnel action.”⁸⁶ In support of this notice-of-injury rule, the opinion cited *Delaware State College v. Ricks*,⁸⁷ arguing “[t]he discovery rule is implicit in the holding of *Ricks* that the statute of limitations began to run ‘at the time the tenure decision was made and communicated to Ricks’”⁸⁸ Relying on *Ricks* and other “discovery rule” cases,⁸⁹ the court affirmed the district court’s holding that Cada’s cause of action accrued on May 5, 1987, the date of his discharge notice.⁹⁰ Because Cada filed with the EEOC more than 300 days after that date, his charge was presumptively untimely.

Continuing its analysis, the court argued that Cada’s charge might still be timely if he qualified for equitable modification.⁹¹ The court asserted that two equitable modification doctrines potentially applied: equitable estoppel or equitable tolling.⁹² The first, equitable estoppel, “comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations.”⁹³ The opinion elaborated on this definition:

[Equitable estoppel] in the law of limitations presupposes that the plain-

85. 920 F.2d at 450 (emphasis added).

86. 920 F.2d at 453.

87. 449 U.S. 250 (1980), discussed *supra* Part II.

88. *Cada*, 920 F.2d at 450 (quoting *Ricks*, 449 U.S. at 258) (emphasis added in *Cada*).

89. The court cited five circuit decisions as additional support for the discovery-of-injury rule. Only two of these actually stated that federal causes of action accrue when the plaintiff discovers his injury. *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.) (RICO and 42 U.S.C. § 1983), *cert. denied sub nom. Nassau County Republican Comm. v. Cullen*, 483 U.S. 1021 (1987); *Trotter v. International Longshoremen’s & Warehousemen’s Union*, 704 F.2d 1141, 1143 (9th Cir. 1983) (Labor Management Reporting and Disclosure Act). Two other cases echo *Cada*’s framework for equitable tolling, described *infra* in notes 101-03 and accompanying text. See *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988) (securities fraud claim accrues when plaintiff discovers facts forming its basis); *Nichols v. Hughes*, 721 F.2d 657, 659 (9th Cir. 1983) (wrongful discharge claim accrues when plaintiff discovers wrongful nature of termination). The fifth case speaks only in terms of equitable tolling. *Suslick v. Rothschild Secs. Corp.*, 741 F.2d 1000, 1004-05 (7th Cir. 1984).

90. *Cada*, 920 F.2d at 453.

91. Once the defendant shows that the charge falls outside the 180/300-day period, the plaintiff bears the burden of proving the appropriateness of equitably modifying the filing period. *Conaway v. Control Data Corp.*, 955 F.2d 358, 362 (5th Cir. 1992); see also 2 CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* 371 (1988 & Supp. 1990). This approach is implicit in *Cada* and other cases.

92. The court also mentioned “plaintiff’s incapacity and the defendant’s fugitive status” as alternative grounds for equitable modification. 920 F.2d at 450.

93. 920 F.2d at 450-51.

tiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant — above and beyond the wrongdoing upon which the plaintiff's claim is founded — to prevent the plaintiff from suing in time.⁹⁴

Cada attempted to invoke the doctrine on the grounds that the reorganization plan, which ostensibly was the reason for his discharge, constituted a "ruse to conceal the plan to fire him because of his age."⁹⁵ The court rejected this argument, stating that it "merge[d] the substantive wrong [of age discrimination] with the tolling doctrine."⁹⁶ For the court, the act of concealing age discrimination was part of the wrongdoing itself. Such concealment thus enjoyed the protection of the limitations period, and should not serve as grounds for suspending that period. Indeed, in the court's opinion, finding a defendant subject to equitable estoppel every time it failed to tell the plaintiff it had discriminated against him on the basis of age "would eliminate the statute of limitations in age discrimination cases."⁹⁷

This analysis conflicts with other parts of the opinion. The court earlier stated that equitable estoppel would lie if Baxter Healthcare had given Cada "forged documents purporting to negate any basis for supposing that Cada's termination was related to his age."⁹⁸ It did not explain, however, why an attempt to refute age discrimination in the form of written documents could toll the filing period while an effort to achieve the same results through oral statements would not. Similarly, the court later stated that if a plaintiff shows the defendant actively misled him, he has made out a case for equitable estoppel.⁹⁹ Although an employer is under no duty to disclose to an employee any discriminatory motives behind its decision, providing an employee with a specific, nondiscriminatory explanation appears to qualify as an "active step[] to prevent the plaintiff from suing in time"¹⁰⁰ because it may deflect a plaintiff's suspicions of possible age discrimination.

Cada's last possibility for avoiding summary judgment was the doctrine of equitable tolling. The court asserted that equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing

94. 920 F.2d at 451.

95. 920 F.2d at 451.

96. 920 F.2d at 451.

97. 920 F.2d at 451.

98. 920 F.2d at 451.

99. 920 F.2d at 452.

100. 920 F.2d at 450. A Title VII case made the distinction between silence and misrepresentation clear. In *Earnhardt v. Commonwealth of P.R.*, 691 F.2d 69, 73 (1st Cir. 1982), the court decided not to apply equitable estoppel because the employer had refused to give a reason for plaintiff's discharge. The court noted, however, that tolling would be appropriate if the employer had actively misled the plaintiff by giving a "phony reason for his discharge." 691 F.2d at 71; see also *infra* note 143 and accompanying text.

on the existence of his claim.”¹⁰¹ Like equitable estoppel, it is distinct from accrual in that “the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run”¹⁰² Equitable tolling differs from equitable estoppel in that it “does not assume a wrongful — or any — effort by the defendant to prevent the plaintiff from suing.” Rather, it addresses situations where the plaintiff “cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.”¹⁰³ Equitable tolling, then, potentially gives a plaintiff more time to file after he learns that unlawful discrimination may have been at play, even if he earlier had notice of the adverse employment action.

The court drew a further distinction between equitable tolling and the doctrines of accrual and equitable estoppel. These last two doctrines, the court stated, delayed the running of the filing period for the full time in which the plaintiff fails to discover his injury or suffers from employer misconduct.¹⁰⁴ In contrast, “a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a *reasonable time* after he has obtained, or by due diligence could have obtained, the necessary information [supporting a possible ADEA claim].”¹⁰⁵ In making this distinction, the court reasoned that “[equitable tolling] is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn’t need it there is no basis for depriving the defendant of the protection of the statute of limitations.”¹⁰⁶ The court added that plaintiffs should benefit less from equitable tolling than equitable estoppel because equitable tolling “adjusts the [limitation period] rights of two innocent parties.”¹⁰⁷ The opinion further noted that age discrimination suits have short statutes of limitation to insulate employers from the unnecessary accumulation of back pay liability, and that “promiscuous application of tolling doctrines” would “trivialize” this important interest.¹⁰⁸ Finally, the panel did not believe that adopting an automatic extension rule for equitable tolling would ease a court’s ability to administer these disputes: “Inquiry would shift from how much time the plaintiff needed after he discovered the essential information bearing on his claim in order to prepare his complaint to how much information really was essential.”¹⁰⁹

101. 920 F.2d at 451.

102. 920 F.2d at 451.

103. 920 F.2d at 451.

104. 920 F.2d at 452.

105. 920 F.2d at 453 (emphasis added).

106. 920 F.2d at 452.

107. 920 F.2d at 452.

108. 920 F.2d at 453.

109. 920 F.2d at 453. Note the weakness in the reasoning on this last point. The opinion’s definition for equitable tolling already requires courts to determine when the plaintiff knew or

Applying its equitable tolling doctrine to the facts, the court believed Mr. Cada could have made out an adequate charge on July 7. On that date he knew that his employer would fire him and that his replacement was a young woman.¹¹⁰ Nonetheless, Cada waited eight months after that date to file his charge.¹¹¹ For the court this period was more than a reasonable time, so equitable tolling would not save Cada's action.¹¹²

Cada v. Baxter Healthcare, Inc., provides a full, if sometimes flawed, analysis of the accrual and equitable modification problems that arise under section 7(d). The following sections compare the *Cada* approach to those developed in other circuits, first with respect to accrual and then equitable modification. These sections will illustrate the conflicts this Note seeks to resolve.

B. Other Approaches to Accrual

Most circuits that have passed on the accrual problem are in accord with the *Cada* notice of adverse employment action rule.¹¹³ Some of these courts also parallel *Cada* by making explicit a "reasonable person" test to discovery by holding that the EEOC charge-filing period begins when the employee discovered, or should have discovered, that she had suffered an adverse employment action.¹¹⁴ The reasonableness element is important because it shifts the balance of equities to the employer; an employer will not have to go to trial against a plaintiff who unreasonably failed to discover that she was the victim of, say, a lower paycheck. A plaintiff can also file timely if she

should have known enough facts to file a charge. Adding the question of what was a reasonable time for the plaintiff to file a charge after she discovered she had a possible ADEA claim thus *increases* a court's burden.

110. 920 F.2d at 452.

111. 920 F.2d at 452. Asked when he first thought of filing with the EEOC, Cada responded, "When I started kicking myself in the fanny for letting it go so long."

112. 920 F.2d at 453.

113. *E.g.*, *Parrish v. Ford Motor Co.*, 953 F.2d 1384 (6th Cir. 1992) (unpublished opinion) (available in WESTLAW) ("As a general rule, the limitations period in an employment discrimination case begins to run on the date upon which the employee first learns or should have learned of the adverse employment action."); *Amburgey v. Cohart Refractories Corp.*, 936 F.2d 805, 810 (5th Cir. 1991) ("The time period generally begins to run when the employee receives notice of the allegedly discriminatory decision, not when the employment actually ceases."); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1420 (3d Cir.) (receipt of bad evaluation, because of its tentative nature, did not begin EEOC filing period absent a showing that plaintiff knew the evaluation made him vulnerable to discharge), *cert. denied*, 112 S. Ct. 379 (1991); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 200 (4th Cir. 1990) ("The 180-day limitations period for an ADEA action arising out of a job termination commences when the employee is informed of his termination . . . even if he is not then aware of its discriminatory nature."); *Economu v. Borg-Warner Corp.*, 829 F.2d 311, 315 (2d Cir. 1987) (filing period began to run no later than when the plaintiff's attorney received notice that plaintiff would be terminated).

114. *Cada*, 920 F.2d at 451; *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir. 1988); *Linn v. Andover Newton Theological Sch.*, 642 F. Supp. 11, 13 (D. Mass. 1985); *see also* *Miller v. Beneficial Mgt. Corp.*, 776 F. Supp. 936, 955-57 (D.N.J. 1991) (plaintiff had constructive knowledge that she was receiving less pay and would not receive promotion).

makes out a case for a continuing violation, either in the form of a systemic discriminatory policy still in effect or a series of discriminatory acts, one of which occurs within the filing period.¹¹⁵ Continuing violation theory, then, makes it possible for some plaintiffs to litigate discrimination that took place long before they filed a charge.

One circuit court has rejected the majority accrual rule, at least in the pay discrimination context under ADEA. In *Hamilton v. 1st Source Bank*,¹¹⁶ the Fourth Circuit, sitting en banc, faced a case which began when the defendant bank fired fifty-nine year-old J.D. Hamilton. Hamilton filed a timely EEOC charge claiming discriminatory discharge on the basis of age. During discovery on the discharge issue, he learned that the bank had paid him less than younger employees in his job category. Thus, under the *Cada* framework for accrual and equitable tolling, Hamilton discovered simultaneously that he suffered the adverse employment action of lower pay, and that his employer may have wrongfully discriminated against him because his pay was less than younger employees. The *Cada* court would no doubt have held that Hamilton's pay claim accrued only upon discovery of the lower pay, and, if it took him longer to discover that his pay was lower vis-à-vis younger employees, equitable tolling might apply. Seventeen months after receiving his last paycheck, Hamilton filed a new EEOC charge alleging pay discrimination.¹¹⁷ A jury awarded Hamilton \$15,135 on his pay claim and \$198,000 on his discharge claim.¹¹⁸

115. *E.g.*, *Parrish v. Ford Motor Co.*, 953 F.2d 1384 (6th Cir. 1992) (unpublished opinion) (available in WESTLAW) (continuing violation doctrine may apply to failure to promote situation); *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059-60 (7th Cir. 1992) (recognizing possibility of continuing violation if plaintiff shows an ongoing pattern of discrimination, one of whose events occurred within the filing period); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614-15 (10th Cir. 1988) ("Where plaintiffs challenge not just one incident or isolated incidents of conduct violative of the ADEA, but an unlawful practice involving several incidents, a charge filed with the EEOC is timely when it is filed within 180 days of the termination of the policy and practice adversely affecting the plaintiffs."); *Cook v. Pan American World Airlines, Inc.*, 771 F.2d 635, 646 (2d Cir. 1985) (applications of alleged discriminatory seniority system constituted continuing violations), *cert. denied*, 474 U.S. 1109 (1986); *Cf. Miller v. Beneficial Mgt. Corp.*, 776 F. Supp. 936, 954-55 (D.N.J. 1991) (to establish continuing violation, plaintiff must show policy or practice that applies to other employees as well as to her). *But see Rendon v. District of Columbia*, 42 Fair Empl. Prac. Cas. (BNA) 782, 785 (D.D.C. 1986) ("It is well-established that a series of allegedly discriminatory actions against the same employee, even with the same alleged motive such as race and age discrimination, is not sufficient to constitute a continuing violation.").

A full discussion of continuing violation analysis is beyond the scope of this Note, and a number of commentators already have attempted to clarify this confusing doctrine. *See, e.g.*, Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171 (1988); Robert J. Reid, Note, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. CINN. L. REV. 1335 (1992). *See generally* 2 SULLIVAN, *supra* note 91, at 376-78 (1988 and Supp. 1990).

116. 928 F.2d 86 (4th Cir. 1990) (en banc).

117. 928 F.2d at 87.

118. 928 F.2d at 87. The \$198,000 included \$99,000 in back pay and an additional \$99,000 in liquidated damages for willful discrimination.

The Fourth Circuit reversed in part and held that Hamilton's pay discrimination claim accrued when he received his last paycheck.¹¹⁹ By timing accrual to receipt of pay and not notice of lower pay, the court asserted a strict occurrence-of-injury rule for pay discrimination cases. Although the *Hamilton* court acknowledged that *Ricks* requires the plaintiff to have some notice of the adverse employment action before the filing period commences, it refused to determine when Hamilton had sufficient knowledge that he was receiving less money than coworkers.¹²⁰ Such an inquiry would, it believed, "soon mire courts in speculative debates about the exact degree of employee awareness . . . [.] a debate that would strip statutory limitations periods of the simplicity and predictability that serviceable legal rules require."¹²¹ The *Hamilton* court further justified its occurrence rule by correctly noting that section 7(d) itself makes no mention of notice or discovery.¹²² Such a narrow reading of the statute, however, again disregards *Ricks*' notice analysis. The *Hamilton* court also used this reading selectively, for it failed to reverse its own decisions holding a discovery-of-injury rule governs discriminatory discharge.¹²³ Finally, the court invoked the repose and loss of evidence policies behind statutes of limitations to support a strict occurrence rule.¹²⁴ This argument also fails. Limitation policies apply equally to the discriminatory discharge context, yet the *Hamilton* court would use them as special support for an occurrence rule affecting only pay discrimination victims.

The *Hamilton* occurrence-of-injury rule for pay discrimination represents a significant theoretical break with other circuits on the accrual issue. Current Fourth Circuit law dictates that, in effect, pay discrimination plaintiffs will have more difficulty filing a charge than discharge claimants because the former may not discover the adverse employment action of lower pay until long after receipt of their last paycheck. Such a rule is in sharp contrast with the notice of adverse employment action rule articulated in *Cada*. The next section evaluates the two approaches in the context of ADEA's legislative history, Supreme Court doctrine, and practical considerations.

C. Occurrence and Notice Accrual Analysis Compared

The *Hamilton* approach to accrual, namely that the EEOC charge-

119. 928 F.2d at 90.

120. 928 F.2d at 88-89.

121. 928 F.2d at 89. The court's rejection of any kind of notice requirement seems especially unjust in *Hamilton* because the plaintiff offered proof that the employer discouraged discussions of salary by employees. 928 F.2d at 89 n.3.

122. 928 F.2d at 87-88.

123. 928 F.2d at 88-90.

124. 928 F.2d at 89-90.

filing period begins to run when the plaintiff, for example, receives less money rather than when he had notice of lower pay, has an initial attractiveness. An occurrence rule would relieve courts from considering what the plaintiff knew when, and allow them to focus on when the adverse employment action itself happened.¹²⁵ An occurrence rule would also provide additional protection to employers from past claims by starting, and thus ending, the charge-filing period sooner. In section 7(d) Congress clearly intended to protect employers at some point from the risk of litigating past claims. The *Hamilton* approach therefore seems to fulfill a congressional goal.¹²⁶

Nevertheless, the weight of policy, as well as authority,¹²⁷ supports adoption of the discovery rule: the ADEA charge-filing period should begin to run when the plaintiff discovers, or reasonably should have discovered, that she has been injured by an adverse employment action. Such a rule sufficiently protects the interest in simplicity and repose that motivated the *Hamilton* court. In terms of simplicity, exactly when a plaintiff discovered or should have discovered an injury is a question of fact which courts resolve routinely.¹²⁸ Indeed, all but the *Hamilton* court find this burden on the judiciary bearable, especially in light of the stakes involved for a plaintiff who faces no recourse if section 7(d) bars her suit.¹²⁹ Similarly, the suggested approach adequately preserves an employer's interest in repose. ADEA claimants still have only six to ten months after discovery to file their charges, less time than plaintiffs bringing analogous federal claims.¹³⁰ In further fairness to employers' repose concerns, the proposed approach requires plaintiffs to demonstrate the reasonableness of any delay in uncovering their injuries.¹³¹ If, for example, Mr. Hamilton had been the payroll officer at 1st Source Bank, and thus knew or could have discovered the salaries of his cohorts, the discovery rule should bar his claim as untimely.

The strongest argument for the proposed approach, however, rests with the Act itself. ADEA first and foremost is a remedial statute, warranting liberal interpretation of its provisions.¹³² Congress charged laypeople with the responsibility to assert their rights and

125. See *Hamilton*, 928 F.2d at 89.

126. See *supra* Part I.

127. See *supra* Part II and sections III.A and III.B.

128. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 166-67 (5th ed. 1984 & Supp. 1988).

129. See *supra* note 3 and accompanying text.

130. See, e.g., The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988) (incorporating state's personal injury limitation period, usually two years or greater); Fair Housing Act, 42 U.S.C. § 3613 (1988) (two years).

131. See *supra* text accompanying note 114.

132. 3 SINGER, *supra* note 54, at § 60.01.

thereby remove age-based barriers in the American workplace.¹³³ Courts should not read the procedures of section 7(d) so narrowly as to thwart Congress' effort to end age discrimination and make its victims whole through the private action process.¹³⁴ While a discovery rule does place an additional burden on employers and courts who must deal with ADEA cases, the equities behind the statute demand it.

Hamilton not only breaks from the near uniformity of agreement on a discovery rule for accrual of employment discrimination claims, but it also fails to provide a compelling reason for its break. Instead, it is the notice of adverse employment action analysis which best fulfills the purposes and interpretation of civil rights statutes like ADEA. The following sections turn to the equitable modification issue.

D. Other Approaches to Equitable Modification¹³⁵

Congress and the courts agree that the ADEA 180/300-day EEOC charge-filing requirement is akin to a statute of limitations, and thus equitable modification is available to ADEA claimants.¹³⁶ Courts disagree, however, over exactly when equitable modification is appropriate. Section III.D.1 discusses equitable estoppel and section III.D.2 examines equitable tolling.

1. Equitable Estoppel

Many courts are in general accord with the *Cada* formulation, allowing equitable estoppel if an employer takes active steps to keep the worker from filing on time.¹³⁷ Implicit in the notion of equitable es-

133. See, e.g., *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976) ("The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. . . . [S]trict compliance with section 7(d)'s time limitation should not be required of laymen attempting to enforce their statutory rights."), *aff'd.*, 434 U.S. 99 (1977).

134. See *Delaware State College v. Ricks*, 449 U.S. 250, 262 n.16 (1980) (Title VII); *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972) (Title VII); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981).

135. This section does not describe all of the relevant cases and considerations, and instead focuses on the most important and/or controversial applications of equitable modification to ADEA § 7(d). A recent annotation, however, has compiled all of the cases in this area. Thomas Fusco, Annotation, *Equitable Considerations as Modifying, Through Tolling or Estoppel, Time Limitations of Age Discrimination in Employment Act (ADEA)* (29 USCS § 626(d)) for Filing Charge with Equal Employment Opportunity Commission, 110 A.L.R. Fed. 377 (1992).

136. H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 12 (1978), reprinted in 1978 U.S.C.C.A.N. 528, 534 ("The conferees agree that the 'charge' requirement is not a jurisdictional pre-requisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act."); see also, e.g., *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir.), *cert. denied*, 112 S. Ct. 198 (1991); *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 751-52 (1st Cir. 1988); *Callowhill v. Allen-Sherman-Hoff Co.*, 832 F.2d 269, 272 (3d Cir. 1987), *cert. denied*, 485 U.S. 962 (1988).

137. See *supra* notes 93-94 and accompanying text; see also, e.g., *Conaway v. Control Data Corp.*, 955 F.2d 358, 362 (5th Cir. 1992); *Amburgey v. Cohart Refractories Corp.*, 936 F.2d 805, 810 n.14 (5th Cir. 1991) ("A defendant is equitably estopped from asserting that a claim is time-barred where its conduct induced a plaintiff to refrain from exercising its rights."). Several

toppel, and made explicit by some courts, is that a plaintiff must have reasonably relied on the employer's misconduct to assert equitable estoppel.¹³⁸ The test of reasonable reliance is important because it benefits employers subject to equitable modification. An employer who tried to keep a plaintiff from suing may get away with it if it can show the employee was unreasonable in relying on such conduct. Equitable estoppel, then, is not as big a burden on employers as it first appears.

Courts are unanimous in saying that equitable estoppel lies if the employer tells the worker it will not plead the limitations defense¹³⁹ or misleads the worker as to the filing period's length.¹⁴⁰ Courts also generally agree that equitable estoppel will not apply to an employer who provides gratuitous severance benefits.¹⁴¹ Consensus in the courts on equitable estoppel starts to break down, however, in other fact situations. For instance, courts disagree on whether an employer's offer of economic inducements not to file should toll the 180/300 day period.¹⁴² Courts also differ on whether an employer's active misrepre-

courts quote the definition of equitable estoppel found in *Price v. Litton Business Sys., Inc.*, 694 F.2d 963, 965-66 (4th Cir. 1982):

The [EEOC filing period] will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge. An employee's hope for rehire, transfer, promotion or a continuing employment relationship . . . cannot toll the statute absent some employer conduct likely to mislead an employee into sleeping on his rights.

See also *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir. 1991); *Clark v. Resistoflex Co.*, 854 F.2d 762, 769 (5th Cir. 1988); *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 646 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986).

138. See *Naton v. Bank of Cal.*, 649 F.2d 691, 696 (9th Cir. 1981) (stating that a finding of estoppel must rest on consideration of the plaintiff's reliance, the defendant's improper purpose or knowledge, and the purpose of the ADEA limitations period). Many courts have made reference to one or both of the first two factors of the *Naton* formula, but have left out the third. See, e.g., *Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 606 (7th Cir. 1992) (equitable estoppel does not lie because plaintiffs did not rely on employer's partial training when they pursued their grievances over the initial denial of training); *Costello v. Boy Scouts of Am.*, 930 F.2d 27 (9th Cir. 1991) (unpublished opinion) (available in WESTLAW) (noting reliance and improper purpose or knowledge).

139. *Cada*, 920 F.2d at 450-51; see also 2 SULLIVAN, *supra* note 91, at 373.

140. E.g., *Dillman v. Combustion Engr., Inc.*, 784 F.2d 57, 61 (2d Cir. 1986).

141. E.g., *O'Malley v. GTE Serv. Corp.*, 758 F.2d 818, 822 (2d Cir. 1985) (employer's assurance that employee would receive retirement benefits was not grounds for equitable estoppel, even when employer did not send application for them until after the filing period elapsed); *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358-59 (8th Cir.) (extension of severance benefits and assistance in finding new work in this case was not affirmative misconduct to lull plaintiff into not filing), *cert. denied*, 469 U.S. 1036 (1984). But cf. *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 595 (9th Cir. 1981) (court remanded case to determine if plaintiff was reasonably inhibited from filing a charge by fears of losing severance benefits, early retirement options, and company aid in finding work), *cert. denied*, 459 U.S. 1200 (1983).

142. Compare *Clark v. Resistoflex Co.*, 854 F.2d 762, 769 (5th Cir. 1988) (equitable estoppel may lie where employer threatened to revoke severance agreement if employee did anything against the employer) and *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 520 (4th Cir. 1986) ("[A] generous severance arrangement conditioned upon compliance with a code of silence [regarding the discharge] would be a powerful inducement that might well lure an older worker into failing to defend his rights.") with *Mogley v. Chicago Title Ins. Co.*, 719 F.2d 289, 290-91 (8th

sensation of the reason for discharge constitutes possible grounds for estoppel.¹⁴³ Finally, there is a dispute over the effect of an employer's attempts to find a discharged employee other work. Some courts hold that this constitutes possible grounds for equitable estoppel because it may lull an employee to delay filing a charge.¹⁴⁴ Other courts are less sympathetic to a plaintiff making this argument.¹⁴⁵ These disagreements over equitable estoppel warrant uniform resolution; otherwise, plaintiffs or employers in one circuit may enjoy more protection than their counterparts elsewhere.

2. Equitable Tolling

The circuits also have described different situations for equitable tolling. Many courts agree with *Cada* that a diligent plaintiff who nevertheless fails to uncover facts forming the basis for an ADEA claim

Cir. 1983) (upholding waiver of right to sue in return for staying on the payroll long enough to qualify for additional benefits) and *Soderlund v. Ben Franklin*, 41 Fair Empl. Prac. Cas. (BNA) 1709, 1711 (N.D. Ill. 1986) (upholding what was effectively a waiver of right to sue in return for severance pay). A handful of cases hold that an employer's entry into settlement negotiations with the employee is, without more, insufficient grounds for equitable modification. *E.g.*, *Salazar v. AT&T*, 715 F. Supp. 351, 355 (S.D. Fla. 1989). But see *Cerbone v. International Ladies' Garment Workers Union*, 768 F.2d 45, 49-50 (2d Cir. 1985) (settlement negotiations may constitute equitable estoppel if plaintiff reasonably relies thereon).

143. *Compare, e.g., Cada*, 920 F.2d at 451 (employer's alleged misrepresentation that discharge was result of reorganization plan is insufficient grounds for equitable estoppel) and *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990) (plaintiff failed to show nexus between employer's misrepresentation of reason for discharge and failure to file timely because at time of discharge he suspected age discrimination), *cert. denied*, 111 S. Ct. 676 (1991) and *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 202 (4th Cir. 1990) (equitable tolling did not lie for employer's alleged misrepresentation of reason for discharge because employee had sufficient facts to file a charge at time of termination) with, *e.g.*, *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878-82 (5th Cir.) (employer's misleading statement that it discharged plaintiff as part of a workforce reduction and would consider rehiring him estopped it from asserting untimeliness; only plaintiffs who diligently pursue their rights can enjoy this protection), *cert. denied*, 112 S. Ct. 198 (1991) and *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307-08 (3d Cir. 1983) (equitable tolling may lie where employer misrepresented reason for discharge), *cert. dismissed*, 465 U.S. 1091 (1984) and *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980) (allegation that employer misrepresented reason for discharge may be grounds for equitable estoppel).

144. *E.g., Rhodes*, 927 F.2d at 879-81 (employer's promise it would consider rehiring plaintiff constituted partial grounds for finding of estoppel); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3d Cir. 1977) (employer may be estopped from asserting ADEA filing period defense if it sent positive signals to employee of alternative employment in the company after discharge), *cert. denied*, 439 U.S. 821 (1978); see also *Dillman v. Combustion Eng., Inc.*, 784 F.2d 57, 61 (2d Cir. 1986) (usual grounds for equitable estoppel is "some bad faith promise of reinstatement that caused the employee to delay filing his EEOC claim").

145. *E.g., Costello v. Boy Scouts of Am.*, 930 F.2d 27 (9th Cir. 1991) (unpublished opinion) (available in WESTLAW) (employer's efforts to find employee another job within organization are not grounds for equitable estoppel); *Price v. Litton Business Sys., Inc.*, 694 F.2d 963, 965-66 (4th Cir. 1982) (an employer's aggressive efforts to find a discharged employee other work in the company did not constitute equitable estoppel absent a showing the employer acted deliberately to thwart the employee's filing or acted with knowledge that this would occur).

One should note also that courts often use the term equitable tolling when referring to employer misconduct. *E.g., Barrow v. New Orleans S.S. Assn.*, 932 F.2d 473, 478 (5th Cir. 1991); *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266-67 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 676 (1991); *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir. 1990).

can invoke equitable tolling to escape the limitations bar.¹⁴⁶ Some of these courts have refined this approach so that once the plaintiff can make out a *prima facie* ADEA case, the filing period resumes running.¹⁴⁷ The *prima facie* case standard is useful because it provides familiar guidance to courts struggling with the question of *what* the plaintiff must know before the limitations period may continue. In terms of how long a plaintiff should have to file a charge after a tolling factor disappears, most courts have not embraced *Cada's* analysis that equitable tolling should give a plaintiff only a "reasonable time." Virtually all decisions on the issue suggest courts should suspend the filing period for the entire period in which a tolling factor existed.¹⁴⁸

146. *E.g., Rhodes*, 927 F.2d at 878; *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986); *Dillman*, 784 F.2d at 60.

147. *E.g., Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (discharge); *Pruet Prod. Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) (discharge); *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411 (7th Cir. 1984) (demotion); *see also Jackson v. Richards Medical Co.*, 961 F.2d 575, 579 (6th Cir. 1992) (plaintiff became aware of possible ADEA charge when she learned of younger replacement); *Economu v. Borg-Warner Corp.*, 829 F.2d 311, 314, 316 (2d Cir. 1987) (affirming trial court's decision dismissing plaintiff's complaint because of untimely EEOC charge; trial court "ruled that a *prima facie* case for age discrimination could have been made out in June 1982 when plaintiff was first told of the proposed diminution of his duties and their transfer to a younger, new employee. . .").

A plaintiff could make out a *prima facie* case for discriminatory discharge if she could show (1) she was a member of the protected class, (2) she was discharged, (3) she was replaced by someone she knew or believed to be outside the protected class, and (4) she believed she was qualified for the job. *See Pruet*, 784 F.2d at 1279; *see also Parrish v. Ford Motor Co.*, 953 F.2d 1394 (6th Cir. 1992) (unpublished opinion) (available in WESTLAW); 2 SULLIVAN, *supra* note 91, at 300-09. The Supreme Court has stated that "a charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984), and lower courts have agreed the threshold for filing a charge is even less than the already modest *prima facie* case. *See, e.g., Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1217 (5th Cir. 1992); *Pruet*, 784 F.2d at 1279. Nevertheless, these courts have found the *prima facie* test a reliable tool in evaluating timeliness problems.

148. *See, e.g., Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 410-11 (7th Cir. 1984) ("[T]he filing deadline with the EEOC is tolled *until* the time when 'facts that would support a charge of discrimination . . . were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff.'" (emphasis added) (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975)); *see also Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1225 (7th Cir. 1991); *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989); *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987). *But cf. English v. Pabst Brewing Co.*, 828 F.2d 1047, 1050-51 (4th Cir. 1987) (refusing to toll filing period for full six months after plaintiff learned of younger "replacement" on grounds that (1) there was no evidence of employer misconduct, (2) there was some doubt younger worker actually replaced plaintiff, and (3) plaintiff's delay in filing after he discovered this information suggested its unimportance), *cert. denied*, 486 U.S. 1044 (1988); *Calhoun v. Federal Natl. Mortgage Assn.*, 823 F.2d 451, 456 (11th Cir. 1987) (plaintiff did not file a charge until five months after he first suspected age discrimination; court held this delay, and fact he was an attorney, against him in denying equitable tolling), *cert. denied sub nom. Kasper v. Federal Natl. Mortgage Assn.*, 484 U.S. 1078 (1988); *Taylor v. General Tel. Co.*, 759 F.2d 437, 442 (5th Cir. 1985) (no equitable tolling in favor of employee who had been aware of ADEA rights for most if not all of filing period, yet who had postponed filing until it was too late). One Title VII case has also hinted that a plaintiff may have only a reasonable time to file charges after the tolling factor disappears. *See Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir. 1980). And in *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147,

Finally, other opinions have stated the following events are also possible grounds for equitable tolling of the ADEA charge-filing period: (1) an employer's failure to post the notice required by ADEA section 8;¹⁴⁹ in this case, equitable tolling will lie until the plaintiff gains actual knowledge of her ADEA rights¹⁵⁰ or constructive knowledge by retaining an attorney;¹⁵¹ (2) the EEOC or other government agency misrepresents the necessity of filing or the period's length;¹⁵² (3) the employee files in the wrong forum;¹⁵³ or (4) application of the tolling doctrine will fulfill the purposes behind section 7(d).¹⁵⁴ Courts have defined these purposes to be "providing the government an opportunity to conciliate while the complaint is fresh and giving early notice to the employer of possible litigation."¹⁵⁵

151 & n.5 (1984), the U.S. Supreme Court presumed that the lower court used a reasonable time limitation on tolling the 90-day period for filing a Title VII court suit.

149. Section 8 of ADEA, 29 U.S.C. § 627 (1988), requires every employer to "post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter." See also 29 C.F.R. § 1627.10 (1992).

150. The leading case for this equitable tolling application, *Kale v. Combined Ins. Co.*, 861 F.2d 746 (1st Cir. 1988), defined "actual knowledge" in the following terms: "Actual knowledge occurs where an employee either learns or is told of his ADEA rights, even if he becomes only generally aware of the fact there is a statute outlawing age discrimination . . ." 861 F.2d at 753.

151. See, e.g., *McBrayer v. City of Marietta*, 967 F.2d 546, 548 (11th Cir. 1992); *Beshears v. Asbill*, 930 F.2d 1348, 1351-52 (8th Cir. 1991); *Costello v. Boy Scouts of Am.*, (9th Cir. 1991) (unpublished opinion) (available in WESTLAW); *Schroeder v. Copley Newspaper*, 879 F.2d 266, 271-72 (7th Cir. 1989); *Kale*, 861 F.2d at 753; cf. *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 347-48 (10th Cir. 1982) (applying equitable tolling to failure to post a notice only if the employer intended to mislead the employee).

Courts generally do not excuse a plaintiff's untimeliness if it is the result of sloppy lawyering by her attorney. But see *Volk v. Multi-Media, Inc.*, 516 F. Supp. 157, 161-62 (S.D. Ohio 1981) (refusing to impose attorney's ineptness on plaintiff).

152. *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 81 (7th Cir. 1992); *Barrow v. New Orleans S.S. Assn.*, 932 F.2d 473, 478 (5th Cir. 1991); *Albano v. Schering-Plough Corp.*, 912 F.2d 384, 386 (9th Cir. 1990) (EEOC's failure to amend timely charge in accord with its own procedures tolls the filing period on that new charge), *cert. denied*, 111 S. Ct. 959 (1991); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 616 (10th Cir. 1988) (by scheduling a conciliation meeting after filing period, EEOC lulled plaintiffs into failing to assert their rights and thus equitable tolling applied). But see, e.g., *Schroeder v. Copley Newspaper*, 879 F.2d 266, 270-271 (7th Cir. 1989) (EEOC's "lukewarm reception [of plaintiff's interest in filing] does not justify equitably tolling the charge-filing period.").

153. *Barrow*, 932 F.2d at 478; *Blumberg*, 848 F.2d at 644-45; *Miller*, 755 F.2d at 24.

154. See *Naton v. Bank of Cal.*, 649 F.2d 691, 696 (9th Cir. 1981); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3d Cir. 1977).

155. *Kale v. Combined Ins. Co.*, 861 F.2d 746, 753 (1st Cir. 1988). Just as courts have confused equitable estoppel and equitable tolling, see *supra* note 145, they have also confused equitable tolling with accrual. In a recent case, *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1213-17 (5th Cir. 1992), the court failed to distinguish equitable tolling and accrual when it held that the filing period began to run when the employees could make out a prima facie case of constructive discharge. Similarly, in *Aronson v. Crown Zellerbach*, 662 F.2d 584, 593-94 & nn.15, 18 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983), the court announced an accrual rule which resembles *Cada's* formula for equitable tolling: "We hold, therefore that in ADEA suits, the applicable limitations period is activated once the employee knows or should know that an unlawful employment practice has been committed." Lastly, at least one court has spoken as if

Courts, then, have identified numerous situations in which equitable modification of the ADEA charge-filing period may apply. The next section draws from these situations to develop an analysis of equitable modification that furthers the goals of the Act.

E. *Proposed Approach to ADEA Section 7(d) Equitable Modification*¹⁵⁶

If an employer has engaged in active misconduct to delay the plaintiff from filing a charge, courts should estop that employer from using the limitation defense.¹⁵⁷ More specifically, equitable estoppel should apply (1) when the plaintiff has shown that the employer misled her by affirmative acts on which the plaintiff reasonably relied,¹⁵⁸ or (2) when the employer failed to post ADEA notices and it cannot demonstrate that the worker was generally aware from another source of her age discrimination rights.¹⁵⁹ Equitable tolling should apply until the plaintiff knows or reasonably should know facts making up a *prima facie* case of age discrimination.¹⁶⁰

The arguments for the proposed approach to equitable modification are similar to those used to justify the discovery-of-injury approach to accrual. The filing period should not begin running too soon to leave plaintiffs unable to vindicate their rights.¹⁶¹ Nevertheless, doctrines of equitable modification should not destroy the repose provided by the limitation period.¹⁶² The proposed equitable estoppel

notice of the adverse employment decision without more constitutes sufficient information to suspect discrimination. See, e.g., *Mull v. ARCO Durethane Plastics, Inc.*, 784 F.2d 284, 291 (7th Cir. 1986).

156. Compare this Note's recommendations with those found in Kathryn Doi, Comment, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U.C. DAVIS L. REV. 749, 779-92 (1985); Jack E. Fernandez, *Equitable Tolling of Title VII Time Limits in Actions Against the Government*, 74 CORNELL L. REV. 199, 220-21 (1988); Steven M. Zarowny, Comment, *Title VII — Time Limitation for Filing Charge Is Subject to Equitable Tolling*, 55 NOTRE DAME L. REV. 614, 624-25 (1980).

157. See, e.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991).

158. See *supra* notes 137-45 and accompanying text.

159. See *supra* notes 149-51 and accompanying text. Since failure to post the required notice focuses at first on employer misconduct, equitable estoppel should be the applicable doctrine. See *Edwards v. Kaiser Aluminum & Chem. Sales, Inc.*, 515 F.2d 1195, 1197 (5th Cir. 1975). Most courts, however, use equitable tolling in this situation, as explained *supra* notes 149-51 and accompanying text.

160. See *supra* note 147 and accompanying text. Courts should also toll the filing period because of government misrepresentations on which the plaintiff reasonably relied, see *supra* text accompanying note 152, or failure to file in the proper forum, see *supra* text accompanying note 153. These situations present classic cases of diligent plaintiffs who fail to file timely through no fault of their own.

161. *Delaware State College v. Ricks*, 449 U.S. 250, 262 n.16 (1980).

162. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991).

rule properly balances these concerns. The theory underlying equitable estoppel is that an employer should not profit from her wrong.¹⁶³ This policy should work to suspend the filing period if the employer misrepresented the reasons for making the adverse employment action,¹⁶⁴ promised the employee alternative job opportunities which it did not in good faith try to generate,¹⁶⁵ or failed to post the required ADEA notice.¹⁶⁶ An employer's use of benefits as an inducement not to file is also suspect, unless she executes a valid waiver with the employee.¹⁶⁷ To invoke equitable estoppel successfully, however, a plaintiff must show that he reasonably relied on any alleged affirmative misconduct of the employer.¹⁶⁸ In failure-to-post cases, the employer also will have the opportunity to avoid liability by showing that the plaintiff had actual or constructive knowledge of age discrimination rights.¹⁶⁹

The proposed equitable tolling standard also has limits; it tolls the filing period only until the plaintiff can make out a *prima facie* case. The plaintiff should not be able to escape the charge-filing requirement by stating she did not know about it.¹⁷⁰ To insist on tolling the period until plaintiffs know exactly the time in which to file would nullify the short statute of limitations period that Congress has maintained since ADEA's enactment. Once a plaintiff can make out a *prima facie* case,¹⁷¹ she has no excuse for failing to exercise her rights promptly, absent a showing of employer actions requiring equitable estoppel. A *prima facie* test for equitable tolling also fulfills the purposes of the short filing period: prompt notice to the employer and an early chance for government conciliation.¹⁷² As soon as the plaintiff has enough facts to suspect discrimination, a suspended filing period will restart and trigger the notice and conciliation at the core of section 7(d).

The proposed equitable tolling rule would, however, suspend the filing period for the duration of the plaintiff's reasonable ignorance of her claim. Plaintiffs should have the full period Congress intended for them to exercise their rights,¹⁷³ and not just a "reasonable time" as

163. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959).

164. *See supra* note 143 and accompanying text.

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

166. *See supra* notes 149-51 and accompanying text.

167. *See supra* note 142 and accompanying text.

168. *See supra* note 138 and accompanying text.

169. *See supra* notes 150-51 and accompanying text.

170. Courts have generally rejected such arguments. *E.g.*, *Barrow v. New Orleans S.S. Assn.*, 932 F.2d 473, 478 (5th Cir. 1991) (lack of knowledge of applicable filing deadlines is not a basis for tolling); *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 754 (1st Cir. 1988) ("[A] plaintiff who is aware of his ADEA rights but unaware of the filing deadlines cannot, without more, invoke the doctrine of equitable tolling.").

171. *See supra* note 147 and accompanying text.

172. *See supra* note 155 and accompanying text.

173. *See supra* note 148 and accompanying text.

urged by *Cada*. The *Cada* court did not cite any authority for this additional limitation on a plaintiff's right to assert an ADEA claim. Given the importance of eliminating age discrimination in the workplace, and the significant procedural hurdles ADEA claimants already face, courts should hesitate to complicate further section 7(d) analysis.

CONCLUSION

Since ADEA's enactment, courts have struggled with applying section 7(d)'s provisions requiring prospective plaintiffs to file discrimination charges with the EEOC. This Note has argued that claims should accrue when a plaintiff discovers or should have discovered that she has suffered an adverse employment action. In other words, the filing period should commence when she receives notice that she has been discharged, demoted, or paid less than coworkers, not when such events occur before or without notice. Similarly, diligent plaintiffs who know that they have been injured but who are unable to make out a *prima facie* ADEA case, or those who reasonably rely on employer misconduct, should enjoy equitable modification of section 7(d)'s filing period.

The proposed approach for accrual and equitable modification of the ADEA charge-filing requirement reflects the balance of interests struck by the legislative history of the Act, relevant Supreme Court decisions, and the array of circuit court opinions. In addition, it provides a uniform, administratively feasible structure for courts to apply. If followed, it will allow reasonably diligent working people to bring their ADEA claims six to ten months after they have discovered their injuries, have freed themselves from any employer misconduct, and have first suspected that discrimination may have been behind their loss.