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Employment Discrimination Laws in Nebraska: A Procedural Labyrinth

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I. INTRODUCTION

The employment discrimination laws in Nebraska have created
a procedural labyrinth. Federal, state, and local antidiscrimination laws provide a variety of procedural routes to attack the Minotaur of discrimination, but the routes are intricately intertwined and have many blind alleys. This is the second part of an Article that explores the labyrinth. Part one described the procedural provisions of the state and local fair employment practices laws in Nebraska and discussed the interrelationship of those laws. This part explores another corridor of the labyrinth. It first describes the procedural provisions of Title VII; then it discusses the interrelationship of Title VII with the state and local antidiscrimination laws in Nebraska. Finally, the Article concludes by considering

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2. When the Minotaur [a monster who was half bull and half human] was born Minos did not kill him. He had Daedalus, a great architect and inventor, construct a place of confinement for him from which escape was impossible. Daedalus built the Labyrinth, famous throughout the world. Once inside, one would go endlessly along its twisting paths without ever finding the exit. There was no possible way to escape.


6. See Willborn, supra note 2.


procedural strategy in employment discrimination cases in Nebraska.

II. TITLE VII PROCEDURES

"Title VII is the core of employment discrimination law."9 It is the most comprehensive of the federal laws prohibiting employment discrimination10 and has had a hegemonic effect on the formation and interpretation of state and local antidiscrimination laws.11 This section will describe the procedural provisions of Title VII. The focus will be on the relationship of Title VII to Nebraska's state and local fair employment practices laws.12

A. Coverage13

Title VII prohibits employment discrimination because of a person's race, color, religion, sex, or national origin.14 Every state and local fair employment practices law in Nebraska contains broader

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11. Title VII, for example, was used as a model when the Nebraska FEPA was drafted. See, e.g., Floor Debate on L.B. 656, at 1970 (June 14, 1965) (statement of Sen. Danner) ("the language in this bill . . . is taken from the national guidelines of [Title VII]"); id. at 1972 (statement of Sen. Kjar) ("the committee tried to keep [the bill in] conformity with [Title VII] just as nearly as possible"); id. at 1972-74, 1976, 1980, 1982-83 (statements of Sen. Danner) (several sections of the Nebraska FEPA are taken from Title VII). In addition, the Nebraska FEPA has been interpreted to conform to Title VII. See, e.g., Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 237, 214 N.W.2d 471, 474 (1976). See also Sullivan & Zimmer, The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?, 27 S.C.L. Rev. 1, 8 (1975) (interpretation of Title VII should guide interpretation of the South Carolina Human Affairs Law).
13. This Article focuses on the relationship between Title VII and the state and local antidiscrimination laws in Nebraska. Consequently, it will not consider a host of coverage issues that might arise under Title VII. See Willborn, supra note 2, at 231 n.36.
prohibitions than Title VII.15

The prohibitions of Title VII apply to employers,16 labor organizations,17 and employment agencies.18 Employers are defined in Title VII as persons having fifteen or more employees.19 Thus, Title VII reaches basically the same employers covered by the Nebraska Fair Employment Practices Act (FEPA);20 the local ordinances in Nebraska reach smaller employers than do Title VII and the Nebraska FEPA.21 Title VII covers basically the same labor organizations22 and employment agencies23 as the Nebraska FEPA and the local ordinances.

B. The Charge24

The Title VII procedure begins, as do all of the antidiscrimination procedures in Nebraska,25 with the filing of a charge.26 The

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15. See Willborn, supra note 2, at 230.
16. Title VII, §§ 703(a), (d), 704(a), (b), 42 U.S.C. §§ 2000e-2(a), (d), 2000e-3(a), (b) (1976).
17. Title VII, §§ 703(c), (d), 704(a), (b), 42 U.S.C. §§ 2000e-2(c), (d), 2000e-3(a), (b) (1976).
19. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." Title VII, § 701(b), 42 U.S.C. § 2000e(b) (1976).
20. The Nebraska FEPA also defines "employer" as "a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." NEB. REV. STAT. § 48-1102(2) (Cum. Supp. 1982). The Nebraska FEPA definition, however, is broader than the Title VII definition. Title VII's definition is restricted to industries "affecting commerce," while the Nebraska FEPA definition is not. See EEOC Decisions, No. 71-351 (Oct. 13, 1970); EEOC Decisions, No. 71-359 (Oct. 22, 1970); EEOC Decisions, No. 71-2240 (May 25, 1971). In addition, the Nebraska FEPA, but not Title VII, covers the State of Nebraska, governmental agencies, and political subdivisions "regardless of the number of employees." NEB. REV. STAT. § 48-1102 (Cum. Supp. 1982).
21. See Willborn, supra note 2, at 231 & nn.41-42.
24. There are a multitude of timeliness issues that are outside the scope of this Article. See Willborn, supra note 2, at 232 n.47.
25. See Willborn, supra note 2, at 231 & n.44.
charge may be filed with the Equal Employment Opportunity Commission (EEOC) by an aggrieved person, by any person on behalf of an aggrieved person,27 or by an EEOC Commissioner.28 To qualify as a charge, a statement need only "identify the parties and . . . describe generally the action or practices complained of."29

In Nebraska,30 a charge must be filed with a state or local agency before it can be filed with the EEOC.31 The EEOC filing cannot occur until 60 days after the state or local filing or until the state or local agency terminates its proceedings.32 The charge must be filed with the EEOC within 300 days of the alleged discriminatory act or within 30 days of the time the state or local agency terminates its proceedings, whichever is earlier.33

A charging party, then, must file a charge with a state or local agency within 240 days of the alleged discriminatory act to be assured of preserving her Title VII cause of action. If a charging party files with a state or local agency 241 days after the alleged discriminatory act and the agency does not terminate its proceed-

27. Id. See EEOC Procedural Regulations, 29 C.F.R. § 1601.7 (1982).
30. Nebraska is a "deferral" state because it has state and local laws prohibiting unlawful employment practices and state and local agencies with the authority to grant relief from such practices. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). In a nondeferral state, a charging party must file a charge with the EEOC within 180 days of the alleged discriminatory act. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976).
31. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). The Supreme Court has approved a dual filing procedure which allows a charging party to complete the filing requirement by filing a charge with the EEOC only. Upon receipt of the charge, the EEOC forwards it to a state or local agency and formally files the charge after 60 days have passed or after the EEOC receives notification that the state or local agency has terminated its proceedings, whichever occurs first. Love v. Pullman Co., 404 U.S. 522 (1972). See EEOC Procedural Regulations, 29 C.F.R. § 1601.13(a) (1982). The EEOC has sanctioned a similar dual filing procedure when the charge is initially filed with a state or local agency. EEOC Procedural Regulations, 29 C.F.R. § 1601.13(b) (1982).
32. Title VII, § 706(c), 42 U.S.C. § 2000e-5(e) (1976). The 60-day deferral period is extended to 120 days during the first year after the effective date of an applicable state or local law. Id.
33. Title VII, § 706(e), 42 U.S.C. § 2000e-5(e) (1976). Theoretically, the time limit for filing a charge with the EEOC could expire as soon as 30 days after the alleged discriminatory act. If the charging party files a charge with a state or local agency on the day the alleged discriminatory act occurs and the agency immediately terminates its proceedings, a charge must be filed with the EEOC within 30 days to be timely. Id.
ings in less than 60 days, the charging party cannot file with the 
EEOC until 301 days after the alleged discriminatory act.\textsuperscript{34} That is 
too late.\textsuperscript{35} On the other hand, a charging party may be able to pre-
serve her Title VII cause of action if she files a charge as late as 300 
days after the alleged discriminatory act. The charging party must 
initially file with a state or local agency, but if the state or local 
agency immediately terminates its proceedings,\textsuperscript{36} a charge filed 
immediately thereafter with the EEOC would be timely.\textsuperscript{37}

\textsuperscript{34} Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976) (a charge cannot be filed with 
the EEOC until 60 days after filing with the state or local agency).

\textsuperscript{35} Title VII, § 705(e), 42 U.S.C. § 2000e-5(e) (1976). \textit{See} Mohasco Corp. v. Silver, 

\textsuperscript{36} The state or local agency may immediately terminate its proceedings because 
the charge is untimely under state or local law. \textit{See} Neb. Rev. Stat. § 48- 
1118(2) (Cum. Supp. 1982) (180-day time limit for filing charge under Ne-
for filing charge under Omaha FEPO); Lincoln, Neb., Mun. Code § 11.02.060 
(1980) (180-day time limit for filing charge under Lincoln FEPO); Grand Is-
under Grand Island FEPO). The state or local charge need not be timely in 
order to preserve the 300-day time limit for filing with the EEOC in a deferral 
Statutory Law, supra} note 12, §§ 3.6(d)(2)-(3), at 290-96.

A riskier approach to this issue is sanctioned by the EEOC's procedural 
guidelines. The EEOC does not require a charging party to file a charge with 
a state or local agency if the state or local charge is "apparently untimely." 
Instead, the EEOC will formally file the charge upon receipt and treat it as 
timely if it is received within 300 days of the alleged discriminatory act. 
EEOC Procedural Guidelines, 29 C.F.R. § 1601.13 (a) (3) (1982). This approach 
is riskier than the approach suggested above because the 300-day time limit is 
an exception to the 180-day time limit in nondeferral states and, technically, 
the exception is only available if the charging party has "initially instituted 
proceedings with a State or local agency." Title VII, § 706(c), 42 U.S.C. 
§ 2000e-5(e) (1976). Thus, a respondent could argue that the EEOC filing is 
untimely because the 300-day exception to the normal 180-day time limit does 
not apply.

Until recently, charging parties before the NEOC had to follow the EEOC 
approach, despite its riskiness. The NEOC refused to accept untimely 
charges; it would not allow charging parties to file them. Consequently, a 
charging party could not institute state proceedings that would terminate 
quickly because of untimeliness. \textit{But see} Title VII, § 706(c), 42 U.S.C. § 2000e- 
5(c) (1976) ("If any requirement for the commencement of [state and local] 
proceedings is imposed . . . other than a requirement of the filing of a written 
and signed statement of the facts . . ., the proceeding shall be deemed to 
have been commenced . . . at the time such statement is sent by registered 
mail to the appropriate State or local authority."). The NEOC has wisely dis-
continued its practice of refusing to accept untimely charges. NEOC Mem-
andum (February 23, 1983) (on file with Nebraska Law Review). The NEOC 
should further assist charging parties in preserving Title VII claims by imme-
diately terminating its proceedings upon receipt of an untimely charge.

\textsuperscript{37} Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976) (a charge may be filed with 
the EEOC upon the termination of state or local proceedings).
C. The EEOC Administrative Process

Upon receipt of a charge, the EEOC notifies the respondent\(^8\) and begins an investigation.\(^39\) As a result of the investigation, the EEOC decides whether to: (1) dismiss the charge, (2) make a determination that there is no reasonable cause to believe Title VII has been violated, or (3) make a determination of reasonable cause to believe Title VII has been violated.

The EEOC may decide to dismiss the charge for a number of reasons.\(^40\) The EEOC may dismiss a charge, for example, if the charge was not timely filed\(^41\) or if the charging party fails to cooperate with the EEOC\(^42\) or cannot be located.\(^43\) The EEOC may even dismiss a charge if the charging party fails to accept a reasonable settlement offer.\(^44\) An EEOC dismissal, though, is accompanied by a right-to-sue letter.\(^45\) The right-to-sue letter authorizes the charging party to file a Title VII lawsuit and, hence, obtain a de novo review of her claim in federal court.\(^46\)

If the EEOC does not dismiss the charge, it will make a reasonable cause determination.\(^47\) If the EEOC determines that there is

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38. Title VII, § 706(b), 42 U.S.C. § 2000e-5(b) (1976). The notice must be served on the respondent within ten (10) days of the filing of the charge. \(\text{id.}\) The right of a charging party to file a private lawsuit under Title VII is not prejudiced by the failure of the EEOC to provide timely notice to the respondent. \(\text{See 118 Cong. Rec. 7167 (1972)}\) ("[I]t is not intended . . . that failure to give notice of the charge to the respondent within 10 days would prejudice the rights of the [charging party]"); \(\text{see also Heath v. D.H. Baldwin Co., 447 F. Supp. 495, 501-02 (N.D. Miss. 1977); Fesel v. Masonic Home, 428 F. Supp. 573, 576 (D. Del. 1977); McAdams v. Thermal Indus., 428 F. Supp. 156, 159-60 (W.D. Pa. 1977).}\)

39. Title VII, § 706(b), 42 U.S.C. § 2000e-5(b) (1976). EEOC regulations contemplate charge dismissals before investigation where the charge appears unmeritorious on its face or as amplified by the statements of the charging party. \(\text{EEOC Procedural Regulations, 29 C.F.R. § 1601.19(a) (1982).}\)


42. \(\text{EEOC Procedural Regulations, 29 C.F.R. § 1601.19(c) (1982).}\)

43. \(\text{Id. at § 1601.19(d).}\)

44. \(\text{Id. at § 1601.19(e). The EEOC Compliance Manual indicates that dismissal for failure to accept a settlement offer should be used only in "extraordinary circumstances" where the "charging party's demands are excessive and the charging party is defiant of the Commission and respondent's effort to reach a settlement." [1982] EEOC Compl. Man. (BNA) § 4.9(a).}\)

45. \(\text{EEOC Procedural Regulations, 29 C.F.R. §§ 1601.19(f), 1601.28(b)(3) (1982).}\)


47. Title VII, § 706(b), 42 U.S.C. § 2000e-5(b) (1976). A settlement, of course, can occur at any time during the administrative process. Discussion of settle-
not reasonable cause to believe Title VII has been violated, it will dismiss the charge. Once again, the EEOC will issue a right-to-sue letter when it dismisses the charge. As a result, the charging party may obtain a de novo review of her charge.

If the EEOC determines that there is reasonable cause to believe Title VII has been violated, it will attempt to conciliate the matter. Conciliation is a specialized form of settlement negotiation. It is different from ordinary settlement negotiations because the government is a party. Since a third party is involved, conciliation can fail even where the charging party and respondent settle their dispute, and conciliation can be successful even in the absence of a settlement between the charging party and the respondent. If the EEOC, respondent, and charging party execute a conciliation agreement, the case is at an end. The conciliation agreement is an enforceable contract. If the charging party does not enter into a conciliation agreement, the EEOC will issue a de novo review of her charge.

See infra notes 51-58 and accompanying text.

49. See supra notes 45-46 and accompanying text.
50. EEOC Procedural Regulations, 29 C.F.R. §§ 1601.19(f), 1601.28(b) (3) (1982).
52. Conciliation under the state and local procedures is also a specialized form of settlement negotiation. See Willborn, supra note 2, at 237-38.
53. "Ordinary" settlements between the parties can occur at any time. The parties may resolve their dispute before the aggrieved party files a charge. After the filing of a charge but before a reasonable cause determination, the EEOC may encourage settlements between the parties by agreeing to discontinue the processing of a charge or consenting to the withdrawal of a charge. EEOC Procedural Regulations, 29 C.F.R. §§ 1601.10, 1601.20 (1982). The parties may also settle after a reasonable cause determination. See infra note 56 and accompanying text. Private settlements after commencement of the EEOC's administrative process, however, entail risks for respondents. The EEOC may file an action against the respondent based either on the charging party's charge, Title VII, § 706(f), 42 U.S.C. § 2000e-5(f) (1976) or, if that charge has been prejudiced or withdrawn, on a Commissioner's charge. EEOC Procedural Regulations, 29 C.F.R. § 1601.20(a) (1982). See supra note 8.
54. See Willborn, supra note 2, at 237 & nn. 75-76.
right-to-sue letter and the charging party may file a lawsuit.

In summary, the EEOC administrative process requires the issuance of a right-to-sue letter in the following situations: (1) after the dismissal of a charge, (2) after a determination of no reasonable cause, or (3) after a determination of reasonable cause and the failure of conciliation. In addition, a charging party may request a right-to-sue letter prior to completion of the administrative process. The EEOC will issue a right-to-sue letter upon request 180 days after the filing of the charge and may issue a right-to-sue letter upon request prior to 180 days after the filing of the charge if the EEOC administrative process cannot be completed promptly.

D. Federal Court Litigation

The charging party must file an action in court within 90 days of receiving a right-to-sue letter. The lawsuit, usually in federal court, is not constrained by the EEOC processes, but rather is a de novo hearing of the charging party’s claim. The EEOC investi-

60. See supra notes 40-41 and accompanying text.
61. See supra notes 42-46 and accompanying text.
62. See supra notes 47-48 and accompanying text.
63. EEOC Procedural Guidelines, 29 C.F.R. § 1601.28(a) (1) (1982).
64. EEOC Procedural Guidelines, 29 C.F.R. § 1601.28(a) (2) (1982).
67. McDonnell Douglas Corp. v. Green, 411 U.S. at 798-99 ("[W]e will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts.").
68. "[C]ourt actions under Title VII are de novo proceedings . . . ." Id. at 799 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971)).
gates and conciliates, but the federal courts retain the primary fact-finding and enforcement responsibilities under Title VII, an adverse determination by the EEOC does not prejudice a charging party's rights in court.

There are only two prerequisites to court action: (1) the timely filing of a charge with the EEOC, and (2) the timely filing of a court action upon receipt of a right-to-sue letter. Most other procedural issues at this stage are governed by the Federal Rules of Civil Procedure.

III. COORDINATION OF FEDERAL WITH STATE AND LOCAL PROCEDURES

A. Administrative Coordination

A charging party in Nebraska may be able to file her charge with as many as three agencies. In Omaha, Lincoln, or Grand Island, a charge may be filed with the federal, state, or local enforcement agency. In other parts of Nebraska, a charge may be filed with the EEOC or the Nebraska Equal Opportunity Commission (NEOC). This section will discuss the administrative coordination between the EEOC and state and local agencies.

A charge must be filed with a state or local agency before it can formally be filed with the EEOC. A charging party may, however, initially file her charge with the EEOC. The EEOC will hold the charge in "suspended animation" and defer the charge.

See generally supra note 2, at 238-43 (adversarial hearings take place before administrative hearing officers under the Nebraska FEPA and Omaha FEPO and before the Lincoln Commission under the Lincoln FEPO).

The EEOC has no offices in Nebraska. As a result, few charges are filed initially with the EEOC. Rather, charges are filed with the EEOC's agents within the state—the NEOC, Omaha Commission and Lincoln Commission. See infra notes 77 & 83-87 and accompanying text.

See supra note 31.
to a qualified state or local agency. The EEOC will then commence its proceedings at the time a charge could formally be filed with the EEOC. The EEOC defers charges arising in areas of Nebraska other than Omaha and Lincoln to the only qualified state or local agency—the NEOC. For charges arising in Omaha and Lincoln, there are two qualified state or local agencies to which the EEOC could defer—the NEOC and the local commission. Except for charges filed within the jurisdiction of the Omaha Commission, the EEOC defers charges initially filed with the EEOC to the NEOC. Charges within the jurisdiction of the Omaha Commission are deferred to the Omaha Commission.

Rather than filing a charge with the EEOC, a charging party may initially file her charge with a state or local agency. The NEOC, Omaha Commission, and Lincoln Commission are agencies as a result, if the charging party requests that the charge be filed with the EEOC as well as the local agency, the

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77. The EEOC must defer to a state or local agency when there is "a State or local law [1] prohibiting the unlawful employment practice alleged and [2] establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings." Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). State or local agencies which satisfy these requirements may be designated by the EEOC as "706 Agencies." 29 C.F.R. § 1601.70 (1982). The NEOC and Omaha Commission are 706 Agencies for all Title VII charges, 29 C.F.R. § 1601.74(a) (1982), and the Lincoln Commission is a 706 Agency for most Title VII charges. 29 C.F.R. § 1601.74(a) & n.8 (1982) (the Lincoln Commission is a 706 Agency for all charges except a charge by an "applicant for membership" alleging a violation of Section 703(c)(2) of Title VII and charges alleging that a "joint labor-management committee" has violated Section 704(a) or 704(b) of Title VII). The Grand Island Commission is not a 706 Agency.


79. The EEOC will formally file the charge 60 days after deferral to the state or local agency, upon termination of the state or local proceedings, or upon waiver of the state or local agency's right to exclusively process the charge, whichever is earliest. 29 C.F.R. § 1601.13(a)(5)(ii) (1982).

80. The EEOC defers charges arising in Grand Island to the NEOC. Worksharing Agreement Between Nebraska Equal Opportunity Comm'n and the Equal Employment Opportunity Comm'n, ¶ III (1982) (on file with Nebraska Law Review) [hereinafter NEOC Worksharing Agreement]. The Grand Island Commission is not a 706 Agency, see supra note 77, and does not have a worksharing agreement with the EEOC. See infra notes 88-95 and accompanying text.

81. See 29 C.F.R. § 1601.70(d) (1982); NEOC Worksharing Agreement, supra note 80 at ¶ III; Letter from Walden Silva, EEOC District Director, to Lawrence Myers, NEOC Executive Director (July 8, 1982) (on file with Nebraska Law Review).


83. See supra note 77.

84. In contrast to charge-filing under Title VII, a charging party need not file with
charge will be deemed filed with the EEOC 60 days after the state or local filing, upon termination of the state or local proceedings, or upon waiver of the state or local agency's right to exclusively process the charge, whichever is earliest. As a practical matter, a charging party in Omaha or Lincoln can choose the agency in which the charge is initially processed. If she files the charge with the Omaha or Lincoln Commission, the local rather than the state agency will initially process the charge; if she files the charge with the NEOF, the state agency will initially process the charge.

A charge filed initially with the Grand Island Commission presents special problems. The Grand Island Commission meets the requirements of Title VII to be a deferral agency; however, it

the EEOC to perfect a charge under a state or local law. Consequently, if the charging party prefers to avoid the EEOC process, she can easily do so by simply refusing to file a charge with the EEOC. See infra note 109 and accompanying text.


86. If a charging party files a charge with the Lincoln Commission and requests that the charge be presented to the EEOC, the Commission notifies the EEOC. The EEOC, pursuant to its worksharing agreement with the NEOF, notifies the NEOF of the charge. NEOF Worksharing Agreement, supra note 80, at § III. Thus, both the Lincoln Commission and the NEOF hold a copy of the charge. By informal agreement, the agency initially receiving the charge—in this case the Lincoln Commission—generally processes it.

87. If the charging party initially files the charge with the NEOF in Omaha and requests that the charge be presented to the EEOC, the NEOF will notify the EEOC. NEOF Worksharing Agreement, supra note 80, at § II. The EEOC, pursuant to its worksharing agreement with the Omaha Commission, notifies the Omaha Commission of the charge. Omaha Com'n Worksharing Agreement, supra note 82, at § 3. By informal agreement, the agency initially receiving the charge—in this case the NEOF—generally processes it.

The Lincoln Commission does not have a worksharing agreement with the EEOC, although one is currently being negotiated. Telephone conversation with Gerald E. Henderson, Executive Director of the Lincoln Comm'n (September 17, 1982). As a result, if a charge is filed with the NEOF in Lincoln with a request that the charge be presented to the EEOC, the EEOC does not defer the charge to the Lincoln Commission. The NEOF, then, is the only state or local agency holding the charge and it will initially process it.

88. A local agency qualifies as a deferral agency when there is: (1) a local law prohibiting the unlawful employment practice alleged, and (2) the local agency is authorized to grant or seek relief from such practices or to institute criminal proceedings. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). See EEOC Procedural Regulations, 29 C.F.R. §§ 1601.13(a)(4)(ii), 1601.70(a) (1982). Cf. St. Aubin v. Transcon Lines, Inc., 420 F. Supp. 972, 974 (D. Neb. 1976) (a state or local agency may qualify as a deferral agency under Section 706(c) even if it is not designated a 705 Agency by the EEOC). The Grand Island Commission meets these requirements for most charges. See Willborn, supra note 2, at 227 n.11 (the Grand Island FEPO generally mirrors Title VII, but does not regulate discriminatory apprenticeship or training programs).
is not a 706 Agency and does not have a worksharing agreement with the EEOC. A charge filed with the Grand Island Commission is initially processed by the Commission. The filing satisfies the state or local filing requirement of Title VII. The charge, though, will not automatically be filed with the EEOC upon request. Rather, the charging party must physically file the charge with the EEOC to preserve her federal cause of action.

B. Issue and Claim Preclusion

Title VII clearly contemplates multiple forums to remedy employment discrimination. The Act requires deferral to an available state or local antidiscrimination agency before the federal administrative and judicial processes can be commenced. Thus, there may be a determination by a state or local tribunal before the Title VII claim has been resolved. On the other hand, because the required deferral period is quite short, there may be a Title VII determination before the state or local claim has been resolved. The Act is not clear on the effect of a state or local determination on a charging party's Title VII claim, or vice versa.

The United States Supreme Court addressed the issue in *Kremer v. Chemical Construction Corporation*. In *Kremer*, the charging party filed a charge with the EEOC. The EEOC deferred the charge to a state antidiscrimination agency. The state agency

90. Telephone conversation with William J. Sheffler, Grand Island Assistant City Attorney (April 26, 1983).
91. See *Willborn*, *supra* note 2, at 231-44.
92. See *supra* notes 30-31 and accompanying text.
93. Compare *supra* notes 83-85 and accompanying text.
94. The charge may be filed with the EEOC in person or by mail. EEOC Procedural Regulations, 29 C.F.R. § 1601.8 (1982).
95. Alternatively, the charging party could preserve her federal cause of action by filing her charge with the NEOC and requesting that the charge be presented to the EEOC. EEOC Procedural Regulations, 29 C.F.R. § 1601.13(b) (1982). See *supra* notes 83-85 and accompanying text. This route, however, may lead to timeliness problems because it could be argued that the charge cannot formally be filed with the EEOC until a period of time after the NEOC filing. EEOC Procedural Regulations, 29 C.F.R. § 1601.13(b) (1) (1982).
96. For definitions of these terms, see *Willborn*, *supra* note 2, at 246-47 & nn.158-60.
97. For the purposes of multiple forums in combating employment discrimination, see *Willborn*, *supra* note 2, at 252-55.
98. Where there are state and local antidiscrimination agencies, Title VII requires only that the charging party initially file under the State or local law, not both. Title VII, § 706(c), 42 U.S.C. § 2000e5(c) (1976).
100. 456 U.S. 461 (1982).
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investigated the charge and concluded there was no probable cause to believe that discrimination had taken place. The state agency's decision was then upheld by an administrative appeals board and a state court. The charging party then filed a Title VII action in federal district court. The Supreme Court held that the prior state court determination precluded federal court consideration of the Title VII claim.

In *Kremer*, the Supreme Court provided guidance on the preclusive effect to be accorded (1) state or local administrative proceedings and (2) state judicial proceedings. The Court stated, in dicta, that state or local administrative proceedings should not be given preclusive effect in subsequent Title VII proceedings. Section 706(b) of Title VII requires the EEOC to give "substantial weight," but not preclusive effect, to state and local administrative determinations. To avoid the anomaly of binding the federal courts to determinations that do not bind the EEOC, the Court stated that the courts are similarly not precluded by state and local administrative determinations.

In Nebraska, then, reasonable cause determinations by state and local agencies do not preclude subsequent federal or state review. In addition, decisions made by state and local agencies after a hearing do not preclude subsequent federal re-

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101. *Id.* at 464. The charging party, who was not represented by counsel at this time, did not request the informal hearing to which he was entitled. As a result, the probable cause determination was made without a hearing. *Id.* at 465. For a more complete recitation of the facts, see Note, Res Judicata, Collateral Estoppel and Title VII: Tool or Trap for the Unwary, 62 NEB. L. REV. 384 (1983).

102. The administrative appeals board held that the state agency's determination was "not arbitrary, capricious, or an abuse of discretion." *Id.* at 464.

103. The state court held that the state agency's determination was not "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," that is, that it was not "devoid of a rational basis." *Id.* at 490-91 (Blackmun, J., dissenting).

104. 456 U.S. at 465.
105. *Id.* at 466, 485.
106. *Id.* at 469-70 & n.7.
108. 456 U.S. at 470 n.7.
109. Every fair employment practices agency in Nebraska makes a reasonable cause determination during its processing of a charge. See Willborn, *supra* note 2, at 234 & n.60.
111. The Nebraska FEPA, the Omaha FEPO, and the Lincoln FEPO provide for an agency decision after an administrative hearing. See Willborn, *supra* note 2, at 238-40. The Grand Island FEPO does not provide for an administrative hearing and decision. Rather, if there is a reasonable cause determination and conciliation fails, the ordinance provides for a hearing in state district court. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981).
view, even though NEOC decisions made after a hearing do preclude subsequent state review.

State court decisions in employment discrimination cases, however, may preclude subsequent federal court review. A federal statute requires federal courts to give "the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." Kremer interpreted this statute to apply with full force in employment discrimination cases. As a result, a state court decision will preclude federal court review if: (1) it would have preclusive effect in the state courts of the state in which it was issued, and (2) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the claim or issue.

Under the Kremer analysis, some but not all Nebraska state court decisions in employment discrimination cases will preclude subsequent federal court review. The procedures in Nebraska should be sufficient to meet Kremer's "full and fair opportunity to litigate" standard. To meet the standard, Kremer required only that a state's procedures satisfy the "minimum procedural requirements" of due process. The procedures under the Nebraska antidiscrimination statutes compare favorably with the state procedures discussed in Kremer and generally satisfy the minimal Kremer standard.

112. 456 U.S. at 470 n.7 ("[U]nreviewed administrative determinations by state agencies . . . should not preclude [federal] review even if such a decision were to be afforded preclusive effect in a state's own courts.").
114. 456 U.S. at 466.
115. Kremer rejected the argument that Title VII impliedly repeals § 1738. 456 U.S. at 468-78.
116. See Note, supra note 101, at 395.
117. 456 U.S. at 481.
118. Compare Willborn, supra note 2, at 229-44 (description of procedures with Kremer, 456 U.S. at 483-84 (description of procedures under the New York antidiscrimination statute).
119. Procedures under the Omaha and Grand Island ordinances present special problems under Kremer's "full and fair opportunity to litigate" standard. Discrimination complaints may be resolved under both procedures even though the person alleging discrimination is not a party to the adjudicatory hearing.

112. 456 U.S. at 470 n.7 ("[U]nreviewed administrative determinations by state agencies . . . should not preclude [federal] review even if such a decision were to be afforded preclusive effect in a state's own courts.").
114. 456 U.S. at 466.
115. Kremer rejected the argument that Title VII impliedly repeals § 1738. 456 U.S. at 468-78. See Note, supra note 101, at 395.
117. Id. at 480-85. The Court held that the "full and fair opportunity to litigate" factor is met if the "state proceedings . . . do no more than satisfy the minimal procedural requirements of the . . . Due Process Clause." Id. at 481.
118. It should be noted that this result cannot be predicted with complete confidence. No Nebraska cases consider the preclusive effect of state or local employment discrimination decisions. Willborn, supra note 2, at 247. Consequently, application of the first Kremer factor is particularly uncertain in Nebraska.
119. 456 U.S. at 481.
120. Compare Willborn, supra note 2, at 229-44 (description of Nebraska procedures) with Kremer, 456 U.S. at 483-84 (description of procedures under the New York antidiscrimination statute).
121. Procedures under the Omaha and Grand Island ordinances present special problems under Kremer's "full and fair opportunity to litigate" standard. Discrimination complaints may be resolved under both procedures even though the person alleging discrimination is not a party to the adjudicatory hearing.

See Willborn, supra note 2, at 239, 244, 261-63, 268 n.290. Has the person alleg-
EMPLOYMENT DISCRIMINATION LAWS

Not all state court employment discrimination decisions, however, have preclusive effect in the state courts of Nebraska. Decisions of state courts under the Nebraska FEPA have preclusive effect in Nebraska, but decisions of state courts under local antidiscrimination ordinances do not have preclusive effect.\(^\text{123}\) Thus, since federal courts are to give state judgments "the same preclusive effect [they] would be given in the courts of the state from which the judgments emerged,"\(^\text{124}\) state court decisions under the Nebraska FEPA have preclusive effect in the federal courts, while state court decisions under local antidiscrimination ordinances do not have preclusive effect in the federal courts. As a result, a charging party\(^\text{125}\) in Nebraska may exhaust a local procedure, including the judicial review component of the procedure, and still obtain a de novo hearing in federal district court. A state court decision under the state procedure, though, would preclude subsequent federal court review.\(^\text{126}\)

The preclusive effect of a federal court decision on subsequent state court review was not addressed in \textit{Kremer}.\(^\text{127}\) As in \textit{Kremer}, the law of the system rendering the initial judgment should be applied.\(^\text{128}\) Thus, a state court should apply federal law to determine

\begin{itemize}
  \item \textit{Willborn, supra} note 2, at 266-68.
  \item Nonpreclusion favors charging parties. Charging parties can commence Title VII proceedings; respondents cannot. As a result, if a charging party loses a local proceeding, a charging party can commence a Title VII proceeding and nonpreclusion guarantees a fresh start. On the other hand, if a respondent loses a local proceeding, the respondent cannot commence a Title VII proceeding, so nonpreclusion is not as helpful.
  \item \textit{See infra} notes 153-255 and accompanying text for a more complete discussion of procedural strategy.
  \item Indeed, the author has been unable to locate any employment discrimination cases on this issue. This absence of cases may result from the Title VII deferential procedures. Title VII requires deferral to a state or local agency and prohibits the federal process from commencing for 60 days after deferral. Title VII, § 706(c); 42 U.S.C. § 2000e-5(c) (1976). In most cases, then, state proceedings should take place before federal proceedings.
  \item In \textit{Kremer}, this approach was required by statute. \textit{See supra} notes 115-16 and accompanying text. Although the source of authority is less certain, the same approach is required when determining the preclusive effect of federal judgments. \textit{Restatement (Second) of Judgments} § 87 (1982). \textit{See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure} ¶¶ 4468, 4472 (1981) [hereinafter cited as \textit{Federal Practice}]; Degnan, \textit{Federalized Res Judicata}, 83 YALE L.J. 741 (1976).
\end{itemize}
the preclusive effect of prior determinations under Title VII.\textsuperscript{129} Reasonable cause determinations by the EEOC should not preclude subsequent state or local proceedings. Reasonable cause determinations are made after an ex parte investigation by the EEOC and are by design tentative conclusions;\textsuperscript{130} the charging party and respondent are not afforded a “full and fair opportunity to litigate” before a determination is made by the EEOC;\textsuperscript{131} and the reasonable cause determination is not binding,\textsuperscript{132} and has only a weak persuasive effect,\textsuperscript{133} on the federal courts. Federal court decisions in employment discrimination cases, however, should be preclusive. Federal court judgments are generally accorded preclusive effect in state court,\textsuperscript{134} the charging party and respondent have had a “full and fair opportunity to litigate,”\textsuperscript{135} and there is nothing in Title VII which overrides the normal preclusive effect

\textsuperscript{129} Asserting in state court the preclusive effect of a federal court decision, as suggested in the text, is the simplest and most direct procedural route. Other strategies for asserting preclusion, however, are worth consideration. First, one may be able to obtain the hospitality of a federal court through removal. See, e.g., Murchison v. Seaboard Coastline R.R., 30 Empl. Prac. Dec. (CCH) ¶ 33,038 (S.D. Ga. 1982). This route will not be available, of course, if the plaintiff does not raise federal claims in the state court action. Second, the prevailing party in federal court may bring an original action in federal court to enjoin reconsideration by the state court. See International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir. 1974); Donelon v. New Orleans Terminal Co., 474 F.2d 1105 (5th Cir. 1973); American Nat'l Bank & Trust Co. v. Taussig, 255 F.2d 765 (7th Cir. 1958). See generally Vestal, Protecting a Federal Court Judgment, 42 TENN. L. REV. 635, 656-63 (1975).


\textsuperscript{135} See supra note 131.
of federal court judgments. If the ordinary requirements for preclusion are present, federal court judgments should preclude subsequent state and federal review.

In Nebraska, then, federal court decisions and state court decisions under the Nebraska FEPA preclude subsequent state and federal proceedings. State court decisions under local anti-discrimination ordinances, however, do not preclude subsequent state or federal proceedings. The legal reasons for these results are clear—statutory law overrides the normal application of preclusion principles for decisions under local ordinances, but does not for decisions under Title VII or under the Nebraska FEPA.

The policy basis is not as clear. If the Nebraska procedures are viewed in isolation from Title VII, the preclusion rules make sense. The nonpreclusion of decisions under local ordinances encourages charging parties to commence proceedings at the lowest administrative level, and yet permits NEOC consideration if the local disposition has not been satisfactory. However, since decisions under the Nebraska FEPA preclude subsequent Title VII proceedings, the primary effect of the preclusion rules is likely to be wholesale avoidance of the Nebraska FEPA procedures. A charging party can satisfy the procedural prerequisites to a Title VII suit, without risking preclusion, by commencing a local proceeding.


137. The requirements for preclusion are generally the same in state and federal courts. RESTATEMENT (SECOND) OF JUDGMENTS § 887, Comment a (1982); FEDERAL PRACTICE, supra note 128, at § 4469. Thus, issue preclusion is available if there was a final judgment on the merits, the identical issue was decided, the party against whom preclusion is to be applied was a party to or in practical control of the prior proceeding, and there was an opportunity to fully and fairly litigate the issue in the prior proceeding. See Willborn, supra note 2, at 287 & n.280.

138. See supra notes 123-37 and accompanying text.

139. See supra notes 123-24 and accompanying text. See also Willborn, supra note 2, at 268.

140. See supra notes 123-24 and accompanying text. See also Willborn, supra note 2, at 267-68.

141. Willborn, supra note 2, at 267-68.

142. See supra note 136.

143. Willborn, supra note 2, at 268.

144. See infra notes 147-49 and accompanying text.

145. Willborn, supra note 2, at 265-66.

146. Avoidance of state procedures was one of the major fears of the dissenters in Kremer. 456 U.S. at 504-05 (Blackmun, J., dissenting). See Note, supra note 101, at 404-05.

147. "[N]o [Title VII] charge may be filed [with the EEOC] before the expiration
Charging parties who prefer a federal forum to a state forum, would be likely to commence a proceeding under a local ordinance, bypass the available state proceeding (and its limiting preclusive effect), and proceed under Title VII. This result would stunt the growth and development of antidiscrimination law under the Nebraska FEPA and would conflict with the goals of multiple forums in employment discrimination cases. Moreover, this preclusion scheme is unfortunate because it sets a "trap for the unwary." The unrepresented or poorly represented charging party is unlikely to understand the complex preclusion scheme and, hence, is most likely to be prejudiced by it. The Nebraska Legislature could avoid these unfortunate results by limiting the preclusive effect of state court decisions under the Nebraska FEPA.

IV. PROCEDURAL STRATEGY IN NEBRASKA

Charging parties have a great deal of freedom when choosing the forum in which to file their claims. This section will discuss salient factors in making a forum choice and the procedural techniques for effectuating that choice.

A. Salient Factors in Making a Forum Choice

A charging party in Nebraska has either two or three forums from which to choose. In areas of Nebraska other than Omaha, Lincoln and Grand Island, federal and state forums are available. In Omaha, Lincoln and Grand Island, federal, state and local forums are available. There are a number of factors that should be considered and, when in conflict, weighed in making a forum choice.

of sixty days after proceedings have been commenced under . . . State or local law . . . ." Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976) (emphasis added). See supra note 32 and accompanying text.

148. See supra note 125.
149. For relevant factors in making a forum choice, see infra notes 154-79 and accompanying text.
150. See Note, supra note 101, at 405.
151. If the NEOC were regularly bypassed, an opportunity to conserve federal resources would be lost, local expertise and experience would be squandered, and the state's ability to experiment, and thereby contribute to the evolution of antidiscrimination procedures, would be limited. See Willborn, supra note 2, at 252 & n.192.
152. Note, supra note 101, at 405.
153. Charging parties have a distinct advantage over respondents in making forum choices. Only a charging party can initiate actions. This section, then, will focus on the choices available to charging parties. The strategies available to respondents will, of course, be discussed where appropriate.
Substantive coverage of the respective laws is, of course, an important consideration. An evaluation of this factor requires a number of related inquiries. First, substantive coverage refers to the persons regulated by the employment discrimination laws. Small employers, for example, may be covered by a local ordinance, but not by the federal or state law. Second, substantive coverage refers to the types of discrimination prohibited. Employment discrimination because a person receives public assistance, for example, is prohibited by the Lincoln FEPO, but not by federal or state law. Pregnancy discrimination is clearly prohibited by Title VII, but may not be prohibited by state law. Moreover, some laws provide more direct prohibitions than others. Assume, for example, that an employer pays a premium wage rate to married employees but not to single employees and that 10% of all married employees are female while 90% of all single employees are female. A female employee could file sex discrimination charges under the federal, state and local laws, but the state and local laws provide a more direct prohibition against marital status discrimination. The more direct prohibition clarifies the liability issue and eases proof problems. Third, substantive coverage refers to the theories of discrimination permitted. Respondents may argue that only disparate treatment, and not disparate impact, applies.

See supra notes 19-21 and accompanying text; Willborn, supra note 2, at 231 & nn.41-43.


In 1976, the United States Supreme Court held that pregnancy discrimination was not prohibited by Title VII's ban on sex discrimination. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Nebraska Supreme Court had reached the same result under the Nebraska FEPA. Richards v. Omaha Public Schools, 194 Neb. 463, 232 N.W.2d 29 (1975). Congress subsequently passed an amendment to Title VII which, in effect, reversed Gilbert by defining Title VII's sex discrimination prohibition so as to include a ban on pregnancy discrimination. 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k) (Supp. IV 1980). The Nebraska legislature has failed to enact a similar proposed amendment to the Nebraska FEPA. See L.B. 523, 88th Leg., 1st Sess. § 5(10) (1983).

“Disparate treatment”... is the most easily understood type of discrimination. The employer simply treats some people less favorable than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. ... Claims of disparate treatment may be distinguished from claims
discrimination is cognizable under the Nebraska FEPA.\textsuperscript{158} Although the argument should be rejected,\textsuperscript{159} a charging party can avoid this problem by opting for a federal forum where disparate impact theory is clearly recognized.

Another salient consideration is the number of "bites at the apple" available to a charging party. This Article argues that decisions under local ordinances do not preclude subsequent state or federal review,\textsuperscript{160} but that decisions under the Nebraska FEPA\textsuperscript{161} and Title VII\textsuperscript{162} do have preclusive effect. Thus, to maximize her number of "bites at the apple," a charging party should begin at the local level and proceed to either a state or federal level.\textsuperscript{163}

\textsuperscript{158} Although the argument has been forwarded by respondents' counsel, it has not been clearly articulated in the case law or literature. See Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 237-38, 214 N.W.2d 471, 474 (1974); NEBRASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NEBRASKA HUMAN RIGHTS AGENCIES 20 (1982); Jackson, Matheson, & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 MICH. L. REV. 1485, 1515-16 & n.168 (1981).

\textsuperscript{159} Those that argue that disparate impact theory is not available under the Nebraska FEPA base their arguments upon Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 214 N.W.2d 471 (1974) and NEBR. REV. STAT. § 48-1119(3) (1978). Duffy provides no support for the argument. Disparate impact theory was inapplicable in Duffy not because the theory was unavailable, but because the facts in the case did not present a practice or system with a disparate impact. 191 Neb. at 238, 214 N.W.2d at 474. Thus, Duffy did not reject the disparate impact theory developed by the federal courts under Title VII; rather, Duffy was in complete accord with the federal courts. 191 Neb. at 237, 214 N.W.2d at 474 (Nebraska FEPA "was designed to conform to" Title VII). See Note, Civil Rights—Employment Discrimination—Nebraska Supreme Court Finds a Need to Prove Intent in Instances of Individual Discrimination, 8 CREIGHTON L. REV. 6, 10-14 (1974). Section 48-1119(3) is a remedial section of the Nebraska FEPA. It provides that the NEOC can provide relief if it determines the respondent has "intentionally" engaged in illegal discrimination. It parrots language of Title VII, see § 706(g), 42 U.S.C. § 2000e-5(g) (1976), and provides no basis for distinguishing the discrimination theories available under the Nebraska FEPA from those available under Title VII.

\textsuperscript{160} See supra note 140 and accompanying text.

\textsuperscript{161} See supra note 139 and accompanying text.

\textsuperscript{162} See supra note 138 and accompanying text.

\textsuperscript{163} The conclusions of this Article on preclusion issues were reached despite a dearth of court opinions on the issues. A litigant, then, should re-evaluate the
The procedural frameworks of the respective systems are an additional consideration when choosing a forum. The federal and state systems, for example, provide divergent rules for class actions. Under Title VII, class actions are very common and many of the procedural issues have been resolved. In Nebraska, class actions are quite rare and even major issues remain undressed. Thus, a charging party contemplating a class action should opt for a federal forum. Similarly, the charging party should anticipate discovery and evidentiary problems and evaluate them under the procedural frameworks available, and the charging party’s counsel should evaluate her competency to operate within the respective procedural frameworks.

Charging parties should also evaluate the quality and propensities of the primary decision maker in making forum choices. Under the Omaha FEPO, the Omaha Commission is the primary decision maker; state courts have only limited review powers. Under the Lincoln FEPO and the Nebraska FEPA, state courts are conclusions as the law develops. Moreover, a litigant should recognize that the courts may disagree with the conclusions of this Article on preclusion issues.


165. See, e.g., General Tel. Co. v. EEOC, 446 U.S. 310 (1980) (Fed. R. Civ. P. 23 does not apply to EEOC class actions); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (Fed. R. Civ. P. 23 applies to private Title VII class action); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (backpay may be awarded to unnamed class members even though they have not exhausted Title VII's administrative procedures); Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978) (res judicata does not bar unnamed class members from pursuing claims that were not actually litigated in the class suit); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975) (Fed. R. Civ. P. 23(b)(2) certification is appropriate for Title VII class actions). See generally Federal Statutory Law, supra note 12, at §§ 6.1-6.9; Larson, supra note 12, at §§ 49.50-56.

166. "In only one [Nebraska] case has the [Nebraska Supreme Court] allowed damages to be recovered by a class, and in that case the class action issue was not contested." Robinson & Dahlke, Class Actions—The Nebraska Procedure, 61 Neb. L. Rev. 30, 52 (1982) (footnotes omitted).

167. No cases have addressed the relationship between the NEOC administrative process and the Nebraska class action statute. Thus, basic issues—for example, whether persons can be included in a class as unnamed class members if they have not exhausted the procedural prerequisites to suit—are unanswered.

168. "[A] plaintiff desiring to pursue [any type of] class action in Nebraska should file in federal court whenever possible because it is virtually impossible to maintain such an action in state court." Robinson & Dahlke, supra note 167, at 52.

169. Willborn, supra note 2, at 239, 243.
the primary decision makers; administrative bodies develop the record and make an initial determination, but the scope of judicial review is very broad. Under Title VII, the federal courts are the primary decision makers. Although evaluation of these decision makers depends heavily on "lawyer's lore" and may vary from year-to-year, charging parties often prefer a federal judge as the primary decision maker.

Finally, a charging party making a forum choice should consider cost and recovery factors. The charging party should evaluate prosecution costs. Under the Omaha and Grand Island fair employment practices ordinances, the city prosecutes the action on behalf of the charging party. That should reduce prosecution expenses and, hence, tends to favor the local forum. The charging party should also estimate the time necessary to resolve a charge. The backlog of the various enforcement agencies may vary considerably, as may the backlog of the respective courts. Differences in the available relief may also be important. Recovery of attorney fees, for instance, is more restricted under the Nebraska FEPA than it is under Title VII.

It is unlikely that all of these factors will point to the same forum. A charging party may, at the same time, be attracted to a federal forum because of the class action advantages and to a

170. Id. at 238-40.
171. Id. at 240-43.
172. See supra notes 65-72 and accompanying text.
174. Willborn, supra note 2, at 239.
175. Id. at 244.
176. Parties prevailing under Title VII may recover for services performed at every stage of the litigation. See, e.g., New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (proceedings before a state administrative agency); Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978) (proceedings on appeal); Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978) (hearing to determine propriety and amount of fee award). Parties prevailing under the Nebraska FEPA may recover attorney fees only if appeal is made to the district court and, perhaps, only for services performed in the district court. Willborn, supra note 2, at 242 & n.122.
177. See supra notes 164-68 and accompanying text.
local forum to maximize her "bites at the apple." There is, of course, no talismanic formula for determining the best forum. The determination can only be made by weighing factors, such as those listed above.

B. Procedural Techniques

Once a forum choice is made, a charging party must consider procedural techniques for effectuating that choice. If the choice is between a state and local forum, there are no problems. As a practical matter, in Nebraska, the place of filing will determine the agency that initially processes a charge. If the choice, however, is between a state or local forum, on the one hand, and a federal forum, on the other hand, the procedural techniques are not as simple.

1. Securing a Federal Forum

Assume that a decision is made by a charging party that a federal forum is preferable to a state or local forum. Title VII procedure requires a state or local filing as a prerequisite to a federal filing. The problem, then, is one of opting out of the state or local procedure without prejudicing the Title VII cause of action.

There are two techniques for opting out of state or local procedures that preserve the Title VII cause of action but sacrifice any state or local claims. First, a charging party can opt out by withdrawing the state or local charge. Title VII does not require as a

178. See supra notes 160-63 and accompanying text.
179. This section does not attempt to exhaustively list the factors that should be considered in making a forum choice; rather, important factors are listed and, beyond that, trust is placed in the judgment of the Nebraska bar.
180. See Willborn, supra note 2, at 245-46.
182. Although this Article argues that a Nebraska state court decision under a local law should not preclude subsequent federal consideration, there is a risk that the federal claim would be precluded. See supra note 119. The "opting out" strategies discussed in this section enable a charging party to avoid that risk.
183. The sacrifice of state or local claims may be meaningless. A federal adjudication, which is presumptively preferable, would preclude a subsequent state or local adjudication. See supra notes 128-37 and accompanying text. Thus, nothing is gained by attempting to preserve state or local claims until after a federal adjudication unless the state or local law provides an attack that is not available under federal law. If the claim, for example, is solely a sex discrimination claim, the sacrifice of state and local avenues of redress is relatively meaningless. However, if the claim could be framed as either sex or marital status discrimination, the sacrifice of state and local avenues of redress would be significant if the sex discrimination claim fails in federal court.
prerequisite to a federal action that state or local procedures be exhausted; it only requires that state or local procedures be "commenced." Thus, the technique of filing and then withdrawing a state or local charge satisfies the prerequisite to a filing under Title VII while avoiding a state or local adjudication of the claim which may prejudice the federal action. Second, the charging party can, in effect, opt out by seeking an administrative determination of "no reasonable cause" from the state or local agency. A respondent would not have standing to obtain review of such a determination, so the state or local proceeding would conclude at that point, and a state or local finding of "no reasonable cause" would not prejudice a subsequent Title VII proceeding.


185. Title VII provides state and local agencies with exclusive jurisdiction of discrimination charges for a period of 60 days. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976). It is therefore advisable to withdraw the state or local charge more than 60 days after the initial filing. Such a delayed withdrawal avoids claims that the "exclusive jurisdiction" policy of Title VII has been undermined, but see supra note 184 and accompanying text, but allows the withdrawal to occur before the federal claim has been prejudiced.

186. Agreeing to a stipulation of no reasonable cause is one way of doing this. There are two problems with that route. First, the respondent may not enter into the stipulation if it prefers a state or local forum. Second, the state or local commission may refuse to accept a stipulation of "no reasonable cause." The NEOC has refused to accept stipulations of "reasonable cause" desired by respondents (presumably to avoid an NEOC investigation) because of its statutory duty to investigate charges. NEB. REV. STAT. § 48-1118(1) (Cum. Supp. 1992). The charging party may also seek a determination of "no reasonable cause" by failing to cooperate fully in the investigation.

187. Indeed, the statute does not explicitly provide for review of reasonable cause determinations even if the party seeking review has standing. But see Willborn, supra note 2, at 234-36 (judicial review of adverse reasonable cause determinations should be available).

There is another technique for opting out of state or local procedures which entails a greater risk of prejudice to the Title VII proceeding, but which has the advantage of preserving state or local claims. The charging party can seek a continuance in state court until the federal court has had an opportunity to hear the Title VII cause of action. If successful, this would preserve any unique state or local claims. State courts, however, have a great deal of discretion in granting or denying continuances and they are not likely to be overly receptive to this type of continuance request. If the motion for a continuance is denied, a state court decision may preclude any subsequent consideration by a federal court.

Respondents desiring a federal forum have another procedural option. They may be able to remove a state action to federal court. Removal is permitted, however, only if the federal court would have original jurisdiction. A charging party, then, can avoid removal by raising only state claims in state court and reserving federal claims for a subsequently filed federal action.

2. Securing a State or Local Forum

A party may decide that a state or local forum is preferable to a federal forum. None of the state or local procedures require a filing with the EEOC before the state or local charge can be processed. As a result, the problem is not one of opting out of a procedure that must be begun. Rather, the problem is one of

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189. The charging party may also, with less risk to the federal cause of action, seek a continuance earlier in the state or local proceeding. For example, the charging party can request a delay in the reasonable cause determination or in the administrative hearing. If such a continuance request is denied (the NEOC, for example, generally denies continuance requests), the charging party still has the option of withdrawing her charge to ensure nonprejudice to her federal cause of action.

190. State or local claims which are not unique, however, would be precluded by a federal court decision. See supra notes 128-37 and accompanying text.


193. See supra note 182.


delaying the Title VII cause of action until the state or local claim has been resolved.

There are two primary methods of delaying the Title VII cause of action. First, the charging party can simply fail to file charges with the EEOC. This guarantees noninterference with the state or local cause of action, but sacrifices the Title VII cause of action. Second, the charging party can file a charge with the EEOC while actively pursuing the state or local charges. The EEOC processing of the Title VII charge does not influence the state or local proceeding. As a result, if the state or local proceedings are completed before the EEOC completes its consideration of the Title VII charge, a charging party can have her claim heard in a state or local forum while preserving any residual Title VII rights. If, however, the state or local proceedings are still in process when the EEOC issues a right-to-sue letter, the charging party must either sacrifice her Title VII claim by allowing the time limit for filing a lawsuit to expire, or file a Title VII lawsuit and risk interference with the state or local proceedings.

3. "Two Bites in One"

An alternative to sequential state or local and federal hearings is to have claims under different laws heard by one forum. Thus, a state or federal court may hear both state and federal claims si-

199. The Title VII cause of action will be lost if the EEOC filing is not made within 300 days of the alleged illegal act. Title VII, § 706(e), 42 U.S.C. § 2000-5(e) (1976). See supra notes 33-37 and accompanying text.

200. Since the goal is to delay the Title VII proceeding until the state or local proceedings have been completed, a charging party should file the state or local charges as soon as possible and the Title VII charge as late as possible. This strategy could give the state or local proceedings a 300-day headstart before the EEOC even begins to consider the charge. See supra notes 30-37 and accompanying text.

201. A charging party is likely to be more interested in preserving her Title VII cause of action if she decides to initially pursue the local, rather than the state, remedy. Determinations under a local ordinance would not have preclusive effect in a subsequent Title VII proceeding, while determinations under state statute would have preclusive effect. See supra notes 139-43 and accompanying text.

202. See supra notes 130-33 and accompanying text.

203. The advantage of this route is that it, once again, guarantees noninterference with the state or local proceedings.

204. The interference would be most direct if the federal action concluded before the state or local action. See supra notes 134-37 accompanying text. In addition, interference could result if respondents attempted to remove the state or local action and consolidate it with the federal action. A charging party could attempt to avoid interference by moving for a stay of the federal action until completion of the previously-instituted state or local proceedings. But see Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983).
multaneously. This may be the optimum solution for some charging parties. A charging party with class-wide claims of sex and marital status discrimination, for example, may prefer the state or local laws substantively\textsuperscript{205} and Title VII procedurally.\textsuperscript{206} Attempts to raise state and federal claims simultaneously raise issues of jurisdiction and exhaustion of administrative remedies.

a. \textit{Raising Title VII Claims in State Court}

One option for the innovative charging party is to have Title VII claims heard in state court along with state or local claims.\textsuperscript{207} A charging party, for instance, may want to ensure the availability of disparate impact theory,\textsuperscript{208} while operating in a procedural framework more familiar to counsel.\textsuperscript{209} This option raises two primary issues: (1) Do state courts have jurisdiction of Title VII claims? and (2) can charging parties satisfy the procedural prerequisites to a Title VII action?

State courts should have jurisdiction over Title VII claims.\textsuperscript{210} State courts of general jurisdiction generally have the power to exercise jurisdiction over cases arising under the laws of the United States, unless the power is expressly denied by Congress:

[\textit{R}]ights acquired under the laws of the United States, may be prosecuted in the United States Courts or in the State Courts . . . subject, however, to this qualification, that where a right arises under a law of the United

\textsuperscript{205} See supra text at notes 156-57.
\textsuperscript{206} See supra notes 164-68 and accompanying text.
\textsuperscript{207} It is difficult to consolidate state and local claims in a single proceeding. \textit{See} Willborn, supra note 2, at 257 & n.216. As a result, the charging party will have to decide whether to consolidate her state or her local claim with her Title VII claim.
\textsuperscript{208} See supra notes 157-59 and accompanying text.
\textsuperscript{209} See supra notes 164-68 and accompanying text.

It should be noted that state court jurisdiction over Title VII claims may increase the preclusive effect of state court decisions. Since claim preclusion applies to claims that could have been raised in a prior proceeding, \textit{see} Willborn, supra note 2, at 246-47, permitting charging parties to raise Title VII claims in state court may result in claim preclusion applying to all Title VII claims of a charging party who pursues an action in state court, whether or not the claims were actually raised in state court. \textit{See} Willborn, supra note 2, at 255-57.
States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction.\textsuperscript{211}

Congress has not expressly denied state court jurisdiction of Title VII claims. Title VII's private enforcement scheme permits a charging party to bring "a civil action . . . against the respondent named in the charge."\textsuperscript{212} The Act specifically grants jurisdiction to federal district courts,\textsuperscript{213} but it does not limit the rights of a charging party to file suit elsewhere.\textsuperscript{214} In contrast, Title VII authorizes the Attorney General in public enforcement actions\textsuperscript{215} to file only in "the appropriate United States district court."\textsuperscript{216} Statements in the \textit{Congressional Record} relating to private enforcement in the federal courts\textsuperscript{217} and sections of Title VII referring to the Federal Rules of Civil Procedure and federal statutes applicable only in federal court,\textsuperscript{218} indicate only that Congress saw the federal courts as the primary enforcers of Title VII rights. The statements and sections are not an express denial of state court jurisdiction. This result—that state courts have concurrent jurisdiction over Title VII claims—aligns enforcement of Title VII with enforcement of other federal civil rights statutes on this issue.\textsuperscript{219}

\textsuperscript{211} Chaflin v. Houseman, 93 U.S. 130, 136-37 (1876). This general rule, although ancient, see Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25-27 (1820), continues to maintain its vitality. See Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962).


\textsuperscript{215} See supra note 8.


\textsuperscript{217} See, e.g., 110 Cong. Rec. 7213 (1964) (Interpretative Memorandum of Senate floor manager; Clark and Case); 110 Cong. Rec. 7243 (1964) (statement of Sen. Case); 110 Cong. Rec. 12708, 12722 (1964) (statement of Sen. Humphrey).


\textsuperscript{219} Salem v. La Salle High School, 31 Empl. Prac. Dec. (CCH) ¶ 33,527 (C.D. Cal. 1983); Bennun v. Bd. of Governors of Rutgers, 413 F. Supp. 1274, 1279-80 (D.
Charging parties should be able to satisfy the procedural prerequisites to a Title VII action. The only procedural prerequisites are: (1) the timely filing of a charge with the EEOC, and (2) the timely filing of a court action upon receipt of a right-to-sue letter. Since the EEOC will issue a right-to-sue letter upon request any time after 180 days from the filing of a charge of discrimination, the charging party should be able to coordinate matters so that receipt of the right-to-sue letter will coincide with the time for filing an action in state court.

Thus, charging parties should be able to raise Title VII claims in state court. The state courts have jurisdiction of Title VII claims and charging parties should be able to fulfill the procedural prerequisites to suit.

b. Raising State or Local Claims in Federal Court

A charging party may also attempt to get "two bites in one" by combining state or local claims with Title VII claims in federal court. This would allow charging parties to benefit from the substantive advantages of state or local law while maintaining the procedural advantages of the federal forum. Once again, issues of jurisdiction and exhaustion of administrative remedies are raised.

Charging parties have had varying success in attempting to append state or local claims to Title VII claims under the pendent jurisdiction doctrine. A federal court has discretion to exercise jurisdiction over state or local claims in Nebraska are generally heard on the record developed before an administrative hearing officer or agency. See Willborn, supra note 2, at 240-43. Title VII claims, on the other hand, are subject to a trial de novo in court. See supra notes 67-68 and accompanying text. Consequently, in a case in which claims have been combined, the charging party should have an opportunity to present evidence on her Title VII claim.

221. EEOC Procedural Guidelines, 29 C.F.R. § 1601.28(a)(1) (1982). See also id. at § 1601.28(a)(2) (1982) (EEOC may issue right-to-sue letter upon request prior to expiration of 180 days from filing of charge if EEOC administrative processes cannot be completed promptly).
222. State or local claims in Nebraska are generally heard on the record developed before an administrative hearing officer or agency. See Willborn, supra note 2, at 240-43. Title VII claims, on the other hand, are subject to a trial de novo in court. See supra notes 67-68 and accompanying text. Consequently, in a case in which claims have been combined, the charging party should have an opportunity to present evidence on her Title VII claim.
223. See supra note 2, at 239; see supra note 205 and accompanying text.
224. See supra notes 164-68 and accompanying text.
exercise pendent jurisdiction over state or local claims if: (1) the claims "derive from a common nucleus of operative fact," and (2) Congress has not expressly or impliedly negated the exercise of pendent jurisdiction.

In employment discrimination cases, the state or local and federal claims generally arise from a common nucleus of facts. Some courts, however, have refused to exercise pendent jurisdiction over state or local claims because, in their view, Congress in enacting Title VII impliedly negated the exercise of pendent jurisdiction by limiting the available relief and by imposing certain procedural limitations. In Jong-Yul Lim v. International Institute of Metropolitan Detroit, Inc., for example, the court noted that Congress restricted Title VII plaintiffs to equitable relief only. Thus, in the court's opinion, pendent jurisdiction of claims under state or local laws providing broader relief was precluded. Even if this rationale were completely persuasive, which it is not, it

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227. Id. at 725.


231. Id. at 725.


233. See Catania, supra note 225, at 795-805.
would not undermine pendent jurisdiction of claims based on the Nebraska FEPA. The Nebraska FEPA also provides for equitable relief only, so appending the claims to a Title VII claim would not conflict with any Congressional desire to restrict available relief under Title VII. Similarly, the court in Jong-Yul Linn found an implied negation of pendent jurisdiction in certain procedural limitations of Title VII, specifically, in the denial of a right to a jury trial and in the provisions providing for the appointment of a master. Once again, even if persuasive, these procedural limitations indicate an intent to negate pendent jurisdiction only to the extent that Title VII's procedural provisions conflict with a state or local law's procedural provisions. Thus, the denial of a right to a jury trial would not negate pendent jurisdiction of claims under the Nebraska FEPA which, like Title VII, provides for equitable relief only and does not extend a right to a jury trial.

Some federal courts have declined to exercise pendent jurisdiction over state or local employment discrimination claims, not because of a lack of constitutional or statutory power, but in the exercise of their discretion. In exercising this discretion, courts should make the determination based upon “considerations of judicial economy, convenience and fairness to litigants” and should avoid needless decisions of state law. Thus, the argument agenda is established, and it is entirely appropriate for courts with the power to exercise pendent jurisdiction to do so in some cases, but not in others.

234. The remedial provision of the Nebraska FEPA is based upon, and is very similar to, the remedial provision of Title VII. Compare Neb. Rev. Stat. § 48-1119(3) (1978) with Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) (1976).

The Omaha FEPO and Lincoln FEPO provide for legal, as well as equitable, relief. Omaha Civil Rights Hearing Bd. Rules, ch. 5, rule 7-3 (1981); Lincoln, Neb., Comm'n on Human Rights, Rule and Regs. for Conducting Pub. Hearings, rule 9-2 (1982). The Grand Island FEPO is silent on the relief available. Thus, if this Jong-Yul Linn rationale is accepted, pendent jurisdiction over some local claims in Nebraska may be precluded.


237. But see Catania, supra note 225, at 906-08.

238. See Willborn, supra note 2, at 238-42.

239. See infra note 242.


If a federal court exercises pendent jurisdiction over a state or local claim, it must still address the issue of exhaustion of state or local administrative remedies. The issue may arise in one of two ways. First, the charging party may have completed the procedural prerequisites to court action, but filed the action in federal rather than state court. Second, the charging party may have filed the action in federal court without completing the state or local procedural prerequisites to suit.

As an example of the former, a charging party may pursue a claim under the Nebraska FEPA until the NEOC issues an opinion. Then, instead of appealing the decision to state district court, the charging party files a Title VII action in federal court with the state claim appended. The "appeal" to federal court should be permissible even though the Nebraska FEPA grants the state district courts exclusive jurisdiction of such appeals; state attempts to limit the power of a federal court to assert pendent jurisdiction are invalid. Charging parties have the ability to pursue this strategy because of their ability to time the receipt of federal right-to-sue letters. The strategy is attractive because it largely avoids the exhaustion issue; simply stated, the charging party has exhausted the state's procedural prerequisites to court action. Ironically, the danger of the strategy for charging parties is that they may succeed before the NEOC. If that happens, respondents may appeal to state district court. Thus, there may be two "appeals," one in state and one in federal court. Comity inter-

243. See Willborn, supra note 2, at 238-39. Similarly, a charging party may pursue a claim under the Omaha FEPO or Lincoln FEPO until the local commission issues an opinion. See Willborn, supra note 2, at 239-40.
244. See Willborn, supra note 2, at 240-43. But see infra note 251.
247. See supra notes 63-64 and accompanying text.
248. See infra notes 254-55 and accompanying text.
249. See Willborn, supra note 2, at 240-43.
250. If a charging party is totally successful before the NEOC, she has no right to appeal the NEOC decision, see Neb. Rev. Stat. § 48-1120(1) (1978) (only "ag-
ests may result in a deferral by the federal court in such a situation.251

Alternatively, a charging party may file a Title VII action in federal court, with a pendent state or local claim, without completing the state or local procedural prerequisites to suit. *Erie Railroad Co. v. Tompkins*252 requires a federal court hearing a state claim to "apply state substantive law and federal procedural law."253 A charging party's argument, then, is that the state or local prerequisites to suit are procedural,254 and consequently, that a federal court need not dismiss the suit for failure to satisfy the prerequisites.255

In sum, attempts to append state or local claims to a Title VII claim in federal court open up new and largely unexplored pathways in the labyrinth. Both major issues raised by the tactic—jurisdiction and exhaustion of remedies—are subject to uncertainty. Charging parties contemplating this strategy must weigh the potential advantages against the uncertainty.

V. CONCLUSION

The procedural labyrinth discussed by this Article is particularly treacherous. Every turn down a new tunnel, it seems, discloses a number of new paths. And many of these paths have never been explored. This Article provides some guidance through the labyrinth and alerts Nebraska practitioners to paths that merit exploration.

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251. See also OMAHA, NEB., MUN. CODE § 13-199 (1980).
252. 304 U.S. 64 (1938).
254. The distinction between procedure and substance, despite its importance, is particularly ill-defined. See *Ely, The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 603, 724 (1974) ("[w]e were all brought up on sophisticated talk about the fluidity of the line between substance and procedure"); Risinger, "Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions," 30 UCLA L. Rev. 189, 202 (1982) ("organized confusion is the official doctrine"). For a discussion of the proper classification of state or local prerequisites to suit, see Catania, *supra* note 225, at 826-32.