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## ADMINISTRATIVE WAIVER OF THE UNTIMELINESS DEFENSE IN TITLE VII CASES CONCERNING FEDERAL EMPLOYEES: A PROPOSED ANALYSIS

### I. INTRODUCTION

“Waiver is a troublesome term in law . . . . It is used with different meanings and there are, therefore, necessarily conflicting judicial statements as to its requisites.”<sup>1</sup>

Imagine that Peter Gibbons,<sup>2</sup> an unremarkable computer programmer for the Department of Veterans Affairs (VA), applies for a supervisory position at the VA.<sup>3</sup> He has been very vocal in complaining that he has never received a promotion, and following this most recent promotion denial, determines it is time to take action.<sup>4</sup> Peter feels his promotion denial is the result of discrimination and retaliation for past complaints.<sup>5</sup>

Under Title VII provisions pertaining to federal employees, Peter is required to meet two deadlines as prerequisites to completion of the administrative process.<sup>6</sup> Peter is late in meeting the deadline for filing a formal administrative complaint.<sup>7</sup> Despite missing this deadline, an Equal Employment Opportunity (EEO) investigator examines the merit of Peter’s complaint, finds in a final decision that no discrimination occurred, and issues

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1. 5 WILLISTON ON CONTRACTS § 678 (3d ed. 1961).

2. Peter Gibbons (played by Ron Livingston) was a character in the movie OFFICE SPACE (20th Century Fox 1999). He was a run-of-the-mill computer programmer for Initech prior to a change in personality stemming from his disillusionment with his current work situation. His change in personality launched him into middle management and trouble. In this hypothetical, unfortunately, Peter is denied entry into management.

3. This hypothetical is based largely upon *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001).

4. *Id.* at 1070.

5. *Id.* Title VII of Civil Rights Act of 1964 was amended by the Equal Employment Opportunity Act of 1972. The hope of the amendment was elimination of discrimination in federal employment. See *Chandler v. Roudebush*, 425 U.S. 840, 849 (1976). Congress adopted 42 U.S.C. § 2000e-16 because of indications that the Civil Service Commission was unable to satisfactorily thwart discrimination in the federal sector. See *Jackson v. United States Civil Serv. Comm’n*, 379 F. Supp. 589, 593 (S.D. Tex. 1974).

6. A complainant, as part of the administrative process for federal employees, is required to “initiate contact” with an EEO counselor and later file an administrative complaint with the agency that the complainant claimed discriminated against him or her. See 29 C.F.R. §§ 1614.105(a)(1), 1614.106(b) (2001).

7. *Ester*, 250 F.3d at 1070-71.

a right-to-sue letter based on a finding of no discrimination.<sup>8</sup> Peter, with the aid of a lawyer, files a lawsuit in federal district court within ninety days after receipt of his right-to-sue letter.<sup>9</sup> This suit is based on claims of sex discrimination and retaliation. The VA, in its answer to the complaint, cites for the first time Peter's late filing of the administrative complaint as a failure to exhaust administrative remedies in a timely manner. Thus, the VA's answer concludes that, based on the untimeliness defense, the complaint should be dismissed.<sup>10</sup> But untimeliness had not been raised at the administrative level. Is Peter's lawsuit going to be dismissed or did the VA waive the defense of untimeliness?

The Equal Employment Opportunity Act of 1972<sup>11</sup> provides the sole avenue whereby federal employees may claim job discrimination on account of race, color, religion, sex or national origin.<sup>12</sup> In providing coverage for federal employees under 42 U.S.C. § 2000e-16, no administrative structure was established for federal employees. Specifically, no time limits under which an employee claiming discrimination must act were set out in § 2000e-16. The Equal Employment Opportunity Commission (EEOC), however, was empowered under § 2000e-16(b) to issue rules<sup>13</sup> for the efficient administration of Title VII for federal employees and establish the requirement of exhaustion of administrative remedies.<sup>14</sup>

The federal courts are nearly uniform in concluding that an agency does not waive the untimeliness defense just because it admitted a complaint and then proceeded with an investigation.<sup>15</sup> There is a split in the circuits, however, over what approach to take when the administrative agency fails to

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8. See § 1614.110. The right-to-sue letter is provided to the complainant at the end of the administrative process with a finding by the agency. See *id.* If there is no discrimination upon which the agency can act to remedy, the agency need not further pursue the complaint. Thus, with administrative options closed, the complainant is provided the right to pursue relief in federal court. See *id.*

9. 42 U.S.C. § 2000e-16(c) (1994 & Supp. V 1999).

10. See *Ester*, 250 F.3d at 1071.

11. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 111 (1972) (codified at 42 U.S.C. § 2000e (1994 & Supp. V. 1999)).

12. § 2000e-16(a).

13. The EEOC regulations covering federal employees begin at 29 C.F.R. § 1614 (2001).

14. See *Bragg v. Reed*, 592 F.2d 1136, 1138 (10th Cir. 1979) (noting the exhaustion requirement); *Swain v. Hoffman*, 547 F.2d 921, 923 (5th Cir. 1977) (same); *Ettinger v. Johnson*, 518 F.2d 648, 651-52 (3d Cir. 1975) (same).

15. See *Huntley v. Dep't of Health, Educ. & Welfare*, 550 F.2d 290, 295 (5th Cir. 1977) (concluding that "once [a government] agency [has] accepted [a] complaint and [has] acted on it, the time limit mentioned in the regulations is not mandatory"); *Oaxaca v. Roscoe*, 641 F.2d 386, 389-90 (5th Cir. 1981) (rejecting the contention that by merely accepting and investigating a tardy complaint an agency waives its objection to a complainant's failure to comply with time limits unless the agency has done a good deal more than simply accept and investigate the complaint).

make a ruling on the timeliness issue at the administrative level but the agency then raises an untimeliness defense when the case reaches district court. This Comment examines a circuit split over the proper framework federal courts should use in analyzing the issue of waiver of the untimeliness defense when the affirmative defense is not raised at the administrative level but a final decision is provided by the agency on the merits of the complaint.

The recommended approach is based on principles from *Ester v. Principi*,<sup>16</sup> along with the import of “technical defect”<sup>17</sup> analysis. The Seventh Circuit in *Ester* provided three fundamental principles of administrative law that courts should examine when ruling on a case that involves the affirmative defense of untimeliness being raised, when timeliness was not raised at the administrative level.<sup>18</sup> These three principles are: the need for objection at the administrative level, the need for courts to stand behind the reasons provided at the administrative level and the need for independent grounds for dismissal of a case to be raised initially at the administrative level.<sup>19</sup> Further, “technical defects”, such as untimely filing, should be resolved at the administrative level so that court review is limited to policy-based considerations.<sup>20</sup>

Part II of this Comment describes the development of the doctrine of exhaustion of administrative remedies and when exhaustion of administrative remedies is waived in federal Title VII actions. Part III analyzes the circuit split over the proper analysis for examining the waiver of the exhaustion requirement in federal sector Title VII actions when the defense is not raised at the administrative level. Part IV provides the author’s newly developed analysis based on examination of cases within the differing circuits and general principles of waiver. This Comment concludes by reiterating the need for courts to recognize the issues implicated when untimeliness is not found by an administrative agency and by evaluating the likelihood for change in this area of the law in conformance with the above-recommended reasoning.

## II. BACKGROUND PRINCIPLES OF EXHAUSTION AND WAIVER

### A. *General Principles of Exhaustion*

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16. 250 F.3d 1068 (7th Cir. 2001). In *Ester*, Judge Williams of the Seventh Circuit analyzed the issue of waiver of the untimeliness defense based upon the need for objection before administrative agencies to preserve issues for appeal, the need for agencies to state the reasons for their actions and stand behind those reasons in later proceedings, and the need for independent grounds of dismissal such as failure to exhaust administrative remedies to be stated by the agency prior to the case reaching federal court. *See id.* at 1071-73. *See also infra* notes 101-122.

17. *Time Warner Entm’t Co. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998).

18. *Ester*, 250 F.3d at 1070-73.

19. *Id.*

20. *Time Warner*, 144 F.3d at 80.

Exhaustion of administrative remedies is a requirement that all steps in the administrative process be completed prior to a complainant being able to file suit in district court.<sup>21</sup> The exhaustion requirement makes a complainant go through a series of steps seeking review of an adverse decision with the goal of obtaining a remedy based on the prior administrative action being unlawful or otherwise inappropriate.<sup>22</sup> In the context of federal sector EEO complaints, exhaustion serves important policies such as encouraging “informal, conciliation-oriented resolution of disputes and reduc[ing] the burden on federal courts.”<sup>23</sup>

Exhaustion allows an agency to make use of its expertise<sup>24</sup> under a particular statutory structure in providing an initial evaluation of a case,<sup>25</sup> developing the facts of the case,<sup>26</sup> and stating the reasons for its decision.<sup>27</sup> Exhaustion also provides agencies an assurance that its internal procedures will not be disrupted by premature resort to the courts.<sup>28</sup> Finally, exhaustion allows for an agency to correct errors prior to review by a court.<sup>29</sup> The overarching

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21. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982) (“Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided.”); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (“[A]ppropriate deference to Congress’ power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.”); Bernard Schwartz, “*Apotheosis Of Mediocrity*”? *The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141 (1994).

22. See *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

23. *Sampson v. Civiletti*, 632 F.2d 860, 862-63 (10th Cir. 1980).

24. See *McKart v. United States*, 395 U.S. 185, 195 (1969); see also *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997); *United States v. Western Pac. R.R.*, 352 U.S. 59, 64-65 (1956).

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

*Id.*

25. See *McKart*, 395 U.S. at 195. See also *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (noting Standard Oil was unable to establish irreparable harm by engaging in the administrative process and that administrative remedies must be exhausted before a complainant can turn to the courts).

26. See *In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (“[T]he purposes underlying the exhaustion doctrine include the opportunity for the agency to exercise its discretion and expertise and the opportunity to make a record for the district court to review.”) (citations omitted).

27. See *McKart*, 395 U.S. at 195.

28. See *id.*

29. See *id.*

principle of exhaustion is best summarized as: “The long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”<sup>30</sup>

There are exceptions to the exhaustion requirement.<sup>31</sup> *McKart v. United States*,<sup>32</sup> set in the context of a criminal prosecution, provided that when a person no longer has the ability to return to the administrative process and the application of exhaustion is “exceedingly harsh,” courts must take a closer examination of the circumstances surrounding the requirement of exhaustion.<sup>33</sup> Specifically, the Court stated:

We are not here faced with a premature resort to the courts—all administrative remedies are now closed to petitioner . . . . We cannot agree that application of the exhaustion doctrine would be proper in the circumstances of the present case . . . . There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end . . . .<sup>34</sup>

In *Sampson v. Civiletti*,<sup>35</sup> the Tenth Circuit found that

[e]xhaustion of administrative remedies can often be what its name implies, exhausting. It is easy for a person, especially one . . . who chooses to process his claim without the assistance of an attorney, to be tripped up by the lengthy procedures and short deadlines. Thus, the administrative requirements “are not to be interpreted in an overly technical manner.”<sup>36</sup>

Based on examination of various courts’ analyses of the exhaustion issue, Kenneth Culp Davis, in his treatise on administrative law, found that four factors were used to determine whether exhaustion of the administrative process would be required.<sup>37</sup> These factors are:

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30. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

31. *See* *McKart*, 395 U.S. at 193.

32. 395 U.S. 185 (1969).

33. *McKart*, 395 U.S. at 197. *But see* *Yakus v. United States*, 321 U.S. 414, 433-34 (1944) (stating that a person who does not take the opportunity to challenge a rule that he violated at the administrative level cannot take up such a challenge in subsequent criminal proceeding); *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978) (stating judicial review not available because administrative opportunity to challenge rule was not taken by petitioner).

34. *McKart*, 395 U.S. at 196-97, 199.

35. 632 F.2d 860 (10th Cir. 1980).

36. *Sampson*, 632 F.2d at 863 (citations omitted); *see also* *Hoffman v. Boeing*, 596 F.2d 683, 685 (5th Cir. 1979).

37. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 15.2 (3d ed. 1994).

(1) the extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency factfinding or application of expertise, and (4) the extent to which the agency has already completed its factfinding or applied its expertise.<sup>38</sup>

As a clarifying point, Davis noted that these factors do not always point in exactly the same direction, but that the use of these factors provides some clarity and “will aid considerably in rationalizing and simplifying the law of exhaustion.”<sup>39</sup>

### B. *General Principles of Waiver*

The waiver doctrine is largely based on the premise that arguments not raised at the administrative level by the complainant or the agency should not be considered by courts.<sup>40</sup> Therefore, a court’s analysis should be limited to examining the reasoning provided by the agency.<sup>41</sup> This “general rule” was set out in *United States v. L.A. Tucker Truck Lines, Inc.*<sup>42</sup> as: “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”<sup>43</sup> This principle promotes determination of issues at the administrative level, thus resolving conflicts before a resort to the court system.<sup>44</sup>

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38. *Id.* at 315.

39. *Id.*

40. *See Massachusetts, Dep’t of Pub. Welfare v. Sec’y of Agric.*, 984 F.2d 514, 523 (1st Cir. 1993) (citations omitted); *Fed. Power Comm’n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955) (“No objection to the order of the Commission shall be considered by the Court (of Appeals) unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”); *Kirk v. Fed. Prop. Mgmt. Corp.*, 22 F.3d 135, 139 (7th Cir. 1994); *Unemployment Comp. Comm’n v. Aragan*, 329 U.S. 143, 155 (1946); *Torus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (D.C. Cir. 2001) (finding that an agency must set forth the reasons for its actions and the court is constrained to examine only the agency determination regardless of whether such a determination is overly limited in scope); *U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000); *D & F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1195 (D.C. Cir. 2000); *Proper v. Apfel*, 140 F. Supp. 2d 478, 484 (W.D. Pa. 2001).

41. *See Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994); *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 18 (1st Cir. 1999); *United States v. Puerto Rico Elec. Power Auth.*, 106 F. Supp. 2d 216, 220 (D. Puerto Rico 2000).

42. 344 U.S. 33 (1952).

43. *Id.* at 37. *But see Bethesda Hosp. Ass’n v. Bowen*, 485 U.S. 399, 404-05 (1988).

44. *See Borden v. Sec’y of Health & Human Services*, 836 F.2d 4, 6 (1st Cir. 1986) (summarizing the theory of waiver by stating: “[p]arties must take before the [agency], ‘not only

If an agency does not recognize an issue at the administrative level and provide examination of the issue, it is likely unworthy of examination by the courts. The duty of courts is not to “sift pleadings and document to identify[]arguments that are not ‘stated with clarity’” during the administrative process.<sup>45</sup> If a reviewing court analyzes issues not raised at the administrative level, it “usurps the agency’s function . . . and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its actions.”<sup>46</sup> A waiver based on an issue not being raised at the administrative level, however, has not been found where the administrative process is merely inquisitorial and not adversarial.<sup>47</sup> Under such circumstances, formal objection is not required to preserve an issue for appeal.<sup>48</sup>

An evolution in the area of exhaustion was the D.C. Circuit’s development, in *Time Warner Entertainment Co. v. FCC*,<sup>49</sup> of a distinction between “technical defects” and “policy-based errors” made at the administrative level.<sup>50</sup> A “technical defect” must be raised at the administrative level or review of the issue is waived in district court. But, if an issue not raised at the administrative level is a “policy-based error,” there must be an examination of whether the issue was implicated as part of a broader argument.<sup>51</sup> If part of a broader argument, the issue is preserved for court examination.<sup>52</sup> For example, failure to meet a time limit for completing the administrative process would likely fall under the rubric of “technical defect.” Therefore, the matter must be raised at the administrative level.<sup>53</sup>

### C. *The Administrative Process for Federal Employees*

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their ‘best shot’ but all of their shots”) (citation omitted); *Singh-Bhathal v. INS*, 170 F.3d 943, 945 (9th Cir. 1999); *Kirk*, 22 F.3d at 139.

45. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997).

46. *Unemployment Comp. Comm’n v. Aragan*, 329 U.S. 143, 155 (1946).

47. *See Sims v. Apfel*, 530 U.S. 103, 109-10 (2000); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997); Gary E. O’Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process*, 49 AM. U. L. REV. 1279 (2000).

48. *Sims*, 530 U.S. at 109-10.

49. 144 F.3d 75, 75 (D.C. Cir. 1998).

50. *Id.* at 80. A “technical defect” is defined by the D.C. Circuit as an error that “could easily have been cured if called to the Commission’s attention on reconsideration.” *Id.*

51. *Id.* at 80-81. The D.C. Circuit defined a “policy-based error” as a “basic challenge to a Commission policy[.]” *Id.* at 81. *See also Comsat Corp. v. FCC*, 250 F.3d 931, 937 (5th Cir. 2001).

52. *Time Warner Entm’t Co. v. FCC*, 144 F.3d 75, 80-81 (D.C. Cir. 1998).

53. *Id.*



There are two administrative time limits a federal employee seeking to file suit against the government must meet as a condition precedent to reaching district court.<sup>54</sup> First, the employee must “initiate contact”<sup>55</sup> with an EEO counselor within forty-five days<sup>56</sup> of an alleged act of discrimination or within forty-five days from the effective date that a “personnel action” alleged to be discriminatory occurred.<sup>57</sup> If a federal employee does not contact an EEO counselor within forty-five days, the employee’s complaint could be dismissed at the administrative level for noncompliance with administrative prerequisites to exhaustion.<sup>58</sup>

The agency is required to have a “final interview with the aggrieved person” within thirty days of the date the aggrieved person contacted the agency’s EEO office to request counseling.<sup>59</sup> If informal methods employed by the agency cannot induce a settlement of the allegations raised in the initial contact, the complainant, to continue the administrative process, must file a formal administrative complaint.<sup>60</sup> The second time limit that a complainant must meet as part of the administrative process is filing of a formal administrative complaint “with the agency that allegedly discriminated against the complainant” within fifteen days after receipt of notice to file such a complaint.<sup>61</sup> An employee who does not file an administrative complaint

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54. *Cf. Cooper v. Bell*, 628 F.2d 1208, 1213 (9th Cir. 1980) (noting two intra-agency deadlines and a deadline for filing a lawsuit in district court for a federal employee pursuing a Title VII action).

55. 29 C.F.R. § 1614.105(a)(1) (2001).

56. The requirement under § 1614.105(a)(1) for the initiation of contact to be within forty-five days is a modification, following the Civil Rights Act of 1991, from a requirement that contact be initiated within thirty days. *See* Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12,634 (April 10, 1992).

57. § 1614.105(a)(1); *see also* *Bickham v. Miller*, 584 F.2d 736, 737-38 (5th Cir. 1978) (establishing that the tolling period for filing a complaint of discrimination begins when the facts that establish a charge of discrimination would be apparent to a similarly situated person with a reasonably prudent recognition of his rights); *Aiken v. Reilly*, No. 90-0987-LFO, 1991 WL 126000, at \*3 (D. D.C. 1991).

58. § 1614.105(a)(1); *see also* *Johnson v. United States Treasury Dep’t*, 27 F.3d 415, 416 (9th Cir. 1994); *Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985); *Brown v. Gen. Services Admin.*, 425 U.S. 820, 835 (1976); *Zografos v. V.A. Med. Ctr.*, 779 F.2d 967, 970 (4th Cir. 1985).

59. § 1614.105(d).

60. *See* § 1614.104(b) (indicating that federal agencies must employ “reasonable efforts” to insure complaints are resolved in an informal fashion); § 1614.105(a); § 1614.105(f) (noting alternative dispute resolution is available to federal employees who present a complaint that lies under the rubric of Title VII).

61. § 1614.106(b); § 1614.105(d).

The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a

within the fifteen days after the final interview, as with the failure to meet the forty-five day requirement to “initiate contact” with an EEO counselor, could have his or her administrative complaint dismissed for failure to exhaust administrative remedies.<sup>62</sup> If the administrative agency issues a “final action”<sup>63</sup> pursuant to § 1614.110 based on the issues raised in the administrative complaint, an employee must file an action in district court within ninety days.<sup>64</sup>

Failure of the complainant to meet the time limit for “initiating contact” or filing a formal administrative complaint will establish the basis for an affirmative defense for the defendant agency in a Title VII action brought in district court by a federal employee.<sup>65</sup> The two administrative deadlines are not likened to jurisdictional requirements, but are instead akin to statutes of limitations.<sup>66</sup> Because the administrative deadlines are subject to the same

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complaint and of the complainant’s duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

*Id.*

62. § 1614.106(b); *see also* Miller v. Runyon, 32 F.3d 386, 389-90 (8th Cir. 1994); Baker v. Runyon, 951 F. Supp. 90, 91 (E.D.N.C. 1996); Baunchand v. Runyon, 847 F. Supp. 449, 450 (M.D. La. 1994); Tillett v. Carlin, 637 F. Supp. 251, 254 (D. Conn. 1986); Quillen v. United States Postal Serv., 564 F. Supp. 314, 317 (E.D. Mich. 1983); Baber v. Runyon, No. 97 CIV.4798(DLC), 1998 WL 912065, at \*3 (S.D.N.Y. 1998); Chalom v. Perkins, No. 97 Civ.9505(LAP), 1998 WL 851610, at \*3 (S.D.N.Y. 1998).

63. *See* § 1614.110.

The final decision shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final action shall contain notice of the right to appeal the final action to the Equal Employment Opportunity Commission, the right to file a civil action in federal court, the name of the proper defendant in any such lawsuit and applicable time limits for appeals and lawsuits.

*Id.* Section 1614.110(a) covers a situation where an administrative agency takes a final action following an administrative law judge issuing a decision regarding the case. Section 1614.110(b) contains nearly identical language but covers a situation where there is no finding by an administrative law judge and the administrative agency issues its own findings as part of the final action. If there is a finding of discrimination, the principal burden is on the agency and EEOC to fashion just relief. *See* § 1614.110(b). Use of the administrative process allows federal agencies to discretely resolve internal conflict and avoid having the federal courts enter such conflicts to the greatest extent possible. *See* Federal Sector Equal Employment Opportunity, *supra* note 56 (“the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened”); *see also* President v. Vance, 627 F.2d 353, 362 (D.C. Cir. 1980) (commenting that the exhaustion doctrine should not be “a massive procedural roadblock to access to the courts”).

64. 42 U.S.C. § 2000e-16(c) (1994 & Supp. V 1999); 29 C.F.R. § 1614.407(a), (c) (2001).

65. 29 C.F.R. §§ 1614.105(a)(1), 1614.106(b) (2001). *See also infra* note 67.

66. *See generally* Kizas v. Webster, 707 F.2d 524, 543 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); Dailey v. Carlin, 654 F. Supp. 146, 148 (E.D. Mo. 1987); Downey v. Runyon,

analysis as statutes of limitations, equitable principles apply to the failure to meet the administrative deadlines, namely, principles of “waiver, estoppel, and equitable tolling.”<sup>67</sup> The doctrines of estoppel and equitable tolling have been extensively discussed by courts and commentators and are viable equitable principles upon which an employee can have a seemingly late claim accepted as timely.<sup>68</sup> The focus of this Comment, however, will be limited to examination of the equitable principle of waiver.

*D. Principles of Exhaustion and Waiver when a Specific Finding of Timeliness or Untimeliness is made at the Administrative Level in Federal Sector EEO Cases*

When an agency finds that a federal employee met the requirements for completion of the administrative process in a timely or untimely manner, federal courts normally follow such rulings and do not find a waiver of the untimeliness defense in light of a finding of untimeliness.<sup>69</sup> The Internal Revenue Service (IRS) in *Girard v. Rubin*<sup>70</sup> initially held Girard’s complaint to be untimely, but upon appeal to the EEOC’s Office of Review and Appeals, the EEOC determined in a final order that the complaint was timely.<sup>71</sup> In

160 F.3d 139, 145 (2d Cir. 1999); *Pauling v. Secy of the Dep’t of Int.*, 71 F. Supp. 2d 231, 232-33 (S.D.N.Y. 1999); *Ross v. United States Postal Service*, 696 F.2d 720, 722 (9th Cir. 1983); *Andrzejewski v. United States Postal Service*, 636 F. Supp. 758, 760 (E.D. Mo. 1986); *Bethel v. Jefferson*, 589 F.2d 631, 641-42 (D.C. Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 474-75 (D.C. Cir. 1976); *Braham v. State Ins. Fund, No. 97 Civ.7121 (DLC)*, 1999 WL 14011, at \*2 (S.D.N.Y. Jan. 14, 1999); *Loe v. Heckler*, 768 F.2d 409, 419 n.20 (D.C. Cir. 1985).

67. Codified in § 1614.604(c). *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (noting the general proposition that Title VII deadlines are commensurate to statute of limitations).

68. *See generally Irwin v. Dept of Veterans Affairs*, 498 U.S. 89, 96 (1990) (contending that while it is true that the deadline provisions of Title VII are subject to equitable estoppel, the doctrine will not be applied before a Title VII plaintiff proves that the defendant engaged in affirmative misconduct intended to mislead or deceive plaintiff and also that “principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.”); Kathryn Doi, *Equitable Modification of Title VII Time Limitations to Promote Statute’s Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U.C. DAVIS L. REV. 749 (1985); Cynthia Reed, *Time Limits for Federal Employees Under Title VII: Jurisdictional Prerequisites or Statutes of Limitation?*, 74 MINN. L. REV. 1371 (1990); Mark D. Laponsky, *Procedural Problems and Considerations in Representing Federal Employees in Equal Employment Opportunity Disputes*, 29 HOW. L.J. 503 (1986).

69. *See generally Stockton v. Harris*, 434 F. Supp. 276, 279-80 (D.D.C. 1977). *But see Kushner v. Glickman*, No. C96-1380MHP, 1997 WL 419402, at \*6 (N.D. Cal. July 7, 1997) (noting that courts should not be overly mechanical in judging whether complainant has met short time deadlines under Title VII structure for federal employees).

70. 62 F.3d 1244 (9th Cir. 1995).

71. *Id.* at 1246, 1247.

district court, the IRS contended again that Girard failed to exhaust administrative remedies by not filing a timely complaint.<sup>72</sup> The court agreed and dismissed the complaint.<sup>73</sup> The Court of Appeals for the Ninth Circuit disagreed with the district court and remanded the case for deliberation on the merits of the case.<sup>74</sup> The court placed its focus on the final decision of the EEOC as establishing a legal fiction.<sup>75</sup> Although Girard clearly missed the filing date, the EEOC's decision, ruling his complaint timely, made it so.<sup>76</sup> The court focused on the language in 29 C.F.R. § 1613.214(a)(4) that "the agency shall extend the time limits . . . for other reasons considered sufficient by the agency."<sup>77</sup> Based on this language, the EEOC was permitted to forward the legal fiction of an untimely complaint being determined timely.<sup>78</sup> The court did not rest on its statutory construction but forwarded policy reasons for its conclusion.<sup>79</sup> The court stated:

When a government employee seeks to pursue a claim of discrimination under Title VII or the ADEA, the government cannot be at war with itself. Protean though it may sometimes be, it cannot in its EEOC form say that the employee may go forward, while in its IRS form it says he may not. Once the EEOC determined that Girard was entitled to pursue his discrimination claims the IRS was not entitled to ask a court to hold otherwise. It was bound.<sup>80</sup>

In *Ward v. Califano*,<sup>81</sup> the Civil Service Commission Board determined that the complaint was timely and remanded it to the agency for determination on the merits.<sup>82</sup> Upon a second remand, the Commission determined that discrimination had not occurred.<sup>83</sup> The District of Columbia District Court, ruling on the issue of timeliness, stated that the statute of limitations should not bar the action.<sup>84</sup> The defendant agency could not claim it would suffer

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72. *See id.* at 1246.

73. *See id.*

74. *See id.* at 1247.

75. *Girard*, 62 F.3d at 1247.

76. *See id.* at 1247-48; *see also* Briones v. Runyon, 101 F.3d 287, 290 (2d Cir. 1996); Humm v. Crowell, No. 97-5988, 1998 WL 869981, at \*3 (6th Cir. Nov. 30, 1998); Henderson v. U.S. Veterans Admin., 790 F.2d 436, 441 (5th Cir. 1986).

77. *Girard*, 62 F.3d at 1246.

78. *See id.*

79. *See id.* at 1248.

80. *See id.*

81. 443 F. Supp. 89 (D.D.C. 1977).

82. *See id.* at 91.

83. *See id.*

84. *See id.*

prejudice to now defend the action based on the extensive administrative attention the complaint had received and the finding of timeliness.<sup>85</sup>

Focusing now on when a complaint is ruled untimely at the administrative level, courts normally follow the ruling of untimeliness made by an agency.<sup>86</sup> In *Almaguer v. Walker*,<sup>87</sup> the claimant was ten months late in meeting the requirement of filing a formal administrative complaint within fifteen days.<sup>88</sup> Upon receipt of the formal complaint, the Army requested further information regarding the complaint.<sup>89</sup> The plaintiff submitted that the defense of untimeliness was waived based on the memorandum.<sup>90</sup> The court noted that the memorandum stated no “legal conclusions” which established agency waiver of the untimeliness defense.<sup>91</sup> The court noted *Munoz v. Aldridge*<sup>92</sup> for the proposition that “automatic waiver [can be] found where [the] agency has done a good deal more than simply accept and investigate plaintiff[']s complaint.”<sup>93</sup> The court, citing *Munoz*, stated there is an automatic waiver of the requirement of exhaustion of administrative remedies after a certain level of administrative action.<sup>94</sup> The final ruling of the agency, however, was that

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85. *See id.* at 91 n.2 (“By fulfilling the requirements of 42 U.S.C. § 2000e-16(c), any defects alleged in the filing of the original EEO complaint essentially become irrelevant. This is especially true where the agency accepted the complaint and a final decision was rendered.”). *But see* *Adams v. Henderson*, 197 F.R.D. 162, 168-69 (D. Md. 2000). In *Adams*, an Administrative Judge (AJ) for the Postal Service found that the complaint was timely filed. The Postal Service, declining to follow the finding of the AJ, ruled the complaint untimely. *See id.* at 169. The Maryland District Court disregarded both findings and stated, in its own judgment, the complaint was untimely. *See id.* at 168-69. The court did not examine whether any “specific finding” of timeliness constituted a waiver of the timeliness defense. *See id.* at 169.

86. *See, e.g.*, *Wrenn v. Sec’y, Dept. of Veterans Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990); *Bruno v. Brady*, Civ. A. No. 91-2605, 1992 WL 57920 (E.D. Pa. Mar. 16, 1992). In *Bruno*, the complainant did not raise the issue of discrimination to an EEO counselor within thirty days of when the discriminatory act took place. *See id.* at \*2. The Administrative Law Judge failed to supply analysis on the timeliness issue in its decision, and the agency’s final agency decision made no mention as to untimeliness and dismissed the complaint on the merits. *See id.* at \*3. Despite there being no formal finding of untimeliness, the court found the untimeliness defense preserved based on the government attorney raising the untimeliness defense during adjudication at the administrative level. *See id.* The district court, ruling based on objection within the administrative process, found that the untimeliness issue was not waived and the complaint was to be dismissed as untimely. *See id.*

87. 1999 WL 33289710 (W.D. Tex. Jan. 4, 2001).

88. *See id.* at \*5.

89. *See id.*

90. *See id.*

91. *See id.*

92. 894 F.2d 1489 (5th Cir. 1990).

93. *See Almaguer*, 1999 WL 33289710, at \*5 n.28 (citing *Munoz*, 894 F.2d at 1494).

94. *See id.*

the complaint was untimely and the district court followed the agency's specific finding of untimeliness.<sup>95</sup>

Even when a settlement is negotiated following an administrative finding of untimeliness, the untimeliness defense is not waived.<sup>96</sup> An agency is able to refer back to its final ruling of untimeliness when faced with failed negotiations and a lawsuit in district court.<sup>97</sup> The complainant is left "in no worse a position than if the [agency] had originally rejected [the] claim as time-barred."<sup>98</sup> Negotiation efforts after the final ruling by the agency constituted mere acceptance of the claim and a partial investigation, but the fact that negotiations occurred after the final order could not affect the binding final order if the complainant attempted to bring a case in federal district court.<sup>99</sup>

### III. WAIVER OF THE UNTIMELINESS DEFENSE WHEN THIS DEFENSE IS NOT RAISED AT THE ADMINISTRATIVE LEVEL IN FEDERAL SECTOR EEO CASES: THE CIRCUIT SPLIT

While courts normally follow the ruling made by the agency as to timeliness, the circuit split below depicts how the outcome is less predictable when the federal agency fails to state whether the complainant has or has not timely met administrative time deadlines.

#### A. *The Legal Waiver Rule*<sup>100</sup>

##### 1. Seventh Circuit Approach

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95. *See id.* at \*8.

96. *See* Blount v. Shalala, 32 F. Supp. 2d 339, 341-42 (D. Md. 1999).

97. *See id.* at 342.

98. Howell v. Dept. of the Army, 975 F. Supp. 1293, 1302 (M.D. Ala. 1997).

99. The District of Columbia District Court followed the approach of *Howell* in *Thompson v. The Capitol Police Board*, 120 F. Supp. 2d 78 (D.D.C. 2000). In *Thompson*, the plaintiff received mediation based on his EEO complaint claiming discrimination. The court, following *Howell*, stated that the meeting between Thompson and the Capital Police Department did not result in a waiver of the untimeliness defense. It further found that "appearance at a mediation session did not prejudice the rights of the plaintiff, nor did it deprive him of any opportunity he would have enjoyed. Thus, the defendant's participation in mediation did not waive its limitations defense." *Id.* at 83-84.

100. "Legal waiver" is defined as "a voluntary and intentional relinquishment of a known right." *See, e.g.,* Van Den Broeke v. Bellanca Aircraft Corp., 576 F.2d 582, 584 (5th Cir. 1978). The determination of whether there was a waiver is based on the existence of "[a] promise, express or implied in fact, supported only by action in reliance thereon, to excuse performance of a condition." *Billman v. V.I. Equities Corp.*, 743 F.2d 1021, 1024 (3d Cir. 1984) (citations omitted). The issue courts focus on under the "Legal Waiver Rule" is whether, based on a finding on the merits by an agency, there has been an implicit promise to waive the untimeliness defense in later federal court proceedings.

When an agency provides a final decision on the merits<sup>101</sup> and there is no mention of untimely exhaustion of administrative remedies, courts have taken different approaches as to whether waiver of the untimeliness defense has occurred. The Seventh Circuit held that, in the event an agency does not mention the defense of untimeliness and the case is decided on the merits, the untimeliness defense is waived in a subsequent district court action.<sup>102</sup> A three-prong analysis was provided by the Seventh Circuit to explain its conclusion.<sup>103</sup>

The three-prong analysis was laid out in *Ester v. Principi*. There, complainant Ester filed his formal administrative complaint thirty-three days after he was provided notice following his informal counseling with an EEO officer at the VA.<sup>104</sup> This filing was untimely based on § 1614.106(b), which states that a formal administrative complaint must be filed within fifteen days after receipt of notice to file the complaint. Despite the late filing, the VA made a determination of no discrimination based on the merits of the complaint without mention of the untimely filing.<sup>105</sup> Judge Williams framed the issue, one of first impression for the Seventh Circuit, as: “[W]hen [should] an agency’s failure to assert an available exhaustion defense in administrative proceedings . . . constitute waiver of such a defense in a subsequent lawsuit.”<sup>106</sup>

The first part of the analysis provided in *Ester* is the need for timely objection to issues at the administrative level. Objections not made at the administrative level are waived when a case is moved beyond the agency and into district court.<sup>107</sup> The requirement that an agency object to untimely filing by a complainant at the administrative level

encourages an agency to [not] overlook and leave completely undeveloped allegations that a particular complaint is untimely. [A]n agency’s failure to assert a timeliness defense in its own proceeding causes subsequent courts[.

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101. See 29 C.F.R. § 1614.110 (2001).

102. See *Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001); see also *Mundt v. U.S. Postal Serv.*, No. 00C6177, 2001 WL 1313780, at \*2 (N.D. Ill. Oct. 25, 2001); *Smith v. Danzig*, No. Civ. 00-216-PH, 2001 WL 823642, at \*10-11 (D. Me. July 20, 2001). In *Smith*, Magistrate Justice Cohen from Maine District Court followed *Ester*. Justice Cohen stated the belief that the First Circuit would adopt the same line of reasoning as provided in *Ester* if confronted with the issue. See *id.* at \*11.

103. See *Ester*, 250 F.3d at 1072-73.

104. See *id.* at 1070.

105. See *id.*

106. See *id.* at 1071.

107. See *id.* at 1072 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

But, more importantly,] it creates a significant prejudice to plaintiffs who suddenly must defend a claim of untimeliness never before raised.<sup>108</sup>

The second of the three-prong approach invoked the rule from *SEC v. Chenery Corp.*<sup>109</sup> The *Chenery* rule states that it is not within a court's province to substitute its own determination for the agency's stated reasons for action.<sup>110</sup> Courts are required to act only upon the final determination set out by the agency.<sup>111</sup> The Court in *Chenery* stated:

[I]n dealing with a determination or judgment which an administrative agency also is authorized to make, [a reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency . . . . It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.<sup>112</sup>

This *Chenery* rule was set in the context of notice and comment rule-making: a formal structure requiring the agency to examine the evidence before it and establish a rule based on such evidence and to explain why it established such a rule.<sup>113</sup>

Applying the *Chenery* rule to federal sector Title VII actions, only if an agency states that a complaint is not timely filed can a court review such a finding.<sup>114</sup> Without a finding of untimeliness, district court review of the

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108. *Ester*, 250 F.3d at 1072 (“Agency autonomy, accuracy and the need for a well-developed record for all are served by requiring objections—even those objections possessed by the agency itself—to be raised in the agency proceeding”); *see also* *Brotherhood of R.R. Trainmen v. Chicago*, 380 F.2d 605, 608-09 (D.C. Cir. 1967) (procedural objections made to agency must be made in timely manner); *Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985); *Bd. of Pub. Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1072 (5th Cir. 1969); *James v. Chater*, 96 F.3d 1341, 1343 (10th Cir. 1996) (issues not raised at administrative level are waived in judicial examination of the merits); *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1108 (D.C. Cir. 1992); *Pritchett v. Gen. Motors Corp.*, 650 F. Supp. 758, 761-62 (D. Md. 1986).

109. 332 U.S. 194, 196 (1947) (*Chenery II*).

110. *See Ester*, 250 F.3d at 1072 (citing *Chenery II*, 332 U.S. at 196). *See also* *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*) (“orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained”).

111. *See id.* *See also* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (“[t]he Court is not empowered to substitute its judgment for that of the agency”).

112. *Chenery II*, 332 U.S. at 196-97. *See also* *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (noting it is a “rare circumstance” when a reviewing court will attempt to look beyond the stated reasons provided by the agency for its actions).

113. *See Chenery II*, 332 U.S. at 199-200.

114. *See id.* at 196; *Ester*, 250 F.3d at 1072; *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1214 (10th Cir. 1997) (noting that at least a brief decision providing reasons for agency action is required for sufficient assessment of issues in a particular case).



untimeliness defense is precluded.<sup>115</sup> This determination is based on administrative agencies possessing the expertise to examine whether a complainant timely met administrative deadlines and courts are to give deference to the factual findings of administrative agencies.<sup>116</sup>

The final prong of the analysis is based on analogy to the doctrine of waiver applied in federal habeas corpus cases.<sup>117</sup> Arguments not raised in state court are deemed waived in habeas corpus review at the federal level.<sup>118</sup> “[T]he last state court rendering a judgment [must] make a ‘plain statement’ of any adequate and independent state ground” that would preclude federal court examination of an issue.<sup>119</sup> Otherwise, the basis for judgment on independent state grounds is waived.<sup>120</sup> Analogizing such reasoning to the issue at hand, the court found the independent grounds of failure to timely exhaust administrative remedies must be stated by the agency prior to presentation of the case to federal district court.<sup>121</sup> The Seventh Circuit stated administrative exhaustion does not have an “immortal” status: “timely filing of administrative claims of discrimination is not necessary to preserve our jurisdiction, and a plaintiff’s failure to do so may be waived if the agency reaches the merits without addressing the procedural default.”<sup>122</sup>

## 2. Fifth Circuit Approach

The Fifth Circuit<sup>123</sup> and the Second Circuit<sup>124</sup> take an approach in tension with that of the Seventh Circuit. Specifically, the Fifth Circuit in *Rowe v. Sullivan* found that to have the untimeliness defense waived, an agency must make a “specific finding” that the complaint was filed timely.<sup>125</sup> This approach insures the untimeliness defense will be preserved if a case reaches the district court with a finding on the merits, but not a finding regarding timeliness.<sup>126</sup> The Fifth Circuit was concerned that “agencies may inadvertently overlook timeliness problems and should not thereafter be

115. See *Ester*, 250 F.3d at 1072.

116. See *id.*

117. See *id.* at 1072.

118. See *Harris v. Reed*, 489 U.S. 255, 265 (1989).

119. See *Ester*, 250 F.3d. at 1072-73 (citing *Harris*, 489 U.S. 255, 265 (1989)).

120. See *id.*

121. See *id.*

122. *Id.* at 1073.

123. See, e.g., *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992).

124. See *Belgrave v. Pena*, 254 F.3d 384, 387 (2d Cir. 2001). In *Belgrave*, the Second Circuit adopted the approach taken in *Rowe* that “the agency must make a specific finding that the claimant’s submission was timely.” *Id.* at 387.

125. See *Rowe*, 967 F.2d at 191. But see *Espineuva v. U.S. Dept. of the Navy*, No. 86 C 2353, 1987 WL 5241 at \*2 (N.D. Ill Jan. 6, 1987).

126. See *Rowe*, 967 F.2d at 191.

bound.”<sup>127</sup> Because the agency in *Rowe* had not made a specific finding of timeliness, a waiver of the untimeliness defense had not been made.<sup>128</sup> This finding by the Fifth Circuit was predated by the Department of Health and Human Services (HHS) finding on the merits that Rowe had not been discriminated against by the HHS.<sup>129</sup> Despite HHS’s actions on the merits and its failure to raise the defense of untimeliness at the administrative level, the district court and Fifth Circuit found the claims were barred based on a failure to exhaust administrative remedies.<sup>130</sup> A decision on the merits did not constitute an implicit finding of timeliness.<sup>131</sup>

There is tension between the approach of the Fifth and Seventh Circuit. The Fifth Circuit does not provide for a waiver of the untimeliness defense when untimeliness is not raised at the administrative level, while the Seventh Circuit finds a waiver in such a situation.<sup>132</sup> In the Fifth Circuit, regardless of the determination made by an agency, the untimeliness defense will be preserved upon court review.<sup>133</sup> The Seventh Circuit examines the decision by the agency and if timeliness was not raised as an issue, the untimeliness defense is considered waived.<sup>134</sup>

*B. The Equitable Approach – Examination of Fairness in Determining Whether Untimeliness Defense has been Waived*

The D.C. Circuit has made use of equitable principles in its analysis of whether there is a waiver of the untimeliness defense.<sup>135</sup> The D.C. Circuit found that the “balancing of equities” favored a waiver of the untimeliness defense in an instance where the agency definitively responded to the merits of an employee’s complaint without mentioning the untimeliness defense, prolonged the case by changing legal positions concerning jurisdiction, and failed to raise the untimeliness defense until the case changed jurisdiction three times.<sup>136</sup>

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127. *See id.* (citations omitted).

128. *See id.*

129. *See id.* at 189.

130. *See id.*

131. *See Rowe*, 967 F.2d at 191.

132. *See Ester v. Principi*, 250 F.3d 1068, 1073 (7th Cir. 2001).

133. *See Rowe*, 967 F.2d at 191.

134. *See Ester*, 270 F.3d at 1073.

135. *See, e.g., Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997).

136. *Id.* at 438-39. *See also Brown v. Marsh*, 777 F.2d 8, 16-17 (D.D.C. 1985). The court stated:

Timely or untimely, the appellants complaints have been exhaustively processed at the administrative level. The litigants have been put to considerable time and expense and so have the courts. Although plaintiff did not itemize and describe these various equitable considerations, all are amply evident from the face of the pleadings and the slightest

In *Bowden v. United States*,<sup>137</sup> the petitioner, eight months after being provided notice that he owed additional taxes on a settlement agreement for resolution of a Title VII claim between himself and the Immigrations and Naturalization Service (INS), sent a letter to the INS stating that he believed the INS was responsible for making such a payment.<sup>138</sup> After no response, Bowden, thirteen months after receiving the original notice, again wrote the agency restating his claim.<sup>139</sup> The agency responded to Bowden's letter, asserting that it had paid its full tax duties under the settlement agreement.<sup>140</sup> Within thirty days of receipt of the INS letter, Bowden then sent another letter again stating his position and provided that this letter served as notice that within thirty days of becoming aware of violation of the settlement agreement notice was provided as required by 29 C.F.R. § 1613.217(b).<sup>141</sup>

A few months later, Bowden filed suit in the D.C. District Court.<sup>142</sup> The INS stated originally that the claim should be removed to the Court of Federal Claims.<sup>143</sup> Then, the INS claimed, once in the Court of Federal Claims, that the proper jurisdiction was the federal District Court.<sup>144</sup> Back again in District Court, the INS claimed that Bowden had failed to exhaust his administrative

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perusal of the record, and we think the district judge was bound to take them into account because we find that the Army has not conducted itself so as to preserve its exhaustion defense and further conclude that permitting the Army to raise the defense at this juncture would unfairly prejudice the appellant, we conclude that the decision below cannot stand. We take a dim view of the Army's intransigence in this matter, and hope that any further litigation will be conducted expeditiously. Perhaps the time has come for the Army to assess its losses and find a modus vivendi with Mr. Brown. It is certainly past time for all the many parts of this litigation to come to an end.

*Id.* at 16-18.

137. 106 F.3d 433 (D.C. Cir. 1997).

138. *See id.* at 436. This is not a case falling under the rubric of failure to meet intra-agency deadlines under § 1614.106(b) or § 1614.105(a)(1). Instead, this case deals with the need to provide notice within thirty days of violation of a settlement agreement to the federal agency violating the agreement. *See* § 1614.504(a). While the circumstances are slightly different, the principles concerning waiver under § 1614.504(a) are so closely related to the issue of untimeliness under §§ 1614.106(b) and 1614.105(a)(1) as to require this approach be mentioned.

139. *See Bowden*, 106 F.3d at 436.

140. *See id.*

141. *See id.* 29 C.F.R. § 1613.217(b) (1991) was recodified at 29 C.F.R. § 1614.504(a) (1996). § 1614.504(a) states in part:

If the complainant believes that the agency has failed to comply with the terms of the settlement agreement, the complainant shall notify the [agency's] Director, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance.

142. *See Bowden*, 106 F.3d at 436.

143. *See id.*

144. *See id.*

remedies.<sup>145</sup> Bowden countered that the INS had waived the defense of untimeliness by sending him a letter assessing the merits of the claim and stating that the INS was not liable.<sup>146</sup> Bowden furthered this claim by asserting that the INS had ample opportunity to raise the issue of untimeliness when the case was first in District Court and later in the Court of Claims.<sup>147</sup> The INS instead elected not to raise this issue and, therefore, waived the defense.<sup>148</sup> The District Court agreed with the INS, despite having already been misled on the jurisdictional issue by the agency, and dismissed the case for failure to exhaust administrative remedies.<sup>149</sup> The Court of Appeals, clearly agitated by the INS's gamesmanship in moving the case twice and only raising the timeliness issue when the case returned to the district court for the second time, reversed the district court, agreeing with the plaintiff's claim that a waiver of the untimeliness defense had occurred.<sup>150</sup>

The Court of Appeals notably glossed over the need for a final decision on the merits by implying that the letter sent by the INS to Bowden constituted a decision on the merits.<sup>151</sup> Had the INS not forced Bowden to go on what the court describes as a "jurisdictional merry-go-round," it would likely have been a closer call as to whether the letter, standing on its own, would have convinced the court that a waiver had occurred.<sup>152</sup> The court found that, after the petitioner had gone through a procedural maze, with the agency devoting a large amount of time to jurisdictional gamesmanship, the agency could not

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145. *See id.* at 436-37.

146. *See id.* at 438-39. *See also* *Brown v. Marsh*, 777 F.2d 8, 17 (D.D.C. 1985) (noting that when the defense of untimeliness is at issue equitable principles do not entitle the government to favored treatment).

147. *Bowden*, 106 F.3d at 439.

148. *Id.*

149. *Id.* at 436-37.

150. *Id.* at 438-39.

151. *Id.* at 439. *See also* *Wilson v. Pena*, 79 F.3d 154, 165 (D.C. Cir. 1996). In *Pena*, the court noted that, despite a potential procedural bar being in place, the final decision on the merits results in the agency not being able to respond in district court with a claim of failure to exhaust procedural requirements. The court stated:

Where the agency has taken final action based on an evaluation of the merits, it cannot later contend that the complaint failed to exhaust his remedies this does not mean that the agency will lose on the merits; it simply means that the complainant is entitled under the statute to his day in court.

*Id.* at 165 n.7.

152. *See Bowden*, 106 F.3d at 439. *But see* *De Medina v. Reinhardt*, 444 F. Supp. 573, 578 (D.D.C. 1978) (declining to find waiver because it would deter agencies from voluntarily attempting to find and correct discriminatory practices that are not timely mentioned by the complainant); *See also* *Stockton v. Harris*, 434 F. Supp. 276, 280-81 (D.D.C. 1977).

claim it inequitable to defend the case on the merits.<sup>153</sup> Therefore, the defense of untimely exhaustion of administrative remedies was waived.<sup>154</sup> The court concluded its decision by stating:

[W]e do not intend to create a sweeping principle concerning waiver of administrative time limits under Title VII. [A] balancing of equities in this case—where the agency definitively responded to the merits of an employee’s complaint without mentioning untimeliness, failed to raise untimeliness until the third round in court, and prolonged the litigation for years by shifting legal positions—leads us to conclude that the INS waived its defense of untimely exhaustion. The time has come for the Government’s procedural run-around of Bowden to end and for a court to address his claim on the merits.<sup>155</sup>

C. *Waiver of the Untimeliness Defense Only if There is a Finding of Discrimination*

The Ninth Circuit has adopted an approach that, when an agency receives and investigates a complaint and does not find discrimination, the untimeliness defense has not been waived.<sup>156</sup> In *Boyd v. United States Postal Service*,<sup>157</sup> the complainant was denied reinstatement to a position at the Post Office.<sup>158</sup> Following his rejection, Boyd untimely communicated his belief of

153. *Bowden*, 106 F.3d. at 439. See also *Scott v. Claytor*, 469 F. Supp. 22, 24 n.7 (D.D.C. 1978). The court in *Scott* stated that with a decision on the merits, the equities normally dictate that the complainant is able to bring a case in district court and the untimeliness defense is waived. See *id.* The court stated that “equities justified finding a waiver in [some] circumstances.” *Id.* at 24 n.7. This broad principle of equity was developed in later cases within the D.C. Circuit. See, e.g., *Bowden*, 106 F.3d at 439.

154. *Bowden*, 106 F.3d at 439.

155. *Id.*

156. *Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) (citing *Saltz v. Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982)); *Oaxaca v. Roscoe*, 641 F.2d 386, 389-90 (5th Cir. 1981). See also *Otis v. Frank*, No. 87-6527, 1988 WL 131751, at \*1 (9th Cir. Nov. 25, 1988) (citing *Boyd* stating that because the complaint was not timely filed and the final action by the agency did not find discrimination there was no waiver of the untimeliness defense); *Dailey v. Carlin*, 654 F. Supp. 146, 149 (E.D. Mo. 1987). In *Dailey*, the court did not make a definitive ruling that it would adopt the approach taken in *Boyd* to the issue of waiver. The court asked the parties to provide greater information on the issue before reaching a judgment. No further procedural action is indicated after this request. The court, however, stated:

Defendant argues that plaintiff’s failure to timely bring his race claim to the agency precludes him from pursuing this court action, even though the agency accepted this claim for investigation. Defendant argues that waiver is not applicable because the agency did not make a finding of race discrimination . . . . The Court is inclined to agree.

*Id.*

157. 752 F.2d 410 (9th Cir. 1985).

158. *Id.* at 412.

discrimination.<sup>159</sup> Boyd believed he was discriminated against based on his handicap: post-traumatic stress disorder as a result of service in Vietnam.<sup>160</sup> Following the rejection of his reinstatement request, Boyd also contacted his Senator, requesting help in gaining reinstatement.<sup>161</sup> Upon urging from the Senator, the Post Office informed Boyd, via letter, that the issues raised by the Senator were being considered.<sup>162</sup> Upon a decision by the agency to find Boyd's claim untimely, he filed suit in federal court.<sup>163</sup>

The court held that the Post Office's untimeliness defense had not been waived based on there being no finding of discrimination.<sup>164</sup> The court stated: "The mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit when the later investigation does not result in an administrative finding of discrimination."<sup>165</sup> The holding in *Boyd* encompasses a situation where a finding on the merits of no discrimination would not amount to a waiver of the untimeliness defense.<sup>166</sup> Later courts encountering the situation where the agency found lack of discrimination on the merits without mention of the untimeliness defense have followed *Boyd's* holding that, without a finding of discrimination, there is no waiver of the untimeliness defense.<sup>167</sup>

Only a subtle difference separates the conclusions reached by the Fifth and Ninth Circuits. In both circuits, a finding of no discrimination without mention of the untimeliness defense would not preclude the agency from asserting an untimeliness defense in district court.<sup>168</sup> The only difference between the two circuits concerns whether there is a finding of discrimination at the administrative level without mention of untimeliness and the case is moved to district court.<sup>169</sup> Here, the Ninth Circuit would rule that, because of the finding of discrimination, there was a waiver of the untimeliness defense, while the Fifth Circuit would rule that without a specific finding of timeliness the untimeliness defense was not waived.

#### D. *De Novo Court Review*

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159. See 29 C.F.R. § 1613.214(a)(i)(1984), predating and recodified at § 1614.105(a)(1) (2001).

160. *Boyd*, 752 F.2d at 413.

161. *Id.* at 412.

162. *Id.* at 414.

163. *Id.* at 412.

164. *Id.* at 414.

165. *Boyd*, 752 F.2d at 414.

166. *See id.*

167. *See e.g.*, *Otis v. Frank*, No. 87-6527, 1988 WL 131751, at \*2 (9th Cir. 1988).

168. *See Boyd*, 752 F.2d at 414; *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992).

169. *See supra* text accompanying note 166.

A few courts confronted with the issue of whether there was a waiver of the untimeliness defense when there is a decision on the merits by the administrative agency have examined the issue without regard to the determinations made by an agency.<sup>170</sup> In *Koschoff v. Henderson*,<sup>171</sup> the court held that, even after a trial, the untimeliness defense was not waived. The court appeared to take the procedural deficiencies of the plaintiff into account following trial in making a determination on the merits of the case.<sup>172</sup> The untimeliness defense was vaguely referenced in the court's summary judgment decision and was pointed out *sua sponte* by the court in its determination of the merits of the claim after trial.<sup>173</sup> The court held:

[W]e find Plaintiff's instant action was filed too late to meet the administrative requirements required of her EEO complaints, and we grant Defendant judgment based in part on the non-exhaustion and untimeliness of Plaintiff's administrative remedies. Nevertheless, we emphasize that we have reached our ultimate decision based primarily upon the merits of the case, and only secondarily upon these procedural issues.<sup>174</sup>

Regardless of the agency making a decision to continually ignore the opportunity to raise the untimeliness defense, the court felt it important to examine the issue, even after a trial in federal district court.<sup>175</sup>

#### IV. A PROPOSED APPROACH FOR ANALYZING THE ISSUE OF WAIVER OF THE UNTIMELINESS DEFENSE UNDER TITLE VII FOR FEDERAL EMPLOYEES

##### A. The "Ester plus 'technical defect'" approach

170. See, e.g., *Adams v. Henderson*, 197 F.R.D. 162, 168 (D. Md. 2000).

171. 109 F. Supp. 2d 332 (E.D. Penn. 2000).

172. *Id.* at 345.

173. *Id.* at 344. See also *Bruno v. Brady*, Civ. A. No. 91-2605, 1992 WL 57920, at \*2 (E.D. Pa. Mar. 16, 1992) ("[W]e should not construe such a timebar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'"); *Humm v. Crowell*, No. 97-5988, 1988 WL 869981, at \*3 (6th Cir. Nov. 30, 1998). In *Crowell*, the district court noted that

Humm sought a *de novo* review of an unfavorable administrative decision from the EEOC. Consequently, the district court was not bound by the administrative finding of the EEOC that Humm's claim was not barred for his failure to exhaust his administrative remedies and timely seek the assistance of an EEO counselor. While the district court was correct in determining that it was not bound by the findings of the EEOC, the court did not address whether the TVA should be prevented from challenging its own finding that the time limitations did not bar consideration of the merits of Humm's claim.

*Id.*

174. *Koschoff*, 109 F. Supp. at 345.

175. *Id.*

Courts should follow *Ester*'s approach in determining whether or not there is a waiver of the defense of untimely exhaustion of administrative remedies under Title VII for federal employees when the defense is not raised at the administrative level.<sup>176</sup> Further, courts should invoke the principle of "technical defect" from *Time Warner Entertainment Co.*, thus creating an "*Ester* plus 'technical defect'" analysis.<sup>177</sup> The Seventh Circuit in *Ester* provided convincing analysis of why there is a waiver of the untimeliness defense when the defense is not raised at the administrative level. The approach taken by the Seventh Circuit laid out three fundamental principles of administrative law that all lead down the same road: if an agency fails to raise the untimeliness defense in its final determination of a complaint it waives the defense.<sup>178</sup> The analysis from *Time Warner Entertainment Co.* is directly in accordance with that from *Ester* in that, the failure to raise a "technical defect," such as untimely filing at the administrative level, precludes district court review of the issue.<sup>179</sup>

The first among the three prongs of analysis provided by the Seventh Circuit in *Ester* is the *Chenery* rule: an agency must clearly state the reasons for its actions and stand behind those reasons in later proceedings that examine the agency's actions.<sup>180</sup> Review of agency action is limited solely to the reasons provided by the agency at the administrative level.<sup>181</sup> The second prong of analysis provided in *Ester* is that objections possessed by the agency must be raised at the administrative level to be preserved for later court evaluation.<sup>182</sup> The important principle of initial agency evaluation is devalued if an agency is allowed to raise an untimeliness defense in court that it had not mentioned during the administrative process.<sup>183</sup> Finally, the Seventh Circuit found that if an independent ground for dismissal of a case, such as untimely filing, is not raised at the administrative level, it is deemed waived.<sup>184</sup> When a case reaches federal court without mention of the untimeliness defense, the

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176. *Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001). See also *supra* Part III.A.1.

177. *Ester*, 250 F.3d at 1071-72; *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 80-81 (D.C. Cir. 1998).

178. See *Ester*, 250 F.3d at 1071-73.

179. *Time Warner*, 144 F.3d at 80-81.

180. *Ester*, 250 F.3d at 1072 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *supra* notes 110-16.

181. See *Chenery II*, 332 U.S. at 196.

182. *Ester*, 250 F.3d at 1072; *McKart v. United States*, 395 U.S. 184, 193-95 (1969); *supra* notes 107-08.

183. See *McKart*, 395 U.S. at 195; *Weinberger v. Salfi*, 422 U.S. 749 (1975) ("[W]e believe it would be inconsistent with the congressional scheme to bar the [agency] from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final' within the language of [the statutory structure].").

184. See *Ester*, 250 F.3d at 1073.



defense does not retain “immortal” status, but can be waived when the Title VII claim comes to district court for a decision of the case.<sup>185</sup> This reasoning was developed based on analogy to federal habeas corpus review: the last state court decision must state “independent state ground[s]” for dismissal of an action.<sup>186</sup> Thus, courts, through use of the “*Ester* plus ‘technical defect’” analysis, promote agency development of complete records and examination of all issues implicated in a claim during the administrative process.<sup>187</sup>

This three-pronged analysis promotes important policies in administrative law.<sup>188</sup> The “values of judicial economy, agency autonomy, accuracy and the need for a well-developed record for review, are all served by requiring objections” by the agency as part of its own administrative process.<sup>189</sup> An agency does a disservice to its own administrative process by raising the untimeliness defense for the first time in district court.<sup>190</sup> For a court to make a ruling on the untimeliness defense when it is not presented at the administrative level, the court would be required to “sift pleadings and documents to identify . . . arguments that are not ‘stated with clarity’” during the administrative process.<sup>191</sup> This is not the function of the federal courts.<sup>192</sup> Inevitably, a process that forces courts to review functions, limited to administrative discretion, results in the administrative process being left underdeveloped and the agency having no incentive to do a thorough investigation of a matter and present a reviewing court with a narrow set of issues for examination.<sup>193</sup>

A complainant cannot be expected to defend against that which was not raised at the administrative level.<sup>194</sup> After all, the defendant party in a Title VII action following the agency’s final judgment is the federal administrative agency that had the opportunity to raise the untimeliness defense.<sup>195</sup> With awareness that it will later be the defendant party, the agency has every incentive to find a complaint untimely.<sup>196</sup> An agency that does not object to

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185. *Id.*

186. *Id.*

187. *Id.* at 1072; *supra* notes 24-30.

188. *See Ester*, 250 F.3d at 1071-73.

189. *Id.* at 1072.

190. *See McKart v. United States*, 395 U.S. 184, 195 (1969).

191. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (1997).

192. *Ester*, 250 F.3d at 1072.

193. *See id.*; *McKart*, 395 U.S. at 195; *Action for Children’s Television v. FCC*, 59 F.3d 1249, 1256-57 (D.C. Cir. 1995) (noting that there must be an opportunity for an agency to examine an issue prior to the exhaustion of administrative remedies). *In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986); *supra* notes 24-30.

194. *See Ester*, 250 F.3d at 1072.

195. *See id.*

196. *See id.*

the untimely administrative filing of a complaint as a failure to exhaust administrative remedies presents a surprise defense that the complainant had not taken into account when choosing to pursue a Title VII action in district court.<sup>197</sup> With the agency being required to address objectionable issues at the administrative level through use of its expertise, the complainant will be better able to make an educated determination of whether it is worth litigating a complaint in district court following the administrative process.

If the administrative agency wants to dismiss an action based on untimely filing, such action should be taken at the administrative level. Dismissal at the administrative level prevents extensive and continued review of a case that could easily be disposed of by an agency simply stating that administrative deadlines were not met.<sup>198</sup> The administrative agency is in the best position to judge whether administrative deadlines were timely complied with during the administrative process.<sup>199</sup> When an agency fails to make such a determination, it is not for a court to provide for dismissal of a case based on that which the agency was in the best position to provide but did not so provide.<sup>200</sup>

Directly in accord with the principles from *Ester*, the analysis from *Time Warner Entertainment Co.* should be added to the analysis of why a failure of the agency to raise the untimeliness defense waives the defense in district court. In *Time Warner Entertainment Co.*, the court stated that technical defects must be raised at the administrative level, but “policy-based errors” could be preserved for district court review based on being a component of a broader argument.<sup>201</sup> This analysis limits the issues examined by a reviewing court to important issues of policy; “technical defects” such as timely filing within administrative deadlines are limited to agency review.<sup>202</sup> Application of a “technical defect” analysis sends a message to agencies that timeliness issues must be raised at the administrative level and the failure to raise a “technical defect” eliminates the possibility for its examination by a reviewing court.<sup>203</sup> In Title VII actions, important issues surrounding employment discrimination are often implicated. A court’s attention to the issue of untimely administrative filing not raised at the administrative level takes away from a

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197. *See id.* *See also* *Tinnin v. Danzig*, No. CIV. A. 99-1153, 2000 WL 190255, at \*3 (E.D. Pa. 2000) (“The government should not be allowed to undercut [§ 1614.105(a)] by ignoring [the untimeliness] defense at the administrative level and belatedly springing it on plaintiff for the first time in the district court.”).

198. *See Ester*, 250 F.3d at 1072-73.

199. *See id.*

200. *See Massachusetts, Dep’t of Pub. Welfare v. Sec’y of Agriculture*, 984 F.2d 514, 523 (1st Cir. 1993)

201. *Time Warner Entm’t Co. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998).

202. *Id.*

203. *Id.* at 81.

court's focus on important policy issues.<sup>204</sup> While issues of discrimination lie in wait, courts should not be drawn into a situation of delving back into the administrative process to determine whether or not administrative deadlines were met.<sup>205</sup>

Kenneth Culp Davis submitted, in his *Administrative Law Treatise*, "courts would experience difficulty attempting to apply the technical/policy distinction in many cases."<sup>206</sup> As a matter of general theory, Davis is most likely correct in arguing that such a distinction is difficult, if not impossible, to ascertain. Such a distinction, however, provides some structure to the fact-sensitive doctrines of exhaustion and waiver.<sup>207</sup> While determining what is "policy-based" and what is a "technical defect" is difficult, due to unclear boundaries existing between the two, the dichotomy provides a structure that removes the need for unguided fact-sensitive inquiries over whether or not there was a waiver of the exhaustion requirement.<sup>208</sup> The structure developed by the D.C. Circuit limits some of the confusion as to when exhaustion is required and when it is waived, thus creating a more predictable system.<sup>209</sup> Further, this dichotomy limits court review to cases with policy-based implications. Thus, court review is restricted to important issues of policy and courts are excluded from examining issues where the administrative agency failed to follow through with technical defects that could easily have been examined without court intervention.<sup>210</sup>

#### B. *Unjustified Criticism of Ester v. Principi*

Early negative commentary regarding *Ester* appears unjustified. Major Jeannine C. Hamby, an Army lawyer, stated:

The Court of Appeals for the Seventh Circuit decision in *Ester* may discourage federal agencies from investigating substantively meritorious discrimination claims. Its requirement that an agency raise any timeliness issue during the administrative process may unintentionally cause EEO counselors to focus only on the procedural aspects, rather than the merits, of the claims. The EEO counselor may then dismiss otherwise meritorious claims that deserve investigation. The administrative process is designed to resolve claims at the

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204. *See generally id.* at 80-81.

205. *See id.*; *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987).

206. DAVIS & PIERCE, JR., *supra* note 37, § 15.8 (3d ed. Supp. 2000).

207. *See Time Warner*, 144 F.3d at 80.

208. *See id.*

209. *See id.*

210. *See id.* at 80-81.

lowest level, with a view towards doing the right thing. Whether the court's decision in *Ester* hurts or helps the system remains to be seen.<sup>211</sup>

This reasoning is flawed in that *Ester* asserts an entirely different goal than Hamby suggests. The Seventh Circuit in *Ester* affirmed that it is not attempting to rewrite the established principle that a complaint may be accepted and investigated without a waiver of the untimeliness defense.<sup>212</sup> Judge Williams specifically stated: "Nor does our rule prevent an agency from deciding the merits of a complaint at the risk of losing a timeliness objection; the agency is free to find the complaint untimely, and nonetheless proceed to address the merits of the case."<sup>213</sup> An agency that wishes to address an untimely complaint on the merits in an attempt to redress the grievances of a complainant but wants to limit its involvement in the matter to the administrative process may specifically state that a complaint is untimely but provide a supplementary decision on the merits.<sup>214</sup> This insures that there is a specific finding of untimeliness if the complainant attempts to pursue the matter beyond the administrative process.<sup>215</sup>

The suggestion that *Ester* provides the overbearing requirement on EEO counselors of requiring a check of two filing dates is equally perplexing. Hamby appears concerned that *Ester* will require "[l]abor counselors [to] be vigilant to preserve timeliness issues during the administrative processing of complaints."<sup>216</sup> An EEO counselor would be required to check two dates: when the complainant initiated contact and when the administrative complaint was filed.<sup>217</sup> This minimal work for the EEO counselor is best done at the administrative level and the postponement of the issue until a case reaches district court only results in the agency failing to examine timely filing under its own deadlines, failing to use its expertise in federal Title VII cases, and creating a surprise defense against the plaintiffs.<sup>218</sup> Concerning the need for EEO counselors to be "vigilant," the administrative process will be improved by requiring counselors to develop fuller records, and thus reviewing courts will be provided a better assessment of the potential strengths and weaknesses of a particular claim prior to the case reaching them.<sup>219</sup>

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211. Jeannine C. Hamby, *Assert Timeliness Issue Early to Preserve the Defense in Title VII Cases*, 2001NOV ARMY LAW. 35, 36 (2001).

212. *Ester v. Principi*, 250 F.3d 1068, 1072 n.1 (7th Cir. 2001).

213. *Id.*

214. *See id.*

215. *See id.*

216. Hamby, *supra* note 211, at 36.

217. *See* 29 C.F.R. §§ 1614.105(a)(1), 1614.106(b) (2001).

218. *See Ester*, 250 F.3d at 1072; *Tinnin v. Danzig*, No. CIV. A. 99-1153, 2000 WL 190255, at \*3 (E.D. Pa. Feb. 4, 2000).

219. *See id.*

Lastly, Hamby argues that *Ester* does not identify the time by which the agency must identify the complaint as untimely and that “[f]ailure to raise a timeliness defense early may waive the Army’s ability to raise this potentially dispositive issue in federal court.”<sup>220</sup> This conclusion is at tension with the very holding of *Ester*: “[W]hen an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit.”<sup>221</sup> The use of the phrase “decides the merits” indicates that the agency must address the issue of untimely filing at a time prior to a final decision of the agency on the merits or as part of the agency’s final decision.<sup>222</sup> The plain language of the holding in *Ester* suggests that a finding, as part of an agency’s final decision, on the timeliness issue, will suffice to preserve the untimeliness defense in later court proceedings.<sup>223</sup>

C. *Problems with the approaches taken by other Circuits*

The reasoning provided by circuits outside of the Seventh Circuit is not sufficiently grounded in basic principles of administrative law and, therefore, the result is faulty and contains incomplete legal reasoning and conclusions. The Fifth Circuit stated that a “specific finding” of timeliness must be made by the administrative agency to waive the defense of untimeliness in later court proceedings.<sup>224</sup> The Fifth Circuit claimed this holding was appropriate based on the possibility that an agency inadvertently overlooked a timeliness issue.<sup>225</sup> Such a conclusion is flawed, however, because it fails to require determinations, within the province of the agency, to be left to agency discretion.<sup>226</sup> For agencies to be allowed to ignore the untimeliness defense and then raise the defense in district court is to allow agencies to prejudice plaintiffs with defenses in district court that were not implicated as part of the administrative process.<sup>227</sup> To follow the Fifth Circuit’s holding in *Rowe* is to allow for agency inefficiency and open the door to continued claims of discrimination reaching the district courts without mention of the untimeliness defense. Thus, the result of the Fifth Circuit approach is to force courts to rule on the untimeliness defense when untimely filing issues could have been evaluated and decided at the administrative level.<sup>228</sup>

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220. Hamby, *supra* note 211, at 36.

221. *Ester*, 250 F.3d at 1071-72.

222. *Id.* at 1072.

223. *See id.*

224. *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992).

225. *Id.*

226. *See* *McKart v. United States*, 395 U.S. 185, 194 (1969).

227. *Id.*

228. *See Ester*, 250 F.3d at 1072.

The D.C. Circuit in *Bowden* stated that an agency's decision on the merits, along with consideration of equitable principles, determines whether there is a waiver of the untimeliness defense when the defense was not raised as part of the administrative process.<sup>229</sup> Based on the time and effort that had already been put into the process by the plaintiff after the agency had ruled on the merits of the complaint, it would have been inequitable to find *Bowden* had not exhausted his administrative remedies.<sup>230</sup> The D.C. Circuit's analysis fails to provide a definitive answer to whether the administrative agency waives the untimeliness defense when it is not raised at the administrative level. The D.C. Circuit's evaluation of the untimeliness defense is narrowly applicable to a claimant who was forced to have venue changed several times prior to the untimeliness defense being raised.<sup>231</sup> Such analysis has little practical implication as the defense is most commonly raised upon a case being presented to the district court from the administrative agency.<sup>232</sup>

Because the D.C. Circuit's analysis has such limited applicability, it does not provide needed structure to the issue of when the untimeliness defense is waived.<sup>233</sup> It also provides a false impression that just because a complainant has not gone on a "jurisdictional merry-go-round" the agency has not waived the untimeliness defense.<sup>234</sup> The D.C. Circuit stated its holding was limited to the facts of the case, but a defendant agency could easily distinguish a case based on having not changed jurisdiction three times.<sup>235</sup> Without the D.C. Circuit laying out a rule that states under what circumstances such a waiver occurs, it has developed an unreliable and unnecessarily *ad hoc* jurisprudence regarding the untimeliness defense.<sup>236</sup> In contrast, the "*Ester* plus 'technical defect'" analysis establishes a definite rule where the agency must examine timeliness issues or waive the untimeliness defense.

The determination by the Ninth Circuit, that there must be a finding of discrimination by the agency to establish a waiver of the untimeliness defense, is based on questionable reasoning.<sup>237</sup> The Ninth Circuit was concerned that to find waiver of the untimeliness defense would affect the ability of an agency to investigate complaints during the administrative process.<sup>238</sup> An agency might

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229. *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997).

230. *Id.*

231. *See id.*

232. *See supra* notes 24-30.

233. *See supra* note 236 and accompanying text.

234. *Bowden*, 106 F.3d at 439.

235. *Id.*

236. *Id.* ("[W]e do not intend to create a sweeping principle concerning waiver of administrative time limits under Title VII.").

237. *See Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985).

238. *Id.*

limit its analysis to procedural issues and not focus on the merits of a complaint.<sup>239</sup> However, to require there be a finding on the merits of discrimination for there to be a waiver of the untimeliness defense blends together the merits of a discrimination claim with the procedural requirements placed upon a complainant to complete the administrative process. If an agency addresses a complaint on the merits, the subsequent district court considerations should be based solely on whether the agency was correct in its assessment that no discrimination occurred. There is no basis for changing the analysis concerning a procedural issue, such as untimely filing, because a certain finding was made on the merits.<sup>240</sup>

Similarly, the Alabama District Court in *Koschoff* based its analysis on an interwoven fabric of the merits and the procedural issue of untimeliness.<sup>241</sup> The district court refused to give up its quest to have the defendant raise the untimeliness defense.<sup>242</sup> An agency's decision not to raise an untimeliness defense is within the province of the agency during the administrative process.<sup>243</sup> Therefore, the court in *Koschoff* trounced upon the intricacies of the administrative process by making an inquiry, in its district court decision on the merit of a discrimination claim, into the procedural deficiencies of the claimant during the administrative process.<sup>244</sup>

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239. *Id.*

240. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

241. *Koschoff v. Henderson*, 109 F. Supp. 2d 332, 345 (E.D. Pa. 2000).

242. *Id.* at 344-45.

243. *See McKart v. United States*, 395 U.S. 185, 195 (1969).

244. *See Sampson v. Civiletti*, 632 F.2d 860, 862-63 (10th Cir. 1980).

## V. CONCLUSION

In the final analysis, courts often do not recognize the circuit split implicated in this Comment.<sup>245</sup> Courts fail to distinguish between a situation where the administrative agency made a determination that a complaint was untimely and a situation where the administrative agency made a determination based on the merits of a complaint without mention of untimeliness.<sup>246</sup> When an administrative agency makes a determination on the merits without mentioning untimely filing, the agency has moved beyond a complainant's compliance with administrative deadlines and has implicitly found a timely filing to have been made.<sup>247</sup> However, when a specific finding of untimeliness is made, the defense of untimeliness is preserved.<sup>248</sup> Courts, by making this distinction, insure that federal administrative agencies realize that a complaint must be found untimely during the administrative process or there is a waiver of the untimeliness defense.<sup>249</sup>

*Ester* stands for an evolution in jurisprudence surrounding the untimeliness defense. The case, decided in May, 2001, sends a strong message that there needs to be a differentiation between a case where there is a specific finding as to whether administrative deadlines were timely met, and a case where no administrative finding was made regarding timely exhaustion of administrative remedies. *Ester* provides this formulation by basing its analysis in fundamental principles of administrative law. These principles appear to have become remote considerations in the reasoning provided by other courts in determining whether the untimeliness defense has been waived. In addition, the "technical defect" analysis from *Time Warner Entertainment Co.* furthers this reasoning by providing that procedural matters, such as timely filing, should be resolved at the administrative level or the matter is deemed waived—more important issues of policy are reserved for district court

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245. See *Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001) (noting the circuit split at issue when there is no mention of the untimeliness defense at the administrative level).

246. See *Williams v. West*, No. C 95-2456SI, C 95-2547 SI, 1997 WL 811777, at \*3-4 (N.D. Cal. Dec. 16, 1997) (following *Boyd* without noting that there was a decision on the merits in the case at issue, but not in *Boyd*). See also *Briones v. Runyon*, 101 F.3d 287, 290 (2d Cir. 1996). The Second Circuit in *Briones* followed the analysis in *Girard* and found that when a claimant fails to meet the statutory deadline to bring a complaint, the express finding by the EEOC of timeliness precluded the district court from ruling the case untimely. The court stated that a "governmental agency defendant may not have 'a second bite at the apple' by arguing lack of timely filing in federal court after failing to challenge an EEOC determination that the complaint was timely filed." *Id.* at 291 (following *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995)).

247. See generally *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (noting that court review of administrative decisions is limited to examination of the factors the administrative agency considered).

248. See *supra* notes 69-99.

249. See *Ester*, 250 F.3d at 1073.



assessment. The hopeful goal of this Comment is that courts recognize the issues herein and provide an analysis grounded in basic principles of administrative law.

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\* J.D. Candidate, Saint Louis University School of Law, 2002; I would like to thank Professor Eric Claeys and Emily Rushing Kelly for their attention and suggestions. This Comment is dedicated to my mom, dad and Emma for their love and support.

