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Under the Equal Employment Opportunity Act of 1972,[1] the Equal Employment Opportunity Commission (EEOC or the Commission) may bring suit[2] against employers[3] who discriminate in their employment practices.[4] Before filing suit, the Commission must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[5] The Commission may sue only if it cannot obtain an acceptable conciliation agreement.[6]

EEOC regulations acknowledge that the Commission must attempt conciliation before bringing suit.[7] The scope of the suit may change, however, after initial conciliation talks.[8] If the EEOC adds

1. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). This Act amends Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified at 42 U.S.C. §§ 2000e-1 to 2000e-16 (1976)). The Act, as amended, will be referred to in text as Title VII.

2. If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge.
42 U.S.C. § 2000e-5(f)(1) (1976).

3. The act prohibits discriminatory employment practices by employers, employment agencies or labor organizations. 42 U.S.C. § 2000e-2(a)-(c) (1976).

4. The specific practices prohibited are detailed at 42 U.S.C. §§ 2000e-2 to -3 (1976).

5. 42 U.S.C. § 2000e-5(b) (1976).

6. 42 U.S.C. § 2000e-5(f)(1) (1976). An *individual* plaintiff may sue regardless of whether the Commission has attempted conciliation or not. Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 652 (4th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969).

7. *See* EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 911 (D. Md. 1974), *affd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir. 1976); *see generally* 29 C.F.R. § 1601.24 (1982).

8. Problems generally arise when the scope of the complaint exceeds the scope of the conciliation talks. For example, the complaint may name a party not included in conciliation. *See, e.g.,* EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974) (conciliation talks included employer but not union). The complaint may contain charges of discrimination not discussed during conciliation. *See, e.g.,* EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978) (portion of complaint alleging sex discrimination was dismissed where conciliation covered only race discrimination). The complaint may cover employees not discussed during conciliation. *See, e.g.,* EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977) (granting partial summary judgment on portion of complaint covering management, professional and technical personnel where conciliation only covered flight attendants).

Problems can also arise when the scope of conciliation far exceeds the scope of the complaint. *See* EEOC v. Sears, Roebuck & Co., 650 F.2d 14 (2d Cir. 1981); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980) (alternative holding). In the *Sears* cases, the EEOC initiated conciliation with Sears' national headquarters concerning nationwide discrimination. When conciliation failed, the EEOC filed several suits against a few specific Sears stores. Two courts held such conciliation inadequate because these stores were given no opportunity to comply with the law voluntarily before suit. 650 F.2d at 19; 490 F. Supp. at 1255.

new defendants or charges to the suit, prior conciliation may no longer satisfy the statutory prerequisite.[9] Courts have held that inadequate conciliation efforts or bad faith attempts[10] do not fulfill the statutory prerequisite to suit.[11]

When the EEOC fails to satisfy the statute's conciliation requirement, courts refuse to hear the merits of a case.[12] The procedural disposition of such a case, however, varies. The statute authorizes staying proceedings pending further conciliation,[13] and courts have

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Faced with identical facts, two other courts reached different results. A federal district court in Georgia found no fault with the conciliation efforts. EEOC v. Sears, Roebuck & Co., 22 Empl. Prac. Dec. (CCH) ¶ 30,768 (N.D. Ga. 1980). A suit in Illinois alleging nationwide discrimination survived a motion to dismiss because it was coextensive with the scope of conciliation. EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980).

9. Courts are generally reluctant to review the content of conciliation negotiations. *See* EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between parties . . . ."); EEOC v. North Cent. Airlines, 475 F. Supp. 667 (D. Minn. 1979); *cf.* EEOC v. E.I. DuPont de Nemours & Co., Chestnut Run & Affiliated Facilities, 373 F. Supp. 1321 (D. Del. 1974) (court refused to examine merits of EEOC determination of reasonable cause), *aff'd.*, 516 F.2d 1297 (3d Cir. 1975). When a defendant claims that the Commission failed to attempt conciliation regarding particular charges or a particular defendant, however, courts will examine the validity of that claim. *See* EEOC v. Sherwood Medical Indus., 452 F. Supp. 678, 684 (M.D. Fla. 1978); EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977).

10. Even when conciliation talks included all the issues raised by the complaints, some courts examined the history of the negotiations to determine the EEOC's good faith. *See* EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001 (5th Cir. 1980) (per curiam); EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978).

11. *See, e.g.*, EEOC v. Zia Co., 582 F.2d 527, 531-32 (10th Cir. 1978); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1257-58 (M.D. Ala. 1980); EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 346 (D. Mass. 1979); EEOC v. Sherwood Medical Indus., 452 F. Supp. 678, 682-84 (M.D. Fla. 1978); EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1305-07 (W.D. Pa. 1977).

Since most failures to fulfill the conciliation requirement arise from partial conciliation, this Note will refer only to "inadequate conciliation." This term includes bad faith attempts to conciliate as well as complete failure to attempt conciliation. The term also includes situations in which the EEOC in good faith, but mistakenly, believes that the concilation requirement has been satisfied.

12. *See* EEOC v. Sears, Roebuck & Co., 650 F.2d 14 (2d Cir. 1981); EEOC v. Klingler Elec. Corp., 636 F.2d 104 (5th Cir. 1981) (per curiam); EEOC v. Magnolia Elec. Power Assn., 635 F.2d 375 (5th Cir. 1981); EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001 (5th Cir. 1980) (per curiam); EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980) (alternative holding); EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979); EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978); EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978); EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977); EEOC v. Brown Transp. Co., 15 Fair Empl. Prac. Cas. (BNA) 1062 (N.D. Ga. 1976); EEOC v. National Cash Register Co., 405 F. Supp. 562 (N.D. Ga. 1975); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *aff'd. in part, revd. in part and remanded on other grounds,* 530 F.2d 590 (4th Cir. 1976); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974).

13. The statute explicitly allows the court "in its discretion [to] stay further proceedings for not more than sixty days pending . . . further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1) (1976).

identified circumstances under which they will grant a stay.[14] The statute does not state what a court must do where a stay is inappropriate.[15] Thus, courts have, in their discretion, disposed of suits by either dismissal of the complaint[16] or summary judgment for the defendant.[17]

Dismissal and summary judgment evoke different consequences.[18] As a decision on the merits,[19] summary judgment has res judicata effect and bars any subsequent action by the EEOC based upon the same charge.[20] Dismissal, on the other hand, is generally

14. *See* EEOC v. Klingler Elec. Corp., 636 F.2d 104 (5th Cir. 1981) (per curiam); EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001 (5th Cir. 1980) (per curiam); EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978); EEOC v. Canadian Indem. Co., 407 F. Supp. 1366 (C.D. Cal. 1976). Typically, courts stay proceedings when the parties seem close to agreement, as in *Canadian Indemnity*, or when the EEOC clearly attempted conciliation, but EEOC bad faith caused the negotiations to fail, as in *Pet* and *Zia*. Where the EEOC fails to attempt conciliation, courts generally refuse to exercise their discretion to stay proceedings. *E.g.*, EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 244 (N.D. Ala. 1974). This result accords with the plain meaning of the statute, which provides for a stay pending *"further* efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). The language suggests that some efforts must have already been made.

15. In leaving the availability of a stay to the discretion of the trial court, Congress indicates that other orders disposing of the suit are also appropriate.

16. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 650 F.2d 14 (2d Cir. 1981); EEOC v. Magnolia Elec. Power Assn., 635 F.2d 375, 378 (5th Cir. 1981); Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Home of Economy, Inc., 28 Fair Empl. Prac. Cas. (BNA) 1592 (D.N.D. May 20, 1982); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980); EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978); EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978).

17. *See, e.g.*, EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979); EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977) (partial summary judgment); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *affd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir. 1976); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974).

18. *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2713, at 391 (1973).

19. FED. R. CIV. P. 56; 6 J. MOORE, MOORE'S FEDERAL PRACTICE § 56.03 (2d ed. 1982) ("The tenor of Rule 56 indicates that the summary judgment procedure deals with the merits . . . .").

20. *See* 6 J. MOORE, *supra* note 19, § 56.03 ("[If summary judgment is granted] in favor of the defendant the judgment is in bar and not in abatement."); 10 C. WRIGHT & A. MILLER, *supra* note 18, § 2713, at 405 ("A summary judgment . . . is on the merits and purports to have a res judicata effect on any later action.").

Note that in a more recent volume of this treatise, the authors propose modifying this approach. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4444 (1981). They suggest that when a plaintiff seeks to rebring an action that a court has previously refused to hear, the second court should determine whether the action was barred, not by looking to the original order — either dismissal or summary judgment — but by considering whether barring the action would promote justice. *Id.*, at 392. This flexible application of the claim preclusion doctrine finds additional support in the *Restatement (Second) of Judgments* § 20(2):

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar

without prejudice,[21] and leaves the Commission free to pursue further conciliation talks and to return to court should the talks fail.[22]

This Note suggests that a court faced with inadequate conciliation efforts by the EEOC should dismiss the action without prejudice. Part I argues that dismissal better serves the remedial purpose of the statute than summary judgment. Part II then demonstrates that dismissal satisfies the policy concerns of courts that dispose of inadequately conciliated suits. Although dismissal may not promote judicial efficiency as well as summary judgment, courts and the Commission can handle the dismissal to minimize duplication. Part III advances dismissal for failure to state a claim upon which relief can be granted as the appropriate procedural vehicle for dis-

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another action by the plaintiff instituted after the claim has matured, or the precondition has been satified, unless a second action is precluded by operation of the substantive law. The difficulty with this in the context of summary judgment concerns the function of summary adjudication. Summary judgment serves the primary purpose of speedily adjudicating meritless claims. *See, e.g.,* C. WRIGHT, LAW OF FEDERAL COURTS § 99, at 492 (3d ed. 1976) (summary judgment is a "salutary and efficient instrumentality for expedition of the business of the courts."). Inviting collateral attack on summary judgments to test whether they rest on the failure to meet "a precondition" or on "the operation of substantive law" conflicts directly with the judicial economy that justifies summary adjudication in the first instance.

In any event, courts disposing of suits for inadequate conciliation have apparently assumed that an order of summary judgment will bar subsequent suits by the same litigants on the same charges. *See* EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 249 (N.D. Ala. 1974) ("The Court is aware, of course, of the effect of its summary judgment upon the employees for whom the Commission seeks redress."); EEOC v. Westvaco Corp., 372 F. Supp. 985, 994 (D. Md. 1974) ("[T]he EEOC urges the court to be mindful of the *res judicata* effects of a summary judgment in this case. The court is mindful."). This assumption reflects the nearly universal preponderance of authority. *See, e.g.,* Martucci v. Mayer, 210 F.2d 259, 260 (3d Cir. 1954) (per curiam) ("A judgment under Rule 56 goes to the merits and operates in bar of the cause of action, not in abatement."); Garrigan v. Giese, 420 F. Supp. 68, 71 (E.D. Mo. 1976) ("A determination by summary judgment is as final a judgment as is a determination had after a trial or hearing on uncontroverted facts."), *cert. denied*, 434 U.S. 825 (1977); Hubicki v. United Steelworkers of America, 344 F. Supp. 1247, 1248 (M.D. Pa. 1972), *aff'd. sub nom.* Hubicki v. ACF Indus., 484 F.2d 519 (3d Cir. 1973); Sopp v. Gehrlein, 236 F. Supp. 823, 825 (W.D. Pa. 1964) ("The authorities all agree that the entry of summary judgment against a plaintiff is a general judgment in favor of a defendant and is an effective bar under the doctrine of res judicata to a subsequent action between the same parties on the same cause of action."); Oregon v. United States, 195 F. Supp. 276, 277 (D. Or. 1961) ("A summary judgment goes to the merits of the case and operates in bar of the cause of the action."), *aff'd.*, 308 F.2d 568 (9th Cir. 1962). Since courts seem to assume that claim preclusion automatically follows summary judgment, this Note will discuss this issue as a choice between summary judgment with res judicata effects and dismissal without prejudice.

21. EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980); EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978); *see* C. WRIGHT & A. MILLER, *supra* note 18, § 2713, at 404-05.

22. The need to file a second suit will not prejudice the Commission's case. Available back pay is measured from the time the employee files a charge with the Commission, regardless of when the suit is filed. 42 U.S.C. § 2000e-5(g) (1976). No statute of limitations applies to suits by the EEOC under title VII. Occidential Life Ins. Co. v. EEOC, 432 U.S. 355 (1977). The employer may attack the timeliness of a suit only if he can show prejudice. 432 U.S. at 373. *See also* EEOC v. Bell Helicopter Co., 426 F. Supp. 785 (N.D. Tex. 1976) (applying Administrative Procedure Act's requirement that agencies proceed without "unreasonable delay" to dismiss EEOC suit based on charges five to seven years old).

posing of actions when the Commission has failed to satisfy the conciliation requirement.

I. Disposition To Promote the Policy of the Statute

Courts consistently refuse to hear any case in which the EEOC failed to make an adequate conciliation effort before filing suit.[23] The trial judge may dispose of such suits either by dismissing the complaint or by granting summary judgment. Decisions announcing the disposition of such cases, however, do not acknowledge the choice between dismissing and granting summary judgment.[24] In practice, courts apparently dispose of unconciliated cases simply by granting the defendant's motion, whether for dismissal or summary judgment.[25] Courts are not legally bound to grant or deny the de-

23. *See* note 12 *supra*. Courts have hinted only occasionally that they might entertain a suit despite inadequate conciliation. One case stated that the Fifth Circuit has apparently established a rule that an EEOC suit cannot be dismissed for failure to comply with Title VII's statutory prerequisites, like conciliation, unless the failure was deliberate or prejudiced the defendant. EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1254 n.17, 1258 (M.D. Ala. 1980). The *Sears* court drew this rule from EEOC v. Airguide Corp., 539 F.2d 1038 (5th Cir. 1976), a case involving Title VII's notice requirement. In *Airguide*, the EEOC mailed notice of the charge to respondent, but the company never received the letter. Because EEOC did everything it could to meet the requirement, and the defendant was not shown to have suffered prejudice due to lack of timely notice, the Fifth Circuit reversed the district court's grant of summary judgment and remanded the case for a determination of prejudice to the defendant. 539 F.2d at 1042. The rule established by the Fifth Circuit in *Airguide* should not apply to the conciliation requirement. The strength of the legislative history supporting the conciliation requirement, *see* note 42 *infra* and accompanying text, distinguishes it from the relatively unremarked notice requirement, and makes it unlikely that the Fifth Circuit, or any other court, will allow the EEOC to fail to attempt conciliation. One authority, calling *Airguide* "scarcely definitive," suggests that the case provides "little assistance to other courts except in the precise situation decided." C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination § 3.11(b), at 331, 332 (1980).

Some courts find that negotiations not strictly part of the conciliation process nonetheless fulfill the conciliation requirements. For example, in United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), the court held that negotiating a consent decree fulfilled the conciliation requirement. 517 F.2d at 869. The court in Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), rejected the idea that negotiations begun after suit was filed were sufficient, but left open "the possibility that exceptional circumstances may excuse a failure to attempt conciliation . . . ." 535 F.2d at 272. In EEOC v. Pierce & Stevens Chem. Corp., 434 F. Supp. 1162 (W.D.N.Y. 1977), the court held that presuit correspondence notifying the defendant that the EEOC intended to broaden the scope of its discrimination charges fulfilled the conciliation requirement. 434 F. Supp. at 1166-67.

24. Two courts discussed their refusal to stay proceedings pending further conciliation efforts. *See* EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 245-46 (N.D. Ala. 1974). Both courts held that an opportunity to negotiate settlements after the EEOC files suit does not fulfill the statutory requirement that the EEOC provide the employer an opportunity for conciliation talks *prior* to filing suit. 490 F. Supp. at 1258; 375 F. Supp. at 245; *see* note 2 *supra*.

25. *See* EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980); EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979); EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978); EEOC v. East Hills Ford Sales, Inc., 445 F. Supp. 985 (W.D. Pa. 1978); EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977); EEOC v. General Elec. Co., 376 F. Supp. 757 (W.D. Va. 1974), *revd. on other grounds*, 532 F.2d 359

fendant's motion as labeled; they may convert the motion into the appropriate form.[26] Generally, they have not exercised this power. In nearly every case where the defendant's motion specified either dismissal or summary judgment, the court adopted that characterization for its order.[27] This practice clearly affords defendants unwarranted power and allows unjustifiable inconsistency in the outcome of similar suits.[28]

Instead, courts should consistently dismiss, without prejudice, inadequately conciliated suits. Dismissal does not affect the remedial goal of the statute as severely as does summary judgment. Title VII seeks to eliminate prejudicial discrimination in employment.[29] The 1972 Act provides the EEOC with two means of pursuing this goal: conciliation[30] and litigation.[31] Dismissal leaves the EEOC free to employ both options. Following dismissal, the Commission may renew conciliation efforts.[32] If conciliation fails, the Commission may

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(4th Cir. 1976); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273 (D. Md. 1973).

In one lone case, a district court responded to defendant's motion for summary judgment for failure to conciliate by *dismissing* for failure to satisfy conditions precedent to suit. *See* EEOC v. Pierce Packing Co., 669 F.2d 605, 607 (9th Cir. 1982).

26. If, on a motion asserting . . . failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .

FED. R. CIV. P. 12(b); *see* EEOC v. Pierce Packing Co., 669 F.2d 605, 606 (9th Cir. 1982); *cf.* EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981) (district court erred in granting defendant's motion to dismiss, where court should have granted stay).

27. In four cases, defendants filed alternative motions for dismissal and summary judgment. None of the courts explained why it opted for one or the other. EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978); EEOC v. Brown Transp. Corp., 15 Fair Empl. Prac. Cas. (BNA) 1062 (N.D. Ga. 1976); EEOC v. National Cash Register Co., 405 F. Supp. 562 (N.D. Ga. 1975) (both motions denied); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *aff'd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir. 1976).

28. For example, EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978), and EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974), presented nearly identical factual situations and theories to the court. In both cases the Commission failed to include the union in conciliation talks with the employer. In neither case was there any discussion of EEOC misconduct. Yet in *Wilson* the court dismissed without prejudice, 452 F. Supp. at 205, while in *U.S. Pipe* the court granted summary judgment. 375 F. Supp. at 249.

For other examples of cases with similar fact situations but different outcomes, see EEOC v. Magnolia Elec. Power Assn., 635 F.2d 375 (5th Cir. 1981) (comparing itself to *U.S. Pipe)*; *compare* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), *with* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979); *compare* EEOC v. National Cash Register Co., 405 F. Supp. 562 (N.D. Ga. 1975), *with* EEOC v. East Hills Ford Sales, Inc., 445 F. Supp. 985 (W.D. Pa. 1978).

29. H.R. REP. NO. 914, 88th Cong., 2d Sess. 26, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401 ("The purpose of this title is to eliminate . . . discrimination in employment . . . .").

30. *See* note 5 *supra* and accompanying text.

31. *See* note 2 *supra* and accompanying text.

32. *See, e.g.*, EEOC v. Wilson & Co., 452 F. Supp. 202, 205 (W.D. Okla. 1978) (court, in dismissing, stated that "the commission, union and employer should make a sincere attempt to

bring a new suit against the defendant.[33]

In contrast, summary judgment renders further action by the EEOC ineffectual. The res judicata effect of summary judgment bars the Commission from subsequently filing suit on the same charges.[34] Without the threat of suit, the employer has little incentive to negotiate a settlement.[35] Thus, further conciliation efforts would probably fail. Summary judgment virtually compels the EEOC to rely on suits brought by the charging individuals as the only means of remedying discrimination.

Congress has expressed dissatisfaction with reliance on individual suits.[36] The 1972 amendments to Title VII shifted the onus of enforcement from individuals to the government.[37] According to the Act's legislative history, Congress feared that individuals lacked the capability and the motivation to pursue judicial relief.[38] Yet courts that order summary judgment entrust the statute's enforcement solely to individual suits, a result clearly contrary to congressional intent.[39]

Dismissal interferes less than summary judgment with Title VII's

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resolve the controversy through conference and conciliation"). Note that the statute explicitly provides for further conciliation during a stay. *See* note 13 *supra*.

33. *See* notes 21-22 *supra* and accompanying text.

34. *See* note 20 *supra*.

35. *See* notes 57-59 *infra* and accompanying text.

36. H.R. REP. No. 238, 92d Cong., 2d Sess. 9, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2144; 118 Cong. Rec. 4941 (1972) (statement of Sen. Williams).

37. *See* S. REP. No. 415, 92d Cong., 1st Sess. 23 (1971) ("It is expected that [private suits] will be the exception and not the rule."); *see also* General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) ("The EEOC was to bear the primary burden of litigation . . ." under the 1972 Act.); EEOC v. General Elec. Co., 532 F.2d 359, 373 (4th Cir. 1976).

38. Recognizing the disparity between litigants, the Senate Report called the private employment discrimination suit a " 'modern day David and Goliath confrontation'." S. REP. No. 415, *supra* note 37, at 17 (footnote omitted). The Report also observed that "those persons whose economic disadvantage was a prime reason for enactment of equal employment opportunity provisions find that their only recourse in the face of unyielding discrimination [private suits] is one that is time consuming, burdensome, and all too often, financially prohibitive." *Id.* at 4.

39. Conceivably, summary judgment against the Commission may also bar suits by the individual complainant. The Act provides:

> The person . . . aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . [I]f within one hundred and eighty days from the filings of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days . . . a civil action may be brought against the respondent named in the charge . . . .

42 U.S.C. § 2000e-5(f)(1). This language would seem to permit private suits only if the Commission has not filed a suit. *See* McLain v. Wagner Elec. Corp., 550 F.2d 1115, 1119 (8th Cir. 1977); Crump v. Wagner Elec. Corp., 369 F. Supp. 637, 637-38 (E.D. Mo. 1973).

Dicta in various cases suggest that summary judgment against the Commission will result in barring subsequent prosecution of the underlying individual claims. *See* EEOC v. Burlington N., Inc., 644 F.2d 717, 721 n.14 (8th Cir. 1981) ("Implicit in our holding is the possibility that if bad faith or prejudice is shown, relief for a charging party, who has relied on the EEOC to litigate her claim, may be barred."); Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 249 (N.D. Ala. 1974)

purpose of eliminating employment discrimination. Summary judgment impedes rather than promotes that purpose by foreclosing any subsequent EEOC action and jeopardizing individual suits. Dismissal, on the other hand, leaves the prospects for enforcement exactly where they stood before the Commission filed suit.

II. Disposition To Promote the Policies Recognized by the Courts

In refusing to hear suits before the Commission has made an adequate conciliation effort, courts deter judicial enforcement of Title VII's primary goal. In disposing of such suits, however, courts promote other policies. These policies — encouraging voluntary compliance through conciliation, punishing misconduct by the EEOC, and promoting judicial efficiency — do not suffer, and may benefit, from decisions to dismiss rather than to grant summary judgment.[40]

("The court is aware, of course, of the effect of its summary judgment upon the employees for whom the Commission seeks redress.").

Truvillion v. King's Daughters Hosp., 614 F.2d 520, 521 (5th Cir. 1980), illustrates an alternative approach, based on a jurisdictional analysis of the conciliation requirement. The Fifth Circuit concluded that "the judgment in Suit I [EEOC v. King's Daugthers Hosp., 12 Fair Empl. Prac. Cas. (BNA) 484 (S.D. Miss. 1976)] has no *res judicata* effects as to the EEOC . . . ." 614 F.2d at 525. As such it could have no res judicata effects against the individual claimant. 614 F.2d at 525. For a discussion of the opinion's rationale, see notes 88-92 *infra* and accompanying text. The court refused to limit Mrs. Truvillion to her right to intervention because "[t]here is no right and no obligation to intervene in a defective suit." 614 F.2d at 526.

A subsequent Fifth Circuit opinion indicates the uncertainty in this area. Less than a month after *Truvillion*, Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980), held that dismissal with prejudice in an EEOC action can and did bar a subsequent individual action on the same charge. Wisdom, J., wrote the opinion in both cases. In both he characterized the district court orders as dismissals that did not specify "without prejudice." Interpreting Fed. R. Civ. P. 41(b), he concluded that the dismissal in *Truvillion* (for failure to investigate a charge thoroughly) was without prejudice, 614 F.2d at 524-25, but the dismissal in *Jones* (for inordinate delay in processing the charge and filing suit) was with prejudice. 614 F.2d at 1390. The conciliation requirement is more closely akin to the investigation requirement; both arise from the same section of the statute. 42 U.S.C. § 2000e-5(b) (1976). *Jones* strongly suggests, however, that a prior order of summary judgment can be held to bar an individual suit.

40. Courts do not seem to link the policies they are serving to their choice of disposition. Thus there is no obvious preference for dismissal or summary judgment among courts that encourage conciliation, *compare* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976), *and* EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980), *and* EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978), *and* EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978) (all dismissing suit), *with* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979), *and* EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977), *and* EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974), *and* EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974) (all granting summary judgment), courts that seek to punish EEOC misconduct, *compare* EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *affd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir. 1976), *and* EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974) (both granting summary judgment), *with* EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978) (granting stay), *and* EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245 (M.D. Ala. 1980) (alternative holding dismissing suit), courts that are protecting their jurisdiction, *compare* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979), *and* EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *affd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir.

A. *Encouraging Compliance Through Conciliation*

One policy concern motivating courts adjudicating Title VII litigation is the desire to protect the integrity of the conciliation requirement.[41] Congress intended to enforce Title VII rights primarily through informal means.[42] Until 1972, the EEOC could only seek voluntary compliance,[43] and a cause of action was granted only to individuals.[44] The 1972 amendments allow the EEOC to bring suit.[45] Since Congress expressly made the Commission's power to sue dependent upon the failure of conciliation,[46] the courts have concluded that Congress still favors conciliation as the primary method of handling charges of employment discrimination.[47] The Act as

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1976), *and* EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974) (all granting summary judgment), *with* EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978) (dismissing suit), *and* EEOC v. Magnolia Elec. Power Assn., 635 F.2d 375 (5th Cir. 1981) (reversing District Court dismissal for lack of jurisdiction), *and* EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001 (5th Cir. 1980) (per curiam) (same result as *Magnolia*), and courts that emphasize judicial efficiency, *compare* EEOC v. International Bhd. of Elec. Workers , 476 F. Supp. 341 (D. Mass. 1979) (granting summary judgment), *and* EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977), *and* EEOC v. Brown Transp. Corp., 15 Fair Empl. Prac. Cas. (BNA) 1062 (N.D. Ga 1976) (all granting partial summary judgment), *with* EEOC v. McLean Trucking Co., 64 F.R.D. 643 (W.D. Tenn. 1974), *modified,* 7 Fair Empl. Prac. Cas. (BNA) 302 (1974) (dismissing suit), *revd. and remanded,* 525 F.2d 1007 (6th Cir. 1975).

41. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976); EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 349 (D. Mass. 1979); EEOC v. Sherwood Medical Indus., 452 F. Supp. 678, 683 (M.D. Fla. 1978); EEOC v. Pierce & Stevens Chem. Corp., 434 F. Supp. 1162, 1166 (W.D.N.Y. 1977); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 241 (N.D. Ala. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985, 988 (D. Md. 1974). Several cases dealing with other prerequisites to suit by the EEOC demonstrate similar deference to the congressional policy favoring conciliation. *See* EEOC v. Brown Transp. Corp., 15 Fair Empl. Prac. Cas. (BNA) 1062, 1068 (N.D. Ga. 1976) (requirement that scope of judicial complaint not exceed the scope of the charge); EEOC v. General Elec. Co., 376 F. Supp. 757 (W.D. Va. 1974) (same), *revd.*, 532 F.2d 359 (4th Cir. 1976); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 275 (D. Md. 1973) (requirement that EEOC notify employer of failure of conciliation).

42. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [the] goal [of Title VII]."); Moore v. City of San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980) ("In enacting Title VII, Congress has specifically endorsed voluntary compliance and settlement as the preferred means of achieving the elimination of unlawful employment discrimination.").

43. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259-61 (amended 1972); *see* General Tel. Co. v. EEOC, 446 U.S. 318, 325 (1980).

44. *See* General Tel. Co. v. EEOC, 446 U.S. 318, 325 (1980).

45. *See* note 2 *supra*.

46. *See, e.g.,* Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir.) (The conciliation provision "has been construed to create an express condition on the commission's power to sue."), *cert. denied,* 429 U.S. 920 (1976); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 275 (D. Md. 1973) ("The language of the Act conveys a clear Congressional intent that a bona fide attempt at conciliation by the EEOC is a precondition to its filing suit.").

47. *See* EEOC v. American Natl. Bank, 652 F.2d 1176, 1184 (4th Cir. 1981) ("The EEOC's new role as an enforcer, however, was not intended to diminish its role as conciliator."), *cert. denied*, 51 U.S.L.W. 3279 (U.S. Oct. 12, 1982) (No. 81-2358); EEOC v. Wilson & Co., 452 F. Supp. 202, 203 (W.D. Okla. 1978) ("The Congressional intent that the EEOC should primarily attempt to eradicate discrimination in employment through conciliation was not changed [by the 1972 Act] . . . ."); EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977)

amended does not abandon efforts to seek voluntary compliance, but provides greater incentive for employers to comply voluntarily.[48] The courts, therefore, have reasoned that adjudicating disputes prior to serious conciliation efforts would undermine an important congressional policy.[49]

Both dismissal and summary judgment protect the integrity of the conciliation requirement. As long as the courts scrupulously refuse to hear all suits brought by the EEOC without adequate conciliation efforts, the EEOC cannot circumvent the conciliation requirement.[50] Regardless of the disposition courts select, the EEOC

("Although the 1972 Amendments gave the EEOC the power of an enforcer, they did not change its responsibility as a conciliator." (footnote omitted)); EEOC v. Pierce & Stevens Chem. Corp., 434 F. Supp. 1162, 1166 (W.D.N.Y. 1977); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 242 (N.D. Ala. 1974).

The support for conciliation is ambiguous in the legislative history of the 1972 amendments. After the Act was reported out of committee, Senator Dominick introduced an amendment replacing a provision authorizing the EEOC to issue cease and desist orders with the power to bring suit in federal district court. Senator Dominick intended his amendment to "take over at the level where conciliations fail . . . ." 118 CONG. REC. 589 (1972). Representative Perkins, the senior House conferee, held a similar opinion: "Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement." 118 CONG. REC. 7563 (1972). Courts, relying on such statements, have reasoned that Congress intended to continue to rely primarily upon voluntary compliance. *See, e.g.*, EEOC v. Westvaco Corp., 372 F. Supp. 985, 988 (D. Md. 1974).

The belief that the 1972 Amendments reflected unflagging support for conciliation, however, may merit reevaluation. Congress' disenchantment with conciliation was equally apparent in the record. *See, e.g.,* H.R. REP. NO. 238, *supra* note 36; 118 CONG. REC. 4932 (1972) (Commission conciliated with total or partial success in fewer than half of all cases where reasonable cause was found.). At least one court believed Congress intended to relegate conciliation to the back seat and rely primarily on court action. *See* EEOC v. General Elec. Co., 532 F.2d 359, 373 (4th Cir. 1976).

48. *See* EEOC v. Bailey Co., 563 F.2d 439, 449 (6th Cir. 1977); EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947 (8th Cir. 1974); H.R. REP. NO. 238, *supra* note 36, at 11, 1972 U.S. CODE CONG. & AD. NEWS at 2147.

49. *See* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 349 (D. Mass. 1979) ("If failure to comply with statutory procedures might be excused, . . . courts could easily be transformed into the primary agency for Title VII enforcement, a result at odds with the statutory scheme."); EEOC v. Sherwood Medical Indus., 452 F. Supp. 678, 683 (M.D. Fla. 1978) ("The only construction of the statute which is at all in harmony with the Congressional desire for conciliation is that the Commission's authority to sue is conditioned upon full compliance with the administrative process — investigation, determination, and conciliation — with respect to each discriminatory practice alleged."); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273 (D. Md. 1973).

50. The EEOC might be able to circumvent the conciliation requirement by waiting for an individual to bring suit, then intervening in that action. The individual may sue regardless of the EEOC's failure to attempt conciliation. Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 652 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). The EEOC may be permitted to intervene despite its failure to attempt conciliation. *See* Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841, 847 (8th Cir. 1977). *But see* Harris v. Anaconda Aluminum Co., 479 F. Supp. 11 (N.D. Ga. 1979). This technique is unreliable, since it is not certain that the individual will bring suit. In addition, the courts are alert to the possibility of attempted circumvention. *See* EEOC v. International Bhd. of Elec. Workers, 506 F. Supp. 480, 483 (D. Mass. 1981); National Org. for Women v. Minnesota Mining & Mfg., 73 F.R.D 467, 471 (D. Minn. 1977). Intervention will be limited to the issues the individual could raise; the EEOC may not expand the scope of the individual suit. *National Org. for Women,* 73 F.R.D. at 471.

must attempt conciliation before the action may proceed.

The Commission's attempts to complete conciliation are more effective after dismissal than summary judgment. The possibility of a second suit based on the same charges provides an incentive for the employer to negotiate after dismissal; the original action makes more credible the threat of subsequent legal action.[51] In contrast, since summary judgment bars later government suits,[52] it significantly reduces the incentive to make concessions. The threat of private actions[53] or different charges[54] exerts substantially less influence on the employer.

B. *Punishing EEOC Misconduct*

By refusing to hear actions absent an adequate attempt to resolve the dispute without litigation, some courts seem to see themselves as punishing EEOC misconduct. Although this punitive purpose does not explicitly appear as the reason for disposing of a case, the language of some opinions suggests a desire to sanction Commission wrongdoing. In the first case to require conciliation prior to suit,[55] the court emphasized that the EEOC's "derelictions . . . were . . . bald and unambiguous violations of the plain language of its own rules,"[56] and accused the EEOC of "flout[ing] in essential particulars Title VII and its own regulations . . . ."[57] In another suit, the court granted summary judgment after hearing evidence that the EEOC attorney "singlehandedly spoiled out-of-court settlement of this case."[58] Appellate courts have reversed both dismissal and summary

51. The district court in EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 346 (D. Mass. 1979), acknowledged the "psychological factor of the imminent commencement of a lawsuit." *Cf.* Brennan v. Ace Hardware Corp., 495 F.2d 368, 375 (8th Cir. 1974) (action under the Age Discrimination in Employment Act in which "[t]he District Court succinctly and perceptively held that '[v]oluntary compliance through conciliation, conference, and persuasion is more likely to be effected when the employer clearly understands that the matter will proceed at a level beyond that of the compliance officer if there is not a voluntary resolution of the dispute' ").

52. *See* note 20 *supra*.

53. "In cases posing the most profound consequences, respondents have more often than not shrugged off the Commission's entreaties and relied upon the unlikelihood of the parties suing them." H.R. REP. NO. 238, *supra* note 36, at 9, 1972 U.S. CODE CONG. & AD. NEWS, at 2144; *see* notes 41-44 *supra* and accompanying text.

54. The employer can avoid new charges entirely by ending its discriminatory practices. While this result is desirable, the summary judgment has nonetheless permitted the employer to escape backpay liability to those persons injured by its past acts of discrimination. Dismissal would preserve that potential liability despite prospective improvements.

55. EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974). In *Westvaco*, the Commission filed suit without timely determination of reasonable cause or any effort to conciliate. 372 F. Supp. at 990.

56. 372 F. Supp. at 993.

57. 372 F. Supp. at 991.

58. EEOC v. Zia Co., 582 F.2d 527, 532 (10th Cir. 1978). The district court had found that the EEOC "improperly refused to continue to conciliate in good faith." 582 F.2d at 532.

judgment, holding that the lower courts had acted harshly.[59]

Courts should not use summary judgment as a sanction against EEOC misconduct. The res judicata effect of summary judgment is drastic, especially given the availability of lesser but effective penalties. Egregious Commission misconduct, such as harassment, has not prevailed as an affirmative defense to EEOC charges,[60] or as grounds for summary judgment.[61] Inadequate conciliation may not involve Commission misconduct,[62] so that the harsh penalty of summary judgment seems inappropriate.

Courts may effectively punish EEOC misconduct while dismissing the suit. Dismissal itself imposes a minor sanction; the Commission, already overburdened,[63] must take the time not only to refile the suit, but also to remedy the defect in conciliation that led to the dismissal.[64] If dismissal alone offers an inadequate penalty, courts may provide additional sanctions by awarding attorneys' fees against the Commission.[65] Several courts have held that dismissal qualifies a defendant as a "prevailing party" for purposes of awarding costs.[66] Such a sanction bears a more rational relationship to the Commission's misconduct than does permanently precluding a po-

59. *See* EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981) (per curiam); EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam). *See also* EEOC v. Pierce Packing Co., 28 Fair Empl. Prac. Cas. (BNA) 393, 396 (9th Cir. 1982) (District Court, in dismissing inadequately conciliated suit, found: "The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness.").

60. EEOC v. First Natl. Bank, 614 F.2d 1004, 1008 (5th Cir. 1980), *cert. denied,* 450 U.S. 917 (1981).

61. EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1253-54 (M.D. Ala. 1980) (EEOC misconduct amounting to harassment is not appropriate ground for summary judgment).

62. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 23, at 330 ("[M]ost defaults [of statutory requirements] probably occur not because of the agency's willful refusal to comply but rather from the inevitable mistakes inherent in processing a huge volume of charges with inadequate resources.").

63. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 369-70 (1977); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMATION LAW 769 (1976).

64. Failure to remedy the misconduct could lead to a second dismissal. The pattern could continue indefinitely. Misconduct prejudicing defendants could lead to a permanent dismissal. *See* Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980).

65. 42 U.S.C. § 2000e-5(k) (1976). The Ninth Circuit approved the award of attorneys' fees in a case dismissed for failure to conciliate in EEOC v. Pierce Packing Co., 669 F.2d 605, 609 (9th Cir. 1982). *See also* Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (Court may award attorneys' fees to a prevailing defendant in a Title VII case "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

66. *See* EEOC v. Bailey Co., 563 F.2d 439 (6th Cir. 1977), *cert. denied,* 435 U.S. 915 (1978); *see also* EEOC v. First Natl. Bank, 614 F.2d 1004, 1008 (5th Cir. 1980), *cert. denied,* 450 U.S. 917 (1981) (reversing award of attorney's fees because it reversed the dismissal); EEOC v. McLean Trucking Co., 7 Fair Empl. Prac. Cas. (BNA) 301 (W.D. Tenn. 1974) (awarding costs but not attorneys' fees). Whenever costs are awarded the court may, in its discretion, include attorney's fees. 42 U.S.C. § 2000e-5(k) (1976). The statute does not, however, distinguish cases in which attorneys' fees are appropriate from cases in which only court costs may be awarded. § 2000e-5(k).

tentially meritorious action against discriminatory employment practices.

C. *Promoting Judicial Efficiency*

Courts have refused to hear suits before adequate conciliation because of concern for judicial efficiency. When the EEOC brings several different charges against a defendant without pursuing conciliation regarding all the charges, two dangers arise: the Commission may require more discovery, and the suit may cover a broader range of issues, requiring a longer and more complex trial.[67] Courts therefore prefer to dispose of charges which the Commission has not made the subject of settlement negotiations, and proceed expeditiously with a simpler trial.[68]

Dismissal prevents protracted litigation by permitting trial to proceed only on those issues properly prepared by the EEOC.[69] Summary judgment achieves the same advantage, but at the cost of preventing subsequent action on the counts severed from the complaint.

Courts that are concerned about judicial efficiency may hesitate to dismiss inadequately conciliated suits. Duplicative litigation may follow the bringing of similar charges against a number of defendants, some of whom are dismissed.[70] Summary judgment prevents duplicative litigation. If the court decides the case for some defen-

67. *See* EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977) (granting partial summary judgment on allegations concerning management, professional and technical personnel, but retaining allegations concerning flight attendants). The *Allegheny* court believed that limiting suit to the narrower issues would speed discovery and simplify the trial. 436 F. Supp. at 1307.

68. *Cf.* EEOC v. Brown Transp. Corp., 15 Fair Empl. Prac. Cas. (BNA) 1062, 1068-69 (N.D. Ga. 1976) (dictum supports limiting scope of EEOC investigation to prevent unduly delaying relief to charging party).

69. In some cases, the court may grant a motion to strike some charges. *See, e.g.,* EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978). The net effect is the same. The stricken count is not properly before the court, therefore no judgment on its merits is reached.

70. *See* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, (D. Mass. 1979) (I.B.E.W. I); EEOC v. International Bhd. of Elec. Workers, 506 F. Supp. 480 (D. Mass. 1981) (I.B.E.W. II); *cf.* EEOC v. McLean Trucking Co., 525 F.2d 1007, 1012 (6th Cir. 1975) (permitting joinder of union not named in employee's charge against employer). The *I.B.E.W. I* court dismissed the EEOC's suit against the International for failure to attempt conciliation despite the potential for inconsistent judgments against the local, which had participated in conciliation. 476 F. Supp. at 350. Subsequently, the *I.B.E.W. II* court held that the charging party, who had intervened in the EEOC suit, could proceed independently against the International despite dismissal of the EEOC complaint against it. 506 F. Supp. at 483. In dictum, the court mentioned the possibility of EEOC intervention in the private plaintiff's action against the International. 506 F. Supp. at 483.

Theoretically duplication could arise if the EEOC brought two different charges against the same employer, but only attempted conciliation on one of them. Different charges, however, may not raise similar issues of fact. Facts relevant to a race discrimination charge, for example, may not apply to a sex discrimination charge. Thus, dismissal might pave the way for two simple suits rather than one complex suit. *See* EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977).

dants on the merits, the EEOC cannot resurrect the charges against them in a subsequent action. Elimination of the EEOC suit, however, may give rise to several individual suits,[71] undercutting judicial efficiency.

Dismissal poses a more substantial risk of duplication. If conciliation with the dismissed defendants fails and the EEOC brings a second suit against them, the adjudication of substantially similar issues in separate cases may squander judicial resources.[72] Both the courts and the Commission, however, can minimize the threat of duplication. Courts may avoid duplication either by joining dismissed defendants[73] or by dismissing all defendants.[74] If some defendants are dismissed fairly early in the proceedings, the EEOC may be able to remedy its failure and file suit again before the original suit is ready for trial. The court may then decide to consolidate the actions for trial.[75] When the court dismisses one defendant, the EEOC could enhance the court's consolidation effort by voluntarily dismissing its suit against the others.[76] If conciliation efforts against the dismissed defendant fail, the Commission could refile the entire action.[77]

Either dismissal or summary judgment accommodates the courts' reasons for refusing to hear inadequately conciliated suits — encour-

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71. *But see* note 39 *supra* and accompanying text.

72. *See* EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977) (recognizing EEOC concerns regarding delays and wasted resources, but holding that such factors did not outweigh those favoring dismissal).

73. Courts are understandably reluctant to permit the EEOC to join parties not privy to conciliation talks. In the only case in which a court joined an indispensable party to an EEOC suit, it appears that the Commission did attempt some conciliation with that party. *See* EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975), *revg.* 64 F.R.D. 643 (W.D. Tenn. 1974), *modified*, 7 Fair Empl. Prac. Cas. (BNA) 302 (1974); *see also* FED. R. CIV. P. 19(a); *cf.* Curran v. Portland Superintending School Comm., Portland, Me., 435 F.Supp. 1063, 1074 (D. Me. 1977) (private plaintiff failed to name party in charge filed with EEOC; dismissal denied where party was indispensable and received actual notice).

74. *See* EEOC v. Wilson & Co., 452 F. Supp. 202 (W.D. Okla. 1978); *see also* FED. R. CIV. P. 19(b).

75. FED. R. CIV. P. 42(a) gives courts authority to consolidate actions to promote efficient judicial administration. C. WRIGHT, FEDERAL COURTS § 97 (3d ed. 1976).

76. *See* FED. R. CIV. P. 41(a).

77. FED. R. CIV. P. 41(a)(2) permits voluntary dismissal only upon "such terms and conditions as the court deems proper." *Id.* The court could effectively veto the EEOC's voluntary dismissal by specifying that such dismissal would be with prejudice. The court, thus, has power to decide that proceeding promptly against the remaining defendant outweighs the desire to keep the actions consolidated.

A delay in proceedings against the defendant properly before the court may prejudice that defendant by subjecting it to greater liability for backpay than it would face if the suit proceeded at once. However, the court need not force the defendant to assume that liability in order to preserve a unified suit. The court could utilize its equitable powers to adjust the period for which the defendant is liable for back pay to account for the delay in proceedings. *Cf.* EEOC v. General Elec. Co., 532 F.2d 359, 371-72 (4th Cir. 1976) (limiting backpay liability to two years before employer actually received notice of sex discrimination claims). Courts should consider limiting defendant backpay liability for the period of delay as a condition upon voluntary dismissal.

aging conciliation, punishing EEOC misconduct, and promoting judicial efficiency. Dismissal does pose some risk of duplicative litigation, but the courts and the Commission can minimize the chance of duplication. More importantly, dismissal, because it leaves the EEOC free to refile the same charges after conciliation is perfected, interferes less with Title VII's aim of eliminating employment discrimination than does summary judgment, which bars subsequent suit under the doctrine of res judicata. Generally, courts should secure the central goal of Title VII before seeking to meet secondary goals.[78] Accordingly, dismissal is the appropriate disposition for inadequately conciliated cases.

III. Procedural Aspects of Dismissal Under Rule 12(b)

Some courts have characterized the conciliation requirement as a jurisdictional prerequisite to suit. Because dismissal for lack of jurisdiction is always without prejudice,[79] this procedure initially appears attractive. More rigorous analysis, however, indicates that the appropriate procedure is dismissal for failure to state a claim upon which relief can be granted, provided for in rule 12(b)(6). Since such a disposition is presumptively prejudicial, the court should expressly note in its order that the dismissal is without prejudice to an action brought once the Commission has satisfied the conciliation requirement.[80] The provision of rule 12 that the consideration of material outside the pleadings requires treating and disposing of a 12(b)(6) motion as a motion for summary judgment does not pose an insurmountable obstacle to this approach.

A. *Jurisdictional Analysis*

Some courts have refused to hear cases prior to adequate conciliation for lack of jurisdiction.[81] The procedural requirements of Title

78. *See* Evans v. Sheraton Park Hotel, 503 F.2d 177, 183 (D.C. Cir. 1974) ("We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of the statutory objective."); Stevenson v. International Paper Co., 432 F. Supp. 390, 397 (W.D. La. 1977) (administrative procedure "should not override the overall purpose of Title VII, to provide redress from employment discrimination").

79. Fed. R. Civ. P. 41(b)

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

80. *See* Fed. R. Civ. P. 41(b). The rule allows the court to specify that its dismissal is not an adjudication of the merits.

81. EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341 (D. Mass. 1979); EEOC v. Wilson & Co., 452 F. Supp. 202, 204-05 (W.D. Okla. 1978); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 911-12 (D. Md. 1974), *affd. in part, revd. in part and remanded on other grounds*, 530 F.2d 590 (4th Cir. 1976); EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 244 (N.D. Ala. 1974); *see* EEOC v. Magnolia Elec. Power Assn., 635 F.2d 375 (5th Cir. 1981) (district court dismissed on jurisdictional grounds); EEOC v. Pet, Inc.,

VII, like conciliation, establish conditions precedent to suit;[82] these courts have also held that satisfying the conciliation requirement is necessary for jurisdiction.[83]

If conciliation is a jurisdictional prerequisite, courts must dismiss for lack of jurisdiction suits that do not fulfill that prerequisite.[84] A summary judgment order under these circumstances exceeds the trial court's authority, for without jurisdiction the court cannot adjudicate the merits.[85] Respect for the limited jurisdiction of the federal courts therefore precludes, rather than justifies, granting a motion for summary judgment.

The Supreme Court has suggested, however, that a motion to dismiss for failure to comply with a condition precedent can be treated like a motion to dismiss for lack of jurisdiction, which does not bar subsequent suits.[86] The Fifth Circuit recently applied this doctrine to limit the res judicata consequences of a summary judgment order predicated on the Commission's failure adequately to investigate a discrimination charge. In *Truvillion v. King's Daughters Hospital*,[87] the individual claimant brought suit after the district court had

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Funsten Nut Div., 612 F.2d 1001 (5th Cir. 1980) (per curiam) (district court dismissed on jurisdictional grounds); *see also* EEOC v. American Natl. Bank, 652 F.2d 1176, 1185 (4th Cir. 1981) (found conciliation jurisdictional, but held conciliation efforts adequate on the facts), *cert. denied*, 51 U.S.L.W. 3279 (U.S. Oct. 12, 1982) (No. 81-2358).

82. *E.g.*, EEOC v. Pierce Packing Co., 669 F.2d 605, 607 (9th Cir. 1982); EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd.*, 516 F.2d 1297 (3d Cir. 1975); EEOC v. Container Corp. of America, 352 F. Supp. 262, 265 (M.D. Fla. 1972).

83. *See* note 81 *supra* and accompanying text. The requirement that the EEOC defer to action by state employment discrimination agencies has been considered jurisdictional. Carey v. New York Gaslight Club, Inc., 598 F.2d 1253 (2d Cir. 1979), *aff'd. on other grounds*, 447 U.S. 54 (1980). In Zipes v. Trans World Airlines, Inc., 102 S. Ct. 1127 (1982), the Supreme Court recently reversed the Seventh Circuit's holding that timely filing of an EEOC charge was a jurisdictional prerequisite to suit. 102 S. Ct. at 1132.

84. FED. R. CIV. P. 12(b)(1) authorizes dismissal for lack of jurisdiction.

85. A court without jurisdiction to hear the merits of a case cannot render judgment on the merits. *E.g.*, O'Donnell v. Wien Air Alaska, Inc., 551 F.2d 1141 (9th Cir. 1977); Dassinger v. South Cent. Bell Tel. Co., 505 F.2d 672 (5th Cir. 1974) (per curiam); Thompson v. United States, 291 F.2d 67 (10th Cir. 1961); Campbell v. Mitsubishi Aircraft Intl., 452 F. Supp. 930 (W.D. Pa. 1978).

86. Costello v. United States, 365 U.S. 265 (1961). The Court created an exception to dismissal operating as an adjudication on the merits for "those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claims." 365 U.S. at 285. *Cf.* Schuy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970) (dictum that dismissal on grounds of prematurity must be without prejudice). The *Costello* approach of selectively characterizing preconditions to suit as jurisdictional or quasi-jurisdictional has been justly condemned for adopting an amorphous standard based on an inaccurate use of the word "jurisdictional." *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4435, at 335 (1969) ("This method of interpreting Rule 41(b) is directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction."). The application of the *Costello* doctrine to Title VII's conciliation requirement illustrates its deficiencies.

87. 614 F.2d 520, 524 (5th Cir. 1980); *see also* EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980) (citing *Costello*) (dismissal for failure to conciliate is not on the merits and should be without prejudice).

found, *inter alia*, the Commission's investigation efforts insufficient to sustain a suit.[88] The district court had cast this conclusion in the procedural form of a summary judgment order,[89] which the defendant interposed as a bar to the second suit by the individual.[90] Judge Wisdom reasoned that because the district court had characterized the investigation requirement as a "jurisdictional prerequisite," it had no power to order summary judgment on the merits.[91] Consequently, a jurisdictional disposition of the Commission's action could not preclude the subsequent suit by the individual claimant.[92] Under this analysis, the same jurisdictional deficiency that renders summary judgment improper ensures that an erroneous summary judgment order will not bar a subsequent suit once the plaintiff can establish the jurisdictional prerequisites.

Although elegant, the *Truvillion* approach does not provide a comprehensive solution to the problem of selecting a procedural device to dipose of Title VII suits for inadequate conciliation efforts. First, not all courts agree that the conciliation requirement must be fulfilled before jurisdiction to hear the suit exists.[93] Some courts deny that conciliation is a jurisdictional requirement.[94] Other courts fail to consider jurisdiction explicitly in refusing to hear an inadequately conciliated case.[95] Still other courts hold conciliation juris-

88. 614 F.2d at 522-23.

89. EEOC v. King's Daughters Hosp., 12 Fair Empl. Prac. Cas. (BNA) 484, 490 (S.D. Miss. 1976).

90. 614 F.2d at 523.

91. 614 F.2d at 522-24. The opinion does not clearly state whether the statutory preconditions to suit are jurisdictional, or simply procedural prerequisites which should be treated like jurisdictional questions. A similar ambiguity pervades the *Costello* opinion. Regardless of the terminology, a finding that the preconditions to suit have not been met is outcome determinative, rather than a question of forum or procedure. The critique in the text applies to any disposition of a claim for failure to meet prerequisites to suit that purports to be other than "on the merits."

92. 614 F.2d at 525.

93. Although courts have stated that conciliation is jurisdictional or not jurisdictional, they have failed to develop a reasoned approach for determining whether a procedural requirement is jurisdictional. *See, e.g.,* EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 344-45 (D. Mass. 1979) (jurisdictional); EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974) (not jurisdictional). Instead, the courts' approaches seem results-oriented. Similarly, the Supreme Court in Zipes v. Trans World Airlines, 102 S. Ct. 1127 (1982), after applying a detailed three part test, concluded:

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

102 S. Ct. at 1135 (emphasis added).

94. *See* EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974) (failure to conciliate does not go to jurisdiction); *see also* EEOC v. Standard Forge & Axle Co., 496 F.2d 1392, 1395 (5th Cir. 1974) (statutory procedures are conditions precedent, and may be pleaded generally).

95. Several courts dismiss without reaching the question of jurisdiction. *See* EEOC v. Sears, Roebuck & Co., 650 F.2d 14 (2d Cir. 1981); Patterson v. American Tobacco Co., 535

dictional, but reason that any attempt to conciliate satisfies the requirement sufficiently to provide the court with jurisdiction; adequacy of conciliation does not present a jurisdictional problem.[96] Precedents that characterize the conciliation requirement as substantive rather than jurisdictional leave little room for the *Truvillion* approach, limiting the number of jurisdictions that may rely on it.

Second, the jurisdictional label does not accurately describe the operation of the conciliation requirement. Whether or not inadequate conciliation efforts implicate jurisdiction, they certainly preclude judicial relief by preventing the court from hearing the merits. Under the jurisdictional approach, *no* court has jurisdiction to hear such a claim. Only a transparent fiction can maintain the distinction between substance and jurisdiction in such cases.[97] In similar cases of redundant jurisdictional and substantive prerequisites to recovery, the desire to do justice on the merits has persuaded the courts to treat the condition as substantive.[98] In perhaps the closest analogy, fail-

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F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *see also* EEOC v. Sherwood Medical Indus., 452 F. Supp. 678 (M.D. Fla. 1978); EEOC v. National Cash Register Co., 405 F. Supp. 562 (N.D. Ga. 1975) (granting motions to strike).

96. *See* EEOC v. California Teachers Assn., 534 F. Supp. 209, 213 n.3 (N.D. Calif. 1982) ("The sufficiency of a conciliation effort by the EEOC does not present a jurisdictional question, so long as a conciliation attempt has been made."); EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241, 262 (N.D. Ill. 1980) ("Attempt to conciliate is the prevailing standard . . . . The sufficiency of the conciliation effort presents a question of whether the court should stay the proceeding for further conciliation, not whether it has jurisdiction over the cause."); *see also* EEOC v. North Cent. Airlines, 475 F. Supp. 667, 669 (D. Minn. 1979) ("When absolutely *no* conciliation has occurred, the courts have no jurisdiction over the EEOC suit.") (emphasis original).

97. The classic test of subject matter jurisdiction is whether "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." Bell v. Hood, 327 U.S. 678, 685 (1946). "Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682.

98. Motions to dismiss Sherman Act complaints offer a close analogy, because the statute authorizes a cause of action only for practices "in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1976). Thus recovery on the merits depends on an interstate commerce nexus sufficient to sustain subject matter jurisdiction. The courts have been reluctant to grant 12(b)(1) motions to dismiss for lack of jurisdiction in such cases. Rather, they prefer to hear the merits, initially through a 12(b)(6) motion to dismiss for failure to state a claim. This approach ensures that the complaint will be viewed in the light most favorable to the plaintiff, and more frequently enables the plaintiff to initiate discovery which may reinforce his claim to both jurisdiction and recovery. "[T]he better analysis [would be] to treat an insufficient plea of effect upon interstate commerce as a failure to state a claim upon which relief can be granted rather than lack of jurisdiction (in the sense of power) over the subject matter." Hospital Bldg. Co. v. Rex Hosp., 511 F.2d 678, 681 (4th Cir. 1975) (en banc), *revd.*, 425 U.S. 738 (1976). The Supreme Court agreed that the issue should be cast as a 12(b)(6) motion, but noted that "[i]n either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint." 425 U.S. at 742 n.1. *See* Mortensen v. First Fed. Sav. & Loan Assn., 549 F.2d 884, 897-98 (3d Cir. 1977); A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn., 484 F.2d 751, 759 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974); McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 363 (5th Cir.) ("where the factual and jurisdictional issues are

ure to exhaust administrative remedies is generally viewed as a substantive question properly within judicial discretion, rather than as a jurisdictional prerequisite to judicial authority.[99] These considerations support characterizing the conciliation requirement as an essential element of the Commission's cause of action, unencumbered by amorphous jurisdictional pretensions.[100]

Finally, the Supreme Court's recent characterization of Title VII's filing periods as substantive rather than jurisdictional casts serious doubt on the *Truvillion* approach. In *Zipes v. Trans World Airlines, Inc.*,[101] the Court held "compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires."[102] Three considerations — the structure of Title VII, the congressional policy underlying the Act, and the reasoning of prior cases — led the Court to this result.[103] Applied to the conciliation requirement, these considerations suggest rejecting the jurisdictional approach.

In *Zipes*, the Court noted Title VII's jurisdictional provision is separate from, and makes no mention of, the timely filing requirements.[104] This analysis applies to the conciliation requirement as well.[105] The Court also relied on evidence of congressional purpose

completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other"), *cert. denied,* 389 U.S. 896 (1967).

99. Absent a statutory exhaustion provision that speaks directly to jurisdiction, such as that presented in Weinberger v. Salfi, 422 U.S. 749 (1975), the exhaustion requirement is not an inflexible jurisdictional prerequisite but a judicial doctrine to be adapted to the facts of each particular case. *See* McKart v. United States, 395 U.S. 185, 193 (1969); South Dakota v. Andrus, 614 F.2d 1190, 1192 n.1 (8th Cir.), *cert. denied,* 449 U.S. 822 (1980); Association of Natl. Advertisers v. FTC, 627 F.2d 1151, 1156-58 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 (9th Cir. 1978). Since Title VII's conciliation requirement does not directly address jurisdiction, *see* notes 104-07 *infra* and accompanying text, this analogy suggests that the conciliation prerequisite is nonjurisdictional. Moreover, in the exhaustion context, adjudication by the courts ousts the jurisdiction of executive agencies, implicating the constitutional doctrine of separation of powers. This concern does not apply to Title VII's conciliation requirement, which has the object of committing the resolution of the dispute to the parties themselves, rather than to another branch of the government.

100. Even courts that adopt jurisdictional language recognize this reality. "These courts and others sometimes speak in terms of the defect being jurisdictional. But often they do assert continuing authority over the matter." EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978). The *Truvillion* court, for example, notes that "[t]he requirements of E.E.O.C.'s notice to the respondent and a good faith investigation by the E.E.O.C. in a loose sense might be treated as jurisdictional. They are, however, nothing more than procedural prerequisites to the court's determination of the substantive issues." 614 F.2d at 524.

101. 102 S.Ct. 1127 (1982).

102. 102 S.Ct. at 1135.

103. 102 S.Ct. at 1132.

104. 102 S.Ct. at 1132-33.

105. The conciliation requirement is imposed by 42 U.S.C. § 2000e-5(f)(1) (1976); the jurisdictional provision is contained in 42 U.S.C. § 2000e-5(f)(3). The conciliation proviso does not refer to jurisdiction, and the jurisdictional provision does not mention conciliation.

contained in the relevant legislative history.[106] With respect to conciliation, Congress plainly intended to limit the Commission's ability to sue without appropriate settlement efforts, rather than to limit the authority of the district courts.[107] The Supreme Court has not decided a case turning on the characterization of the conciliation requirement, and the *Zipes* opinion suggests the danger of relying on the use of the jurisdictional label in dicta.[108] The last element of the Court's rationale, therefore, does not apply to analysis of the conciliation requirement. To the extent available from *Zipes*, Supreme Court guidance suggests viewing the conciliation prerequisite as substantive rather than jurisdictional.

Even if the conciliation requirement does amount to a jurisdictional prerequisite, the district courts should carefully discriminate between summary judgment and dismissal for lack of jurisdiction. Admittedly, summary judgment would not bar a subsequent suit if the conciliation requirement is jurisdictional.[109] But the jurisdictional analysis itself denies the trial court the authority to issue such an order on the merits.[110] The possibility of reversal on appeal does little to diminish the need to avoid error at trial.

B. *Consideration of Material Outside the Pleadings Under Rule 12(b)*

The problematic nature of the jurisdictional analysis suggests the more straightforward approach of a motion to dismiss for failure to state a claim. Disposition under rule 12(b)(6) offers a more accurate, if still imperfect, procedural response to inadequate conciliation efforts.[111] But rule 12(b) imposes one additional hurdle to dismissal as distinguished from summary judgment: if the trial court considers factual material outside the pleadings in resolving the 12(b)(6) motion, it must treat the motion as one for summary judgment under

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106. 102 S.Ct. at 1133.

107. *See, e.g.,* Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir.) (the conciliation provision "has been construed to create an express condition *on the commission's power to sue*"), *cert. denied,* 429 U.S. 920 (1976) (emphasis added); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 275 (D. Md. 1973) ("The language of the Act conveys a clear Congressional intent that a bona fide attempt at conciliation *by the EEOC* is a precondition to *its* filing suit." (emphasis added)).

108. *See* 102 S.Ct. at 1133.

109. *See* Truvillion v. King's Daughters Hosp., 614 F.2d 520, 524 (5th Cir. 1980).

110. "[T]he general rule is that it is improper for a district court to enter a judgment under Rule 56 for defendant because of a lack of jurisdiction. . . . If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action." 10 C. WRIGHT & A. MILLER, *supra* note 18 at § 2713 (1973) (footnotes omitted).

111. Ideally, the Federal Rules should contain a specific provision for a dismissal without prejudice for failure to satisfy preconditions to suit. Until the Rules include such a provision, existing procedural devices must be adapted to achieve the most accurate disposition possible under the current Rules.

rule 56.[112] Since the Commission's complaint typically includes an assertion that the claim fulfills all statutory preconditions to suit, a finding of inadequate conciliation must depend on matters outside the pleadings.[113] A mechanical application of rule 12(b) would require granting summary judgment in cases where the defendant's affidavits persuade the court that the Commission has not yet met the conciliation requirement.

But the courts need not interpret the rule so woodenly. Treating a motion as one for summary judgment may mean no more than that the standard for granting or denying the motion to dismiss is identical to the standard for granting or denying a motion for summary judgment. District courts frequently word their orders in such circumstances as granting a motion to dismiss, treated as a motion for summary judgment.[114] It follows that the trial court could resolve the 12(b)(6) motion under the standards set for summary judgment, and then grant the motion as requested with a specific notation that the dismissal is without prejudice to the refiling of the complaint after adequate conciliation efforts.[115] Such an approach serves the underlying purposes of the rule without violence to its language, and provides a procedural device by which to enforce the conciliation requirement without denying plaintiffs an ultimate adjudication of the merits. The fundamental purpose of the federal rules, to produce substantive justice rather than procedural artifice, supports such an interpretation.[116]

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112. FED. R. CIV. P. 12(b)(6).

113. Originally, several courts refused to permit the Commission to plead the conciliation requirement generally, on the ground that the Federal Rules of Civil Procedure require a specific pleading of jurisdictional prerequisites. EEOC v. Western Elec. Co., 364 F. Supp. 188 (D. Md. 1973); EEOC v. Griffin Wheel, 360 F. Supp. 424 (N.D. Ala. 1973); *see* FED. R. CIV. P. 8(a). This practice ended in 1974 when the Fifth Circuit decided EEOC v. Standard Forge & Axle Co., 496 F.2d 1392 (5th Cir. 1974), *cert. denied,* 419 U.S. 1106 (1975). While specifically refusing to comment on the question of jurisdiction, the court held that the EEOC could plead generally that it had fulfilled all conditions precedent to suit. 496 F.2d at 1395; *see* FED. R. CIV. P. 9(c). In subsequent cases, the courts have deferred to the "authoritative judicial interpretation" of *Standard Forge.* EEOC v. United Aircraft Corp., Pratt & Whitney Aircraft Div., 383 F. Supp. 1313, 1315 (D. Conn. 1974); *accord,* EEOC v. Times-Picayune Publishing Corp., 500 F.2d 392 (5th Cir. 1974) (per curiam), *cert. denied,* 420 U.S. 962 (1975); EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976).

114. *See, e.g.,* Hutcherson v. Lehtin, 313 F. Supp. 1324, 1330 (N.D. Cal. 1970) ("defendants' motion to dismiss, treated as a motion for summary judgment as allowed by Rule 12(b) Fed. R.Civ.P., should be and is hereby granted under Rule 56(b).").

115. One court, for example, issued an order to the effect that:

> respondents' motion to dimiss, treated as a motion for summary judgment, is granted with prejudice as to [some allegations] of petitioner's Petition. Respondent's motion to dismiss is granted without prejudice as to [some allegations] of petitioner's Petition. Petitioner is granted leave to file a new action . . . .

Zeidman v. United States Parole Comm., No. 77 Civ. 4709 (N.D. Ill. Apr. 20, 1978).

116. *See* FED. R. CIV. P. 1; Acoustica Assocs. v. Powertron Ultrasonics Corp., 28 F.R.D. 16 (E.D.N.Y. 1961); E.I. du Pont de Nemours & Co. v. DuPont Textile Mills, 26 F. Supp. 236 (M.D.Pa. 1939).

CONCLUSION

Summary judgment based on inadequate conciliation efforts needlessly obstructs the pursuit of justice on the merits in Title VII actions. Dismissal without prejudice reflects greater fidelity to the congressional purpose of combatting employment discrimination, while satisfying the policy concerns of the courts confronted by premature litigation. Dismissal under rule 12(b)(6) for failure to state a claim upon which relief can be granted offers the best available disposition of Title VII actions brought prior to the failure of required conciliation efforts.