

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Case No. 08-1313

PATRICIA RODRIGUEZ,

Plaintiff-Appellant,

v.

WET INK, LLC, d/b/a ALPHAGRAPHICS
and d/b/a WET INK CORPORATION,

Defendant-Appellee.

**BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION FOR PLAINTIFF-APPELLANT
IN SUPPORT OF REVERSAL**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HON. RICHARD P. MATSCH, DISTRICT JUDGE

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**BRIEF OF AMICUS CURIAE
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION**

COMES NOW the National Employment Lawyers Association (“NELA”), and respectfully submits the following Amicus Brief herein:¹

STATEMENT OF INTEREST

NELA is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA’s members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect

¹ NELA gratefully acknowledges the assistance of Matthew S. Schechter, a law student at the University of Denver, and Zahra Billoo, an intern working in NELA’s offices, for their assistance in researching and preparing this Amicus Brief.

the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. Accordingly, NELA has filed amicus briefs to represent them in precedent-setting litigation, including the interpretation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.* See, e.g., *Crawford v. Metropolitan Govt. of Nashville & Davidson County*, ___ S.Ct. ___ (Jan. 26, 2009); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

SUMMARY OF ARGUMENT

NELA will limit this *amicus* brief to the first issue identified by the Plaintiff-Appellant in her opening brief: whether the district court erred in dismissing her Title VII claims because she did not file her lawsuit within ninety (90) days after the Colorado Civil Rights Division ("CCRD") issued its Notice of Right to Sue.

The district court erred in dismissing those claims for at least four reasons. First, the plain language of Title VII grants the power to issue a notice of right to sue for a Title VII claim only to the Equal Employment Opportunity Commission ("EEOC"), not to any state or local fair employment practices ("FEP") agency, such as the CCRD. Second, the EEOC did not delegate to the CCRD the authority to issue a notice of right to sue for a Title VII claim, and the CCRD was not the agent of the EEOC in investigating and issuing such notices for Title VII claims.

Third, the district court's decision, if upheld on appeal, would undermine the statutory right of the EEOC to review decisions of state and local FEP agencies and to

make its own independent determination of the merits of a charge of employment discrimination. Fourth, every decision on point that is still good law has held that a Title VII claim is not barred for failure to file that claim within ninety (90) days of the plaintiff's receipt of a notice of right to sue from a state or local FEP agency, such as the CCRD.

STATEMENT OF THE CASE

On November 29, 2006, Patricia Rodriguez, the Plaintiff-Appellant, filed a charge of employment discrimination (Aplt. App. 19-20), alleging discrimination because of sex and national origin/ancestry, with the Colorado Civil Rights Commission ("CCRC").² The "Jurisdiction" section of the charge stated that the CCRC had jurisdiction over the subject matter of that charge and that the respondent, Defendant-Appellee Wet Ink, LLC ("Wet Ink"), was subject to the jurisdiction of the CCRC and was covered by the provisions of Colo. Rev. Stat. §§ 24-34-301, *et seq.* (Aplt. App. 19).

The EEOC and the CCRD had entered into a Worksharing Agreement (Aplt. App. 53-58) that was in effect between October 1, 2006 and September 30, 2007. That agreement provided that the EEOC and the CCRD "each designate[d] the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges" (Aplt. App. 54). In addition, it provided that the CCRD "shall take all charges alleging a violation of Title VII" of the Civil Rights Act of 1964 and alleging violations of certain other federal

² The CCRC has the power and duty to "receive ... charges alleging unfair or discriminatory practices in violation of parts 4 to 7 of this article." Colo. Rev. Stat. § 24-34-305(2).

statutes³ “where both [it] and the EEOC have mutual jurisdiction, or where only the EEOC has jurisdiction, so long as the allegations meet the minimum requirements of those Acts ...” (*Id.*).⁴

On August 24, 2007, the CCRD issued its Determination (Aplt. App. 38-45) concerning the charge that Ms. Rodriguez had filed with it. The CCRD determined that Wet Ink “has violated C.R.S. 24-34-402, as re-enacted, in respect to [Ms. Rodriguez’s] claim of sex based harassment and discharge based on sex” (Aplt. App. 45). It ordered the parties to proceed to attempt amicable resolution of that claim by compulsory mediation (*Id.*).

The CCRD also determined that Wet Ink had “not violated C.R.S. 24-34-402, as re-enacted, with regard to [Ms. Rodriguez’s] claims of national origin/ancestry based harassment and discharge based on national origin/ancestry” (*Id.*). It advised her of her right to appeal that dismissal to the CCRC (*Id.*).

The CCRD’s Determination provided Ms. Rodriguez with the following notice of her rights to file a lawsuit based on her claims of national origin/ancestry harassment and discrimination:

³ Those statutes are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, *et seq.*; the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206; and Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, *et seq.* (*see* Aplt. App. 53-54).

⁴ The EEOC and the CCRD also agreed that the EEOC would initially process certain categories of charges (Aplt. App. 55-56) and that the CCRD would initially process certain other categories of charges (Aplt. App. 56). Ms. Rodriguez’s charge did not fall within any of those categories.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

- a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or
- b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(I)].

(*Id.*).

On November 28, 2007, the CCRD issued a Notice of Right to Sue (Aplt. App. 48-50) to Ms. Rodriguez. That Notice stated that it was terminating its action on her charge at her request (Aplt. App. 48). The first page of that Notice ended with the following admonition:

Please be advised that jurisdiction with the Colorado Civil Rights Commission ceased on November 25, 2007. All further processing of this charge has been terminated. The issuance of this Notice of Right to Sue shall constitute final agency action and exhaustion of administrative remedies and proceedings pursuant to Part 3 of Article 34 of Title 24, C.R.S. (1988), as amended. Neither the division nor the commission will provide assistance in assessing the claim or providing legal assistance in the filing or framing of any legal action.

(*Id.*) (emphasis in original).

On January 28, 2008, the EEOC issued its Notice of Right to Sue (*Issued on Request*) to Ms. Rodriguez (Aplt. App. 51-52). Ms. Rodriguez filed a demand for arbitration (Aplt. App. 80-92) on February 23, 2008, which she withdrew on April 3, 2008 (Aplt. App. 98-101). On April 25, 2008, Ms. Rodriguez filed a Complaint (Aplt.

App. 6-18) in the district court, in which she alleged that Wet Ink had discriminated against her in violation of Title VII. She did not allege any violation of the employment provisions in the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-402, in that Complaint.

ARGUMENT

I. THE PLAIN LANGUAGE IN TITLE VII GIVES THE SOLE AUTHORITY TO ISSUE A NOTICE OF RIGHT TO SUE FOR A TITLE VII CLAIM TO THE EEOC.

The district court's decision that the time limit for Ms. Rodriguez to file her Title VII lawsuit began to run when the CCRD issued its Notice of Right to Sue appears to have been based on its conclusion that the EEOC had delegated its authority to issue that notice to the CCRD or that the CCRD was the agent of the EEOC for the purpose of investigating and issuing such notices for Title VII claims. The district court cited no authority for its decision. That decision, and the legal theories that appear to underlie it, are without any legal foundation.

The CCRD has the statutory authority to investigate charges of unlawful employment practices, unlawful housing practices, discrimination in places of public accommodation and discriminatory advertising in violation of Parts 4 to 7 of Title 24, Article 34 of the Colorado Revised Statutes. Colo. Rev. Stat. §§ 24-34-306(1) and (2)(a). If the CCRD determines that probable cause does not exist for crediting the allegations of the charge, it shall dismiss the charge and notify the parties of that dismissal. Colo. Rev. Stat. § 24-34-306(2)(b) (I) (A).

That notice must inform the charging party of his or her right to appeal that dismissal to the CCRC and to “file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge he filed with the commission,” within 90 days of the date of the CCRD’s notice or within 90 days of the CCRC’s dismissal of an appeal. Colo. Rev. Stat. §§ 24-34-306(2)(b)(I)(A) and (B). A civil action not filed within the applicable time limit “will be barred and no district court shall have jurisdiction to hear such action.” Colo. Rev. Stat. § 24-34-306(2)(b)(I)(C).

The EEOC has the statutory authority to investigate charges of unlawful employment practices in violation of Title VII. 42 U.S.C. § 2000e-5(b).⁵ During the course of an investigation, the EEOC may utilize the services of state or local FEP agencies and “may utilize the information gathered by such authorities or agencies.” 29 C.F.R. § 1601.15(a). An EEOC Commissioner has the power to issue a subpoena to compel the attendance and testimony of witnesses, the production of evidence or access to evidence for the purpose of examining and copying it. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1); 29 C.F.R. § 1601.16(a). If a party does not comply with such an investigative subpoena, the EEOC can request a district court to order that that party produce the evidence or testimony described in that subpoena. 42 U.S.C. § 2000e-9; 29

⁵ The powers and procedures set forth in 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-8 and 2000e-9 are the same powers and procedures that apply to charges of employment discrimination or retaliation under Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-17. *See* 42 U.S.C. § 12117(a).

U.S.C. § 161(2); *see E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036 (10th Cir. 1993).

Title VII further provides that “[i]f the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.” 42 U.S.C. § 2000e-5(b). In addition, the EEOC may issue a notice of right to sue where it or the Attorney General has not filed a civil action under Title VII, and where the EEOC has not entered into a conciliation agreement, within one hundred eighty (180) days of the date the charge was filed. 42 U.S.C. § 2000e-5(f)(1).⁶

The EEOC’s regulations specify the information that must be contained in a notice of right to sue issued under these circumstances. Where the EEOC has made a determination of no reasonable cause, its letter of determination must “inform the person claiming to be aggrieved or the person on whose behalf a charge was filed of the right to sue in Federal district court within 90 days of receipt of the letter of determination.” 29 C.F.R. § 1601.19(a). Where the EEOC issues a notice of right to sue for a Title VII charge upon the request of the charging party, as happened in this case, that notice must include an [a]uthorization to the aggrieved person to bring a civil action under title VII ...

⁶ A plaintiff alleging age discrimination or retaliation in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, can file a civil action under that statute after more than 60 days have elapsed after filing a charge of discrimination with the EEOC. 29 U.S.C. § 626(d). The charging party need not obtain a notice of right to sue from the EEOC before filing a lawsuit under that statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

pursuant to section 706(f)(1) of title VII ... within 90 days from receipt of such authorization.” 29 C.F.R. § 1601.28(e)(1).

The plain language of Title VII provides the EEOC with the sole authority to issue a Title VII notice of right to sue. The EEOC’s regulations similarly grant the EEOC that sole authority. No provision in that statute or in those regulations grants any state or local FEP agency the power to issue a notice of right to sue for a charge of employment discrimination or retaliation under Title VII.

II. THE EEOC DID NOT AGREE TO GIVE THE CCRD THE AUTHORITY TO ISSUE A NOTICE OF RIGHT TO SUE UNDER TITLE VII.

Title VII provides:

If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. *In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section.* If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b) (emphasis supplied).

For more than two decades, the EEOC has entered into worksharing agreements with state and local fair employment practice (“FEP”) agencies in order to eliminate duplication of effort. *Dixon v. Westinghouse Elec. Corp.*, 787 F.2d 943, 944 n. 1 (4th Cir. 1986); *see* 29 C.F.R. § 1601.13(c) (the EEOC “shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures”). These worksharing agreements are intended to minimize work duplication

while also ensuring plaintiffs are afforded the full protection of both federal and state law. *See* Federal Laws Prohibiting Job Discrimination Questions and Answers, The U.S. Equal Employment Opportunity Commission, May 24, 2002, <http://www.eeoc.gov/facts/qanda.html>, last accessed Feb. 10, 2009. As of 1988, the EEOC had entered into such agreements with approximately 81 of 109 authorized state and local FEP agencies. *E.E.O.C. v. Commercial Ofc. Prods. Co.*, 408 U.S. 107, 112 (1988). It is undisputed in this case that the EEOC and the CCRD had entered into a worksharing agreement (*see* Aplt. App. 53-58).

That Worksharing Agreement provides that the EEOC designated the CCRD as its “agent for the purpose of drafting and receiving charges” (Aplt. App. 54). It does not provide that the EEOC designated the CCRD as its agent for the purpose of investigating charges or issuing notices of any charging party’s right to file a Title VII lawsuit. Instead, that document provides:

- B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the EEOC copies of all documents pertinent to conducting a substantial weight review; the evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements; including, but not limited to:
 - 1. jurisdictional requirements,
 - 2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,
 - 3. relief, if appropriate,
 - 4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders after public hearing or consent orders to which the FEPA is a party.

(Aplt. App. 57).

The decision of a state or local FEP agency, not reviewed by a court, is not binding on the EEOC or on a court in a Title VII lawsuit. In *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470 (1986), the Supreme Court noted that “the congressional directive that the EEOC should give ‘substantial weight’ to findings made in state proceedings, § 706(b), 42 U.S.C. § 2000e-5(b), indicates only the minimum level of deference the EEOC must afford all state determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved.”

The Court then stated, in a footnote to that sentence:

EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

Id. n. 7 (citations omitted).

The EEOC is required to “notify the parties whose cases are to be processed by the designated, certified FEP agency of their right, if aggrieved by the agency's final action, to request review by the Commission within 15 days of that action.” 29 C.F.R. § 1601.76. The EEOC will then examine the case and render its determination. *Recio v. Creighton University*, 521 F.3d 934, 937 n. 2 (8th Cir. 2008).

The fact that the EEOC is not required to adopt the findings of a state or local FEP agency, but is only required to give those findings substantial weight in making its own

determination, means that Congress did not intend any such agency the right to make a determination that is binding on the EEOC, at least absent an agreement by the EEOC and that agency. The EEOC can decide to obtain information that the state or local FEP agency did not obtain, and may decide to evaluate the evidence differently from the way the state or local FEP agency evaluated it. The EEOC has the authority to conclude that reasonable cause exists to believe that a respondent violated Title VII, even though the state or local FEP agency concluded that the respondent did not discriminate or retaliate against the charging party.

The EEOC did not agree in its Worksharing Agreement with the CCRD to waive its right to investigate charges or to issue its own determinations. Nor did it agree to give the CCRD the authority to issue a notice of right to sue under Title VII.

The CCRD understood the limits of its power when it issued its Determination and Notice of Right to Sue in this case. That Determination included findings as to whether Wet Ink had discriminated against Ms. Rodriguez in violation of Colo. Rev. Stat. § 24-34-402 and said nothing about Title VII (Aplt. App. 45). Its Notice of Right to Sue advised Ms. Rodriguez only about the procedures under Colorado state law and also did not mention Title VII (Aplt. App. 48).

The CCRD's Determination and Notice of Right to Sue did not advise Ms. Rodriguez of her right to file a civil action under Title VII or of her deadline to file that action. Those documents did not comply with the EEOC's requirements for a notice of right to sue under those circumstances. They did not do so precisely because they

triggered only the deadlines established by Colo. Rev. Stat. §§ 24-34-306(2)(b)(I)(B) and 24-34-306(11), not the deadline established by 42 U.S.C. §2000e-5(f)(1).

III. THE DISTRICT COURT'S DECISION, IF UPHELD ON APPEAL, WOULD UNDERMINE THE STATUTORY RIGHT OF THE EEOC TO REVIEW DECISIONS OF STATE AND LOCAL FEP AGENCIES AND TO MAKE ITS OWN INDEPENDENT DETERMINATION OF THE MERITS OF CHARGES OF EMPLOYMENT DISCRIMINATION AND TO ATTEMPT TO CONCILIATE THOSE CHARGES.

As discussed in more detail *supra* at 7-8 and 9-11, the EEOC has the statutory authority to investigate charges of employment discrimination and retaliation under Title VII and need only give “substantial weight” to the findings of state and local FEP agencies that have done their own investigations based on the same allegations. In addition, if the EEOC concludes that there is reasonable cause to believe that a respondent discriminated or retaliated against a charging party in violation of Title VII, it can attempt to conciliate the dispute between the charging party and respondent and, if conciliation fails, file a lawsuit against the respondent. *See E.E.O.C. v. W.H. Braum, Inc.*, 347 F.3d 1192, 1196 (10th Cir. 2003).

The district court's decision would have the effect of drastically shortening the amount of time for the EEOC to complete these tasks. A charging party has fifteen (15) days to request that the EEOC conduct a substantial weight review of a state or local FEP agency's decision. 29 C.F.R. § 1601.76. If a charging party requests such a review, the EEOC would have between 75 and 90 days to review that agency's determination, review the evidence that that agency had received or obtained on its own, possibly seek to obtain new evidence, make its own determination, schedule a conciliation meeting or telephone

call(s), attempt conciliation and, if conciliation failed, draft and file a lawsuit before the charging party would be required to file a Title VII complaint.

Technically, the EEOC can file a lawsuit for injunctive and victim-specific relief, even if the charging party already has filed a Title VII lawsuit. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002) (arbitration agreement signed by charging party is not binding on EEOC). Nevertheless, as a practical matter, the district court's decision will limit the ability of the EEOC to perform its investigative, conciliation and litigation tasks significantly. It will require the EEOC either to perform those tasks hastily, or will require to file its own lawsuit or to intervene in the charging party's lawsuit,⁷ possibly months after that lawsuit has been filed.

The inefficiencies resulting from either hasty or belated EEOC lawsuits or motions to intervene will undermine the public policy supporting the EEOC's power to investigate charges, attempt conciliation and file lawsuits. The EEOC generally seeks to vindicate the public interest, even when it is seeking victim-specific relief. *Waffle House*, 534 U.S. at 296. It cannot perform that function effectively if a charging party is required to file a Title VII lawsuit within ninety days after receipt of a state or local FEP agency's notice of right to sue. This Court must give the EEOC sufficient time for it to perform its important public functions.

⁷ The court can grant only a "timely application" to intervene. 42 U.S.C. § 2000e-5(f)(1).

IV. EVERY DECISION ON POINT THAT IS STILL GOOD LAW HAS HELD THAT A TITLE VII CLAIM IS NOT BARRED FOR FAILURE TO FILE THAT CLAIM WITHIN NINETY DAYS OF THE PLAINTIFF'S RECEIPT OF A NOTICE OF RIGHT TO SUE FROM A STATE OR LOCAL FEP AGENCY.

The district court did not cite any authority for its decision, either in its Order of Dismissal (Aplt. App. 119-20) or in its bench ruling (Aplt. App. 116-17). The district court apparently believed that this was a case of first impression.

Prior to the district court's decision, however, a number of federal court decisions had already dealt with this precise issue. In *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000), the Fifth Circuit held that only receipt of a notice of right to sue from the EEOC will start the time limit for filing a Title VII complaint. The court held that the filing deadline under the Texas anti-discrimination statute could not be triggered by the EEOC right to sue letter, and rather required a letter from the local agency. The court reasoned that the limitations period for each type of claim is, unless otherwise provided by statute, independent of the other. *Id.* at 464 (discussing *Commercial Ofc. Prods. Co.*, *supra*). The Fifth Circuit explicitly overruled its earlier decision in *Dao v. Auchan Hypermarket*, 96 F.3d 787 (5th Cir. 1996), and disapproved of the district court opinion in *James v. Texas Dept. of Human Servs.*, 818 F.Supp. 987 (E.D. Tex. 1993), both of which held that receipt of the Texas FEP agency's notice of right to sue would trigger the time limit to file a Title VII complaint. *Vielma*, 218 F.3d at 467.

District court decisions also have held that Title VII complaints were not barred for failure to file those complaints within 90 days of receipt of state or local FEP agency notices of right to sue. *Albright v. City of Philadelphia*, 399 F. Supp. 2d 575, 583 n. 13

(E.D. Pa. 2005) (“The right-to-sue letters that the PHRC sent to Albright do not constitute final agency action by the EEOC”); *Gokay v. Pennridge School Dist.*, 2003 WL 21250656, *4 (E.D. Pa. 2003) (“We are aware of no case in this circuit holding that the closure of a state law administrative case by a state agency triggers the federal Title VII limitations period”); *Perez Cordero v. Wal-Mart PR, Inc.*, 235 F. Supp. 2d 95, 102 (D.P.R. 2002) (“we find that just because [Puerto Rico’s FEP agency] issued a right-to-sue letter in this case does not mean that it was the letter that would trigger the ninety (90) day period for filing a civil action in federal court”); *Muth v. Cobro Corp.*, 895 F.Supp. 254, 256 (E.D. Mo. 1995) (42 U.S.C. § 2000e-5)(f)(1) “explicitly states that the 90 days limitation period runs from receipt of the EEOC ‘Right-to-Sue’ letter only, not from a letter received by the EEOC or any applicable state agency”); *Black v. Brown University*, 555 F.Supp. 880, 884 (D.R.I. 1983); *Foreman v. General Motors Corp.*, 473 F.Supp. 166, 177 (E.D. Mich. 1979) (“the requirement of an EEOC right-to-sue letter was not met” where plaintiff received notice of right to sue only from Michigan’s FEP agency).

In addition, a number of decisions have used equitable principles to make individual exceptions to the general rule that a Title VII plaintiff “must file a discrimination charge with the Equal Employment Opportunity Commission and receive a right to sue letter from the Commission.” *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988). These cases stem in large part from the Supreme Court’s holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), that Title VII’s administrative exhaustion requirements are not jurisdictional in nature, but are

rather more like a statute of limitations, and are subject to equitable considerations such as “waiver, estoppel, and equitable tolling.” *Id.* at 393. The Ninth Circuit’s opinion in *Surrell v. California Water Service Co.*, 518 F.3d 1097, 1104-05 (9th Cir. 2008), is the latest in that line of cases.

The Ninth Circuit *in Surrell* reversed the district court’s decision to grant summary judgment to the defendant on the plaintiff’s Title VII claims on the ground that she had failed to exhaust her administrative remedies with the EEOC, since she had received a notice of right to sue only from the state FEP agency, not from the EEOC. 518 F.3d at 1104-05. That court relied on cases that have “concluded that once a plaintiff is *entitled* to receive a right-to-sue letter (as *Surrell* was once the EEOC did not timely act on her properly filed charge), it makes no difference whether the plaintiff actually obtained it.” *Id.* at 1105 (emphasis in original). *See Moore v. City of Charlotte*, 754 F.2d 1100, 1104 n. 1 (4th Cir. 1985), *cert. denied*, 472 U.S. 1021 (1985) (notice of right to sue against governmental entity not defective because it was issued by EEOC, not by Attorney General); *Marion v. City of Philadelphia/Water Dept.*, 161 F.Supp.2d 381, 384-85 (E.D. Pa. 2001) (same); *Thayer v. Washington County School Bd.*, 949 F.Supp. 445, 447 (W.D. Va. 1996) (same).

The Ninth Circuit held in *Surrell* that “where, as here, a plaintiff is entitled to receive a right-to-sue letter from the EEOC, a plaintiff may proceed absent such a letter, provided she has received a right-to-sue letter from the appropriate state agency.” 518 F.3d at 1105. In that case, the issue was exhaustion of administrative remedies, not the timeliness of the complaint. The use of equitable principles in *Surrell* and other cases to

excuse some charging parties' failure to obtain a notice of right to sue from the EEOC does not alter the statutory requirement that that notice is a prerequisite to a Title VII claim. *See Zipes*, 455 U.S. at 393.

Ms. Rodriguez did obtain a notice of right to sue from the EEOC. She filed her complaint in the district court within ninety days after she received it. As a result, the district court had jurisdiction over her Title VII claims. It erred by dismissing her Title VII complaint because she failed to file it within ninety days after receipt of the CCRD's Determination or Notice of Right to Sue.

CERTIFICATE OF COMPLIANCE

Counsel hereby certify that this Amicus Brief contains 5,115 words, not including the corporate disclosure statement, table of contents, tables of authorities, and any certificate by counsel, and therefore complies with F.R.A.P. 29(d) and 32(a)(7)(B).

CONCLUSION

For the reasons stated herein, NELA submits that this Court should reverse the decision of the district court in this case and remand this matter to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the tenth day of February, 2009, a true and correct copy of the above and foregoing Brief Amicus Curiae of National Employment Lawyers Association was served by electronic mail, addressed to:

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