PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 24 | Issue 1 Article 2

12-15-1996

Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit

Michael D. Moberly

Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit

Michael D. Moberly*

I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC or Commission) is the agency with primary responsibility for enforcing federal employment discrimination laws.[1] An individual asserting a claim under Title VII of the Civil Rights Act of 1964 (Title VII),[2] the Age Discrimi-

---

* B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona; Chairman, Arizona Agricultural Employment Relations Board; Editor, *The Arizona Labor Letter.*

1. *See* 29 U.S.C. § 626 (1994) (Age Discrimination in Employment Act of 1967); 42 U.S.C. § 2000e-5 (1994) (Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 12117(a) (1994) (Americans with Disabilities Act of 1990); Bornholdt v. Brady, 869 F.2d 57, 66 (2d Cir. 1989). Other federal agencies share this responsibility in specific areas. For example, the Office of Federal Contract Compliance Programs of the United States Department of Labor oversees enforcement of Executive Order 11246 and section 503 of the Rehabilitation Act of 1973. 41 C.F.R. §§ 60-30.1 to .37, 60-741.26(a) (1995). The United States Department of Justice has certain enforcement responsibilities in discrimination cases involving public sector employers. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6, 12117(a) (1994); 29 C.F.R. § 1601.29 (1995); United States v. City & County of Denver, 927 F. Supp. 1396, 1398-1400 & n.3 (D. Colo. 1996). State agencies also share responsibility for enforcing federal employment discrimination laws by virtue of certain federal statutory "deferral" provisions. *See* 29 U.S.C. § 633(b) (1994); 42 U.S.C. § 2000e-5(c), (d); 29 C.F.R. §§ 1601.13, 1601.70-.80, 1626.9 (1995). Despite being the "linchpin" of the statutory enforcement scheme, Leslie Abbott, Comment, *Out of Balance: Excluding EEOC Determinations Under Federal Rule of Evidence 403*, 24 LOY. L.A. L. REV. 707, 716 (1991), the EEOC cannot adjudicate employment disputes or impose sanctions. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Thus, "final responsibility for enforcement of [federal employment discrimination legislation] is vested in the courts." *Id.*

2. 42 U.S.C. §§ 2000e to 2000e-17 (1994). Title VII is the "cornerstone" of federal employment discrimination legislation, Abbott, *supra* note 1, at 711 n.33, and prohibits such discrimination on the basis of race, color, religion, sex, and national origin. 42

nation in Employment Act of 1967 (ADEA),[3] or the Americans with Disabilities Act of 1990 (ADA)[4] must file a charge of discrimination with the Commission before commencing litigation.[5] Individuals with claims under the Equal Pay Act of 1963[6] also may seek the Commission's assistance before bringing suit,[7] although filing a charge of discrimination with the EEOC is not a prerequisite to Equal Pay Act litigation.[8]

Upon receipt of a charge alleging a violation of one of these acts,[9] the Commission commences an investigation.[10] As part of its investiga-

---

U.S.C. § 2000e-2(a). Congress' primary objective in enacting Title VII was to equalize employment opportunities and remove barriers that have operated to favor white individuals over other individuals. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

3. 29 U.S.C. §§ 621-634 (1994). The ADEA is the first federal statute intended to prevent employment discrimination based on age. Platt v. Burroughs Corp., 424 F. Supp. 1329, 1340 (E.D. Pa. 1976). Its stated goal is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

4. 42 U.S.C. §§ 12101-12213 (1994). The ADA constitutes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). The act reflects a "virtual revolution in the area of rights for the disabled . . . ." Trautz v. Weisman, 819 F. Supp. 282, 294 (S.D.N.Y. 1993).

5. United Air Lines v. Evans, 431 U.S. 553, 554-55 & n.4 (1977) (Title VII); Vinson v. Ford Motor Co., 806 F.2d 686, 688 (6th Cir. 1986) (ADEA); Bridges v. Diesel Serv., No. CIV.A. 94-2101, 1994 WL 369508, at *1 (E.D. Pa. July 13, 1994) (ADA).

6. 29 U.S.C. § 206(d) (1994). The Equal Pay Act prohibits employers from compensating employees at a rate less than it pays to similarly situated employees of the opposite sex. *Id.* Its purpose is to eliminate all sex-based wage discrimination that Congress found to exist on a broad scale at the time of its enactment. Grumbine v. United States, 586 F. Supp. 1144, 1146 (D.D.C. 1984).

7. *See* Assily v. Tampa Gen. Hosp., 814 F. Supp. 1069, 1070 (M.D. Fla. 1993). The EEOC has had enforcement authority in Equal Pay Act cases since 1979. *See* McKee v. McDonnell Douglas Technical Servs. Co., 700 F.2d 260, 263 n.4 (5th Cir. 1983).

8. *See* County of Washington v. Gunther, 452 U.S. 161, 175 n.14 (1981); Miranda v. B & B Cash Grocery Store, 975 F.2d 1518, 1527 (11th Cir. 1992); Ososky v. Wick, 704 F.2d 1264, 1265-66 (D.C. Cir. 1983). *But cf. Assily*, 814 F. Supp. at 1071-72 (holding that an Equal Pay Act plaintiff "must have both exhausted his administrative remedies and complied with the EEOC's charging procedures" before filing suit).

9. Strictly speaking, the procedures described here apply only in Title VII and ADA cases. No EEOC charge-filing procedures expressly apply to Equal Pay Act cases, although the Commission does have investigatory authority in such cases. *See* 29 C.F.R. § 1620.30(a)(1) (1995). Slightly different rules govern ADEA cases. Upon receipt of a charge alleging a violation of the ADEA, for example, the Commission's specific obligation is not to investigate, but to attempt "conciliation." 29 U.S.C. § 626(b) (1994); 29 C.F.R. § 1626.12 (1995). However, investigation of the charge is an essential component of the Commission's duty to conciliate. *See* Marshall v. Sun Oil Co., 605 F.2d 1331, 1334-35 (5th Cir. 1979) (observing that "conciliation would not be meaningful" unless the EEOC undertook "some independent investigation or verification of evidence supplied by others").

10. 42 U.S.C. §§ 2000e-5(b), -8(a) (1994); 29 C.F.R. § 1601.15(a) (1995); EEOC v.

tion, the Commission is authorized to engage in various forms of evidence gathering,[11] which may or may not culminate in a formal fact-finding conference.[12] If, upon completion of its investigation, the Commission concludes that discrimination has occurred,[13] it issues a "reasonable cause" determination.[14] Once that determination is made,[15]

Shell Oil Co., 466 U.S. 54, 63 (1984). *See generally* Abbott, *supra* note 1, at 711-12 ("The EEOC is given broad authority . . . to investigate charges of employment discrimination."). Under certain circumstances, the Commission can dismiss a charge without conducting an investigation. *See, e.g.*, 29 C.F.R. § 1601.18 (1995). *But cf.* Smith v. Universal Servs., Inc., 454 F.2d 154, 156 (5th Cir. 1972) (stating that the EEOC is "obligate[d] . . . to investigate complaints of unlawful discrimination to determine whether probable cause exists to believe that the employer has engaged in discriminatory practices"); Abbott, *supra* note 1, at 707 n.2 (observing that "Title VII directs the EEOC to investigate a charge of employment discrimination").

11. 42 U.S.C. § 2000e-8(a) (1994); 29 C.F.R. §§ 1601.15-.17 (1995); *see also* EEOC v. Michael Constr. Co., 706 F.2d 244, 248 (8th Cir. 1983) ("Title VII . . . grants the EEOC access to evidence of unlawful employment practices . . . ."); EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 975 (N.D. Ill. 1981) (stating that the EEOC "is permitted to gather any evidence it deems appropriate"); Abbott, *supra* note 1, at 726 (observing that "the EEOC [is allowed] access to 'virtually any material that might cast light on the allegations against the employer'") (quoting *Shell Oil Co.*, 466 U.S. at 68-69).

12. 29 C.F.R. § 1601.15(c) (1995); *see also Chicago Miniature Lamp Works*, 526 F. Supp. at 975 ("EEOC is not required to create a record or hold any sort of hearing."). *See generally* EEOC v. Keco Indus., 748 F.2d 1097, 1100 (6th Cir. 1984) ("[T]he nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency.").

13. The precise inquiry is whether it is "more likely than not" the individual who filed the charge has been the victim of unlawful discrimination. EEOC Compl. Man. (CCH) § 40.2 at ¶ 1062 (1993). "This is known as the 'litigation-worthy' standard." Abbott, *supra* note 1, at 729; *see* EEOC v. Bay Shipbuilding Corp., 27 Fair Empl. Prac. Cas. (BNA) 1372, 1374-75 (E.D. Wis. 1981) (stating the EEOC determination is whether its reasonable cause findings are litigation worthy); BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 374 (referring to the "new [EEOC] statement of enforcement policy further refining its 'litigation-worthy' standard for 'reasonable cause' determinations"); Janis G. White, Note, *The Use of EEOC Investigative Files in Title VII Actions*, 61 B.U. L. REV. 1245, 1247 n.13, 1264 (1981) (discussing reasonable cause determinations).

14. 29 C.F.R. § 1601.21 (1995). In ADEA cases, the Commission issues a "letter of violation" when it has "a reasonable basis to conclude that a violation of the Act has occurred." *Id.* § 1626.15(b). As will be discussed, the distinction between EEOC reasonable cause determinations and EEOC letters of violation, while subtle, bears on the issues addressed in this article. *See* EEOC v. Manville Sales Corp., 27 F.3d 1089, 1095 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995); Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1988); Cary v. Carmichael, 908 F. Supp. 1334, 1341-42 (E.D. Va. 1995).

15. If the Commission does not conclude that discrimination has occurred, the

the Commission attempts to resolve the charge through conciliation.[16] If conciliation is unsuccessful, the Commission issues a notice of right to sue to,[17] or brings suit on behalf of, the party who submitted the charge.[18]

Congress has not addressed the issue of whether EEOC reasonable cause determinations are admissible in subsequent employment discrimination litigation.[19] Consequently, the courts are split on (1) the extent to which such determinations are admissible,[20] and (2) where they are

---

applicable regulations provide for issuance of a "no cause" or "no reasonable cause" determination, which constitutes notice to the individual who filed the charge of the right to bring suit on the matters alleged therein. *See* 29 C.F.R. § 1601.19 (1995). On April 19, 1995, however, the Commission voted to eliminate "no cause" determinations in favor of dismissals without particularized findings in cases where the Commission's investigation does not establish reasonable cause to believe discrimination has occurred. Memorandum from Frances M. Hart, Executive Officer and Executive Secretariat, EEOC, to Gilbert F. Casellas, et al., EEOC Commissioners 3 (Apr. 19, 1995) (on file with the *Pepperdine Law Review*). That change is consistent with the language of Title VII. *See* 42 U.S.C. § 2000e-5(b) (1994) ("If the Commission determines after . . . investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . ."); *Michael Constr. Co.*, 706 F.2d at 252 ("[T]he EEOC must dismiss a charge if it finds no reasonable cause after its investigation of the charge."). Given the change, this article focuses on the impact of reasonable cause determinations.

16. 42 U.S.C. § 2000e-5(b) (1994); 29 U.S.C. § 626(b) (1994); 29 C.F.R. §§ 1601.24(a), 1626.15(b) (1995); *Shell Oil Co.*, 466 U.S. at 63-64; Isaac v. Harvard Univ., 769 F.2d 817, 819 n.2 (1st Cir. 1985); *Keco Indus.*, 748 F.2d at 1101. Conciliation has been described as "an integral part of the statutory scheme to enforce . . . prohibitions against employment discrimination." EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 242 (N.D. Ala. 1974). Indeed, because the basic philosophy underlying the federal discrimination laws is that "voluntary compliance is preferable to court action," Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402 (5th Cir. 1969), the EEOC's conciliation obligation is "among its most essential functions." EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 596 (4th Cir. 1976).

17. Receipt of a notice of right to sue is a condition precedent to an individual action under Title VII or the ADA. Sherman v. Standard Rate Data Serv., 709 F. Supp. 1433, 1436 n.4 (N.D. Ill. 1989); Hladki v. Jeffrey's Consol., Ltd., 652 F. Supp. 388, 392 (E.D.N.Y. 1987). No similar requirement exists under the Equal Pay Act or the ADEA. *See* Miranda v. B & B Cash Grocery Store, 975 F.2d 1518, 1526-27 (11th Cir. 1992); Weaver v. Ault Corp., 859 F. Supp. 256, 257-59 (N.D. Tex. 1993).

18. 42 U.S.C. § 2000e-5(f)(1) (1994); 29 C.F.R. §§ 1601.28(b), 1626.15(d) (1995); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359-60 (1977); *Isaac*, 769 F.2d at 819 n.2. In some cases, the charge may have been submitted by a member of the Commission itself. *See* 42 U.S.C. § 2000e-5(b) (1994). In that event, notice of right to sue is given to, or suit is brought on behalf of, the person whom the charge alleges was aggrieved by an unlawful employment practice. *Id.* § 2000e-5(f)(1); 29 C.F.R. § 1601.28(b)(1)(ii), (3)(ii).

19. *See* Smith v. Universal Servs. Inc., 454 F.2d 154, 156 (5th Cir. 1972); Abbott, *supra* note 1, at 730; White, *supra* note 13, at 1245.

20. *See* Barfield v. Orange County, 911 F.2d 644, 649-50 (11th Cir. 1990); Johnson

admissible,[21] whether they are sufficient to permit a plaintiff to survive an employer's motion for summary judgment.[22] The Ninth Circuit considers reasonable cause determinations to be so probative of discrimination that they (1) can never be excluded from evidence,[23] and (2) categorically preclude summary judgment in favor of the employer.[24] Other jurisdictions leave the admissibility of reasonable cause determinations to the discretion of the trial court,[25] and hold that such determinations standing alone are insufficient to preclude summary judgment.[26]

---

v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984); Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988); Abbott, *supra* note 1, at 742.

21. If an EEOC determination is not admissible, it cannot provide the basis for avoiding summary judgment. *See* Kesselring v. United Techs. Corp., 753 F. Supp. 1359, 1369 (S.D. Ohio 1991) (holding that a reasonable cause determination was "not sufficient to save plaintiff's ADEA claim . . . from summary judgment" because the determination would not be admissible in a jury trial); Stewart v. Personnel Pool of Am., Inc., No. Civ.A. 92-2581, 1993 WL 525575, at *6 (D.N.J. Dec. 16, 1993) ("Exercising its discretion here, the Court concludes that [the] EEOC determination would not be admissible at trial and, therefore, cannot be considered on [the employer's] summary judgment motion."), *aff'd*, 30 F.3d 1488 (3d Cir. 1994). *See generally* Pakizegi v. First Nat'l Bank of Boston, 831 F. Supp. 901, 909 (D. Mass. 1993) ("A plaintiff opposing summary judgment cannot rely on . . . inadmissible evidence to satisfy its burden of proving discrimination."), *aff'd*, 56 F.3d 59 (1st Cir. 1995).

22. *Compare* Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1156 (9th Cir. 1982) (reasonable cause determination is sufficient to avoid summary judgment) *with* Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988) (reasonable cause determination is not sufficient).

23. *See Barfield*, 911 F.2d at 650 (noting that "the Ninth Circuit seems to [say] that there can exist no EEOC determinations in which the . . . circumstances . . . justify exclusion from evidence") (internal quotation marks omitted); Abbott, *supra* note 1, at 743 ("The Ninth Circuit, taking an . . . extreme position, [has] implied that under no circumstance may a judge have discretion to exclude an EEOC determination.") (citing Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981)).

24. *See* Mitchell v. Office of Los Angeles County, 805 F.2d 844, 847 (9th Cir. 1986); Proctor v. Consolidated Freightways Corp., 795 F.2d 1472, 1477 (9th Cir. 1986); *Gifford*, 685 F.2d at 1156.

25. This is the clear majority view of the federal courts. *See* Crockett v. City of Billings, 761 P.2d 813, 820 (Mont. 1988).

26. *See, e.g.*, *Goldberg*, 836 F.2d at 848; Cary v. Carmichael, 908 F. Supp. 1334, 1341-42 (E.D. Va. 1995); Bailey v. South Carolina Dep't of Soc. Servs., 851 F. Supp. 219, 221 (D.S.C. 1993); *Kesselring*, 753 F. Supp. at 1368-69; Baumgardner v. Inco Alloys Int'l, 746 F. Supp. 623, 625 (S.D. W. Va. 1990).

Because trial court judges sitting as triers of fact[27] are free to give reasonable cause determinations whatever weight they deem appropriate,[28] the conflict over the admissibility of such determinations originally may have been somewhat academic.[29] That has not been the case, however, since the enactment of the Civil Rights Act of 1991,[30] which made jury trials available in Title VII and ADA cases.[31] The admissibility issue is significant in cases tried to juries[32] because a reasonable cause determination is more likely to create unfair prejudice in the minds of jurors than in the mind of a trial judge.[33] In addition, the issue of whether a reasonable cause determination precludes summary

---

27. Prior to 1991, there was no right to a jury trial in Title VII and ADA cases. *See* Lehman v. Nakshian, 453 U.S. 156, 164 (1981); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979); Oswald v. Laroche Chems., 162 F.R.D. 283, 284-85 (E.D. La. 1995). There was also doubt about the right to a jury trial in ADEA cases until 1978, when the Supreme Court decided *Lorillard v. Pons*, 434 U.S. 575 (1978). *See* EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1221 (3d Cir. 1983) ("As originally enacted, the ADEA did not contain any references regarding the availability of jury trials in actions instituted either by private individuals or brought by the government."); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 218 (D. Colo. 1977) ("Courts have divided on the issue of the availability of a jury trial under the provisions of the ADEA.").

28. *See, e.g.*, Harris v. Birmingham Bd. of Educ., 537 F. Supp. 716, 721-22 (N.D. Ala. 1982) (giving no weight to reasonable cause determination), *aff'd in part and rev'd in part*, 712 F.2d 1377 (11th Cir. 1983).

29. *See* Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153 (7th Cir. 1985). If that is so, however, there has been a surprising amount of litigation over the issue. *See Crockett*, 761 P.2d at 820 (observing that "much federal case law exists on the subject of the admissibility under federal law of findings by the Equal Employment Opportunity Commission").

30. Pub. L. No. 102-166, 105 Stat. 1071 (1991). For the author's consideration of the 1991 Act, see Michael D. Moberly & Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U. L. REV. 475 (1993).

31. *See* 42 U.S.C. § 1981a(c) (1994); Landgraf v. U.S.I. Film Prods., 511 U.S. 244 (1994); Harrelson v. Elmore County, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994). *See generally* Abbott, *supra* note 1, at 714 n.53 ("If the right to a jury trial is extended to Title VII plaintiffs, the controversy over whether judges have discretion . . . to exclude EEOC determinations from juries becomes all the more important to resolve.").

32. *See* Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984). One commentator has observed that "EEOC findings on reasonable cause were initially considered per se admissible only in Title VII bench trials." Abbott, *supra* note 1, at 742.

33. *See* Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir. 1990); *see also* Abbott, *supra* note 1, at 712 n.45 (finding the potential prejudice of admitting reasonable cause determinations "more pertinent in jury trials because jurors are less aware than judges of the 'limits and vagaries of administrative determinations'") (quoting *Barfield*, 911 F.2d at 651).

judgment in favor of the employer has significant practical implications for employment discrimination litigants.[34]

This article explores these issues,[35] with particular focus on the Ninth Circuit's approach,[36] which is more favorable to plaintiffs than the view prevailing elsewhere.[37] Part II of the article discusses the admissibility of EEOC reasonable cause determinations in both the Ninth Circuit and other jurisdictions.[38] Part III considers the impact of reasonable cause determinations on summary judgment proceedings, again contrasting the view in the Ninth Circuit with those prevailing elsewhere.[39] Part IV addresses the more important policy considerations underlying these issues.[40] The article ultimately concludes that trial courts should have discretion to exclude reasonable cause determina-

---

34. Summary judgment has been hailed as an efficient means of disposing of meritless employment discrimination claims. *See, e.g.*, Blue v. United States Dep't of the Army, 914 F.2d 525, 535 (4th Cir. 1990); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572-73 (7th Cir. 1989). If the existence of an EEOC reasonable cause determination is sufficient to preclude summary judgment, use of that procedural tool is foreclosed in some employment discrimination cases in which summary judgment might have been appropriate. *See, e.g.*, Cary v. Carmichael, 908 F. Supp. 1334, 1341-42 (E.D. Va. 1995). In addition, a plaintiff who is the beneficiary of a reasonable cause determination may elect to engage in little or no pretrial discovery, *cf.* Bailey v. South Carolina Dep't of Soc. Servs., 851 F. Supp. 219, 220 n.2 (D.S.C. 1993), confident that, at least in the Ninth Circuit, the determination will be admitted into evidence, and hopeful that the jury will be "particularly influenced by the value of an official government report, and give it undue weight." Abbott, *supra* note 1, at 738.

35. For commentary on the admissibility issue predating the enactment of the Civil Rights Act of 1991, see Abbott, *supra* note 1 (advocating rejection of a rule of per se admissibility) and White, *supra* note 13 (arguing for a rule of presumptive admissibility). There appears to have been no previous academic consideration of the summary judgment issue.

36. The focus is prompted by the uniqueness of the Ninth Circuit's view, *see Barfield*, 911 F.2d at 649-50; Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153 (7th Cir. 1985), as well as the fact that it is the view with which the author is most familiar.

37. The Ninth Circuit's view apparently is based, at least in part, on its belief that "[a] civil rights plaintiff has a difficult burden of proof, and should not be deprived of what might be persuasive evidence." Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981) (footnotes omitted). However, that belief is open to debate. *See, e.g.*, La Montagne v. American Convenience Prods., 750 F.2d 1405, 1410 (7th Cir. 1984) ("The indirect method [of proof] compensates [the plaintiff] for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation.").

38. *See infra* notes 43-110 and accompanying text.

39. *See infra* notes 111-94 and accompanying text.

40. *See infra* notes 195-239 and accompanying text.

tions where they appear untrustworthy or where their probative value is substantially outweighed by the risk of prejudice to the employer.[41] In addition, the mere existence of a reasonable cause determination should not enable an employment discrimination plaintiff to avoid summary judgment.[42]

II. THE ADMISSIBILITY OF REASONABLE CAUSE DETERMINATIONS

A. *The Ninth Circuit View*

The Ninth Circuit first addressed the admissibility of EEOC reasonable cause determinations in *Bradshaw v. Zoological Society of San Diego*.[43] The plaintiff in *Bradshaw* brought suit under Title VII claiming the defendant refused to hire her because of her sex.[44] She included as an exhibit to her complaint the EEOC reasonable cause determination, but the trial court ordered it stricken.[45] The Ninth Circuit held that the determination was admissible as evidence and accordingly should not have been stricken from the complaint.[46] Although the weight to be given to the determination was a matter committed to the trial court's discretion, the decision not to consider it at all was erroneous.[47]

---

41. *See infra* notes 240-47 and accompanying text.

42. *See infra* notes 245-47 and accompanying text.

43. 569 F.2d 1066 (9th Cir. 1978).

44. *Id.* at 1067.

45. *Id.* at 1068-69; *cf.* MacMillan Women's Group v. MacMillan Publ'g Co., 18 Fair Empl. Prac. Cas. (BNA) 1821, 1822 (S.D.N.Y. 1978) (striking EEOC reasonable cause determination attached as exhibit to complaint); Hart v. Buckeye Indus., 46 F.R.D. 61, 62-63 (S.D. Ga. 1968) (striking reference to reasonable cause determination from complaint).

46. *Bradshaw*, 569 F.2d at 1069; *cf.* McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24, 27 (E.D. Wis. 1980) ("find[ing] no justification for striking references to [a probable cause] determination from the complaint"). An interesting variation on this theme arose in *Hambacher v. IBM*, No. C95-20040 RMW (PVT), 1995 WL 150136, at *1 (N.D. Cal. Mar. 28, 1995), where the court in an ADA case denied the plaintiff's request for court-appointed counsel under 42 U.S.C. § 2000e-5(f)(1)(B), in part because it was unable to evaluate the EEOC no cause determination in light of the plaintiff's "fail[ure] to include the findings of the Commission in his pleadings." *Id.*

47. *Bradshaw*, 569 F.2d at 1069. The fact that trial courts faced with a rule of per se admissibility (as the Ninth Circuit's approach has come to be called, *see* Abbott, *supra* note 1, at 742) can give reasonable cause determinations as little weight as they deem appropriate has prompted one federal appellate court to conclude that, in bench trials, there is little functional difference between the per se rule and a rule that gives courts discretion to exclude such determinations from evidence. Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153 (7th Cir. 1985). That conclusion seems to have been borne out in *Harris v. Birmingham Bd. of Educ.*, 537 F. Supp. 716, 721-22 (N.D. Ala. 1982), *aff'd in part and rev'd in part*, 712 F.2d 1377 (11th Cir. 1983), where the court admitted a reasonable cause determination, but refused to give it any weight.

In *Plummer v. Western International Hotels Co.*,[48] the Ninth Circuit extended *Bradshaw* to cases involving jury trials,[49] holding that "a plaintiff has a right to introduce an EEOC probable cause determination in a Title VII lawsuit, regardless of . . . whether the case is tried before a judge or jury."[50] The plaintiff in *Plummer* brought suit under Title VII and 42 U.S.C. § 1981,[51] alleging that she was denied a promotion because of her race.[52] Citing *Bradshaw*, the plaintiff sought admission of the EEOC's reasonable cause determination.[53] The employer argued that *Bradshaw* should not apply in cases tried to juries because a jury might give an EEOC determination undue weight.[54] The trial court ap-

48. 656 F.2d 502 (9th Cir. 1981).

49. *Id.* at 505; *see* Baldwin v. Rice, 144 F.R.D. 102, 104 (E.D. Cal. 1992) ("Although [*Bradshaw*] was decided prior to any jury trial right, the Ninth Circuit [in *Plummer*] . . . held that [*Bradshaw*] applies in Title VII actions, regardless of whether the trial is one before the court or the jury."); Abbott, *supra* note 1, at 743 (citing *Plummer* for the proposition that "[t]he Ninth Circuit was the first to conclude that an EEOC determination may not be excluded from a jury on balancing test grounds"). Because *Bradshaw* involved an appeal from a summary judgment ruling, the impact of EEOC determinations in jury trials was not considered in that case, although it was peripherally at issue there. *See infra* note 61.

50. *Plummer*, 656 F.2d at 505. *See generally* Abbott, *supra* note 1, at 745 (characterizing *Plummer* as "an unprecedented expansion of the per se admissibility rule" adopted in *Bradshaw*).

51. Section 1981 states, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1981(a) (1994). In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Supreme Court held that "§ 1981 affords a federal remedy against discrimination in private employment on the basis of race," and that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 459-61.

52. *Plummer*, 656 F.2d at 502-03. At the time, jury trials were available under § 1981, but not in Title VII cases. *See id.* at 504 & n.6. Because jury trials were not available under Title VII, the admissibility issue typically arose "when Title VII [was] pled together with another statute affording the right to a jury trial." Abbott, *supra* note 1, at 714. However, as a result of Congress' enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), jury trials are now available in many Title VII cases, and the admissibility issue can be expected to arise much more frequently. *See supra* notes 30-33 and accompanying text.

53. *Plummer*, 656 F.2d at 503-04.

54. *Id.* at 504.

parently agreed,[55] and excluded the determination.[56] The case proceeded to trial, and the jury returned a verdict for the employer.[57]

On appeal, the Ninth Circuit rejected the contention that excluding the determination was a proper exercise of the trial court's discretion, adhering instead to the "per se rule of admissibility" announced in *Bradshaw*.[58] The court acknowledged that the admissibility of evidence occasionally may vary between jury and nonjury trials.[59] However, because EEOC determinations are highly probative, the court found "no more reason to keep [them] from a jury's consideration than from a judge's."[60] The court stated:

> An EEOC determination, prepared by professional investigators on behalf of an impartial agency, [is] a highly probative evaluation of an individual's discrimination complaint. If we were to adopt the distinction between jury and non-jury trials urged by [the employer], in many cases *Bradshaw* could in effect be ignored and the value of EEOC determinations wasted. . . . We believe that *Bradshaw* should apply . . . even when the plaintiff requests a jury trial.[61]

The Ninth Circuit's only departure from *Bradshaw*'s per se rule occurred in *Gilchrist v. Jim Slemons Imports, Inc.*[62] The plaintiff in *Gil-*

---

55. The trial court did not explain the basis for its ruling. *Id.* at 503 n.3; *see also* Abbott, *supra* note 1, at 743-44 (noting that the trial court in *Plummer* excluded the reasonable cause determination "without specifying a reason").

56. *Plummer*, 656 F.2d at 503.

57. *Id.* at 502-04.

58. *See id.* at 504 n.5, 505; *cf.* Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984) (referring to the "*Bradshaw* rule of *per se* admissibility"). One commentator has stated that the Ninth Circuit does not characterize its approach as a per se rule, Abbott *supra* note 1, at 709 n.20, despite discussing *Plummer* at length, in which that characterization *is* used. *See id.* at 743-45. Under a per se rule of admissibility, the evidence at issue is admissible regardless of the factual context of the particular case. *Id.* at 709 n.20. "[A] per se rule . . . does not grant the trial judge discretion to exclude the evidence if . . . its probative value is substantially outweighed by the danger of unfair prejudice under the circumstances of the case." David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 14 n.71 (1986).

59. *Plummer*, 656 F.2d at 505. For an elaboration of the Ninth Circuit's view on this point, see *EEOC v. Farmer Bros. Co.*, 31 F.3d 891 (9th Cir. 1994). "[I]n a bench trial, the risk that a verdict [sic] will be affected unfairly and substantially by the admission of . . . evidence is far less than in a jury trial." *Id.* at 898; *see also* United States v. Caudle, 48 F.3d 433, 435 (9th Cir. 1995) (stating that "it would be most surprising if [the] potential prejudice [from the admission of evidence] had any significance in a bench trial").

60. *Plummer*, 656 F.2d at 505.

61. *Id.* (citations omitted). In reaching that result, the court noted that *Bradshaw* had not foreclosed the possibility of admitting EEOC reasonable cause determinations in cases tried to juries, and that because the plaintiff in *Bradshaw* had invoked 42 U.S.C. § 1983 as well as Title VII, that case could have been tried to a jury on remand. *Id.*

62. 803 F.2d 1488 (9th Cir. 1986).

christ brought suit under the ADEA after his employment was terminated.[63] The jury returned a verdict for the plaintiff,[64] and the employer appealed.[65] Among other contentions, the employer argued that the trial court erred in admitting a letter issued by the EEOC that charged the employer with violating the ADEA.[66]

The Ninth Circuit drew a distinction between Title VII reasonable cause determinations and ADEA "letters of violation."[67] That distinction becomes critical, the court observed, "when considering the potential for prejudicing a jury."[68] In the Ninth Circuit's view, reasonable cause determinations do not suggest that the employer has violated Title VII, but only that "preliminarily," there is reason to believe a statutory violation has occurred.[69] A letter of violation, by contrast, reflects the EEOC's determination that an ADEA violation *has* occurred.[70] Its admission, therefore, has a greater potential for prejudicing a jury.[71] The court concluded:

> A jury may find it difficult to evaluate independently evidence of age discrimination after being informed that the EEOC has already examined the evidence and

---

63. *Id.* at 1491-92. In *Gilchrist*, the plaintiff alleged that his termination resulted from age-based discrimination by the defendant employer. *Id.*

64. Jury trials have been available in ADEA cases since 1978, when the Supreme Court decided *Lorillard v. Pons*, 434 U.S. 575 (1978). Congress codified the right to jury trials in ADEA cases later that year. *See* 29 U.S.C. § 626(c)(2) (1988); Goodman v. Heublein, Inc., 645 F.2d 127, 129-30 n.2 (2d Cir. 1981) (discussing *Lorillard* and the Senate amendment to the ADEA).

65. *Gilchrist*, 803 F.2d at 1491.

66. *Id.* at 1491, 1499. The trial court had been "reluctant to admit the letter . . . but felt compelled to do so based on [its] reading of *Plummer*." *Id.* at 1500.

67. *Id.* The Fifth Circuit also recognizes this distinction, as has at least one federal district court. *See* EEOC v. Manville Sales Corp., 27 F.3d 1089, 1095 (5th Cir. 1994); Cary v. Carmichael, 908 F. Supp. 1334, 1341-42 (E.D. Va. 1995).

68. *Gilchrist*, 803 F.2d at 1500; *see also* Abbott, *supra* note 1, at 744 n.317 (discussing *Gilchrist* and observing that "this distinction between 'preliminary' and 'conclusive' EEOC findings might affect the tendency of the evidence to unduly prejudice the jury").

69. *Gilchrist*, 803 F.2d at 1500; *see also Manville Sales Corp.*, 27 F.3d at 1095 (stating that "a [determination] of reasonable cause is . . . tentative in its conclusions"); *Cary*, 908 F. Supp. at 1342 (concluding that a reasonable cause determination is "a tentative determination, and not a [finding] that the Company in fact violated Title VII").

70. *Gilchrist*, 803 F.2d at 1500. The pertinent regulation provides for the issuance of a letter of violation "[w]henever the Commission has a reasonable basis to conclude that a violation of the [ADEA] has occurred or will occur." 29 C.F.R. § 1626.15(b) (1995).

71. *Gilchrist*, 803 F.2d at 1500.

found a violation. The probative value of a letter of violation may not, in every case, outweigh the potential for prejudice. Therefore, the per se rule of *Plummer* does not apply and the district judge should have exercised his discretion to admit or to exclude the letter of violation.[72]

In *Heyne v. Caruso*,[73] the Ninth Circuit dispelled any suggestion that *Gilchrist* reflected a general retreat from *Bradshaw* and *Plummer*.[74] The plaintiff in *Heyne* brought a Title VII claim alleging that she had been terminated unlawfully for rejecting the defendant's sexual advances.[75] The plaintiff sought to introduce a probable cause finding[76] issued by the Nevada Equal Rights Commission (NERC).[77] The trial court refused to admit the finding and prohibited the plaintiff's attorney from

---

72. *Id. But cf.* Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988) (following *Plummer* in ADEA case); Strickland v. American Can Co., 575 F. Supp. 1111, 1112 (N.D. Ga. 1983) (same). The *Gilchrist* court ultimately concluded that the trial court's admission of the letter under the per se rule of *Bradshaw* and *Plummer* was harmless error because the potential prejudice to the employer had been mitigated by a limiting instruction. *Gilchrist*, 803 F.2d at 1500-01; *cf. Abrams*, 702 F. Supp. at 512 ("[G]iven the lingering potential for prejudice, the Court will . . . entertain a jury instruction to ensure that the jury does not deem the EEOC determination dispositive. The Court has complete confidence that the jury, guided by such a charge, will not give the EEOC letter undue weight.") (citation omitted).

73. 69 F.3d 1475 (9th Cir. 1995).

74. District courts in the Ninth Circuit have followed *Bradshaw* and *Plummer* on numerous occasions. *See* Baldwin v. Rice, 144 F.R.D. 102, 104 (E.D. Cal. 1992); EEOC v. Judson Steel Co., 33 Fair Empl. Prac. Cas. (BNA) 1286, 1294 (N.D. Cal. 1982); EEOC v. Lucky Stores, Inc., 30 Empl. Prac. Dec. (CCH) ¶ 33,232 at 27,875 (E.D. Cal. 1982); Iverson v. City of Portland Civil Serv. Bd., 22 Fair Empl. Prac. Cas. (BNA) 114, 115 n.3 (D. Or. 1978).

75. *Heyne*, 69 F.3d at 1477. *See generally* Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (stating that "a supervisor's demand that an employee submit to an unwelcome sexual advance or face discharge from employment could well constitute a sustainable *quid pro quo* [sexual] harassment claim").

76. *Heyne*, 69 F.3d at 1477. In the employment discrimination context, the terms "reasonable cause" and "probable cause" are often used interchangeably. *See, e.g.*, Mitchell v. Office of Los Angeles County, 805 F.2d 844, 847 (9th Cir. 1986) (referring to EEOC finding that "there is reasonable cause to believe the [charging party's] allegation . . . is true" as a "'probable cause' determination").

77. *Heyne*, 69 F.3d at 1477-78. The NERC is the agency with primary responsibility for enforcing Nevada's employment discrimination laws. *See* NEV. REV. STAT. ANN. § 613.405 (Michie 1995); Palmer v. Nevada, 787 P.2d 803, 804 (Nev. 1990).

referring to it in opening statement.[78] The jury returned a verdict in favor of the defendant, and the plaintiff appealed.[79]

On appeal, the plaintiff contended the trial court erred in refusing to admit the probable cause finding.[80] The defendant responded that, under *Gilchrist*, exclusion of the finding had been a proper exercise of the trial court's discretion.[81] The Ninth Circuit rejected the defendant's argument, holding that *Plummer*, and not *Gilchrist*, was controlling.[82] The court stated that the NERC determination was "a preliminary investigative determination more like the EEOC reasonable cause determination in *Plummer*" than the ADEA letter of violation at issue in *Gilchrist*.[83]

In reaching this conclusion, the *Heyne* court emphasized that "the *Plummer* ruling is not restricted solely to EEOC findings of probable cause but extends to similar administrative determinations, including NERC findings."[84] Because the Ninth Circuit believed the probative value of such findings outweighed any prejudicial effect they may have on a jury,[85] the trial court committed reversible error by excluding the NERC's determination.[86]

---

78. *Heyne*, 69 F.3d at 1478. After this ruling, the parties stipulated to a jury instruction referring to the probable cause finding, but also indicating that the plaintiff had withdrawn her charge of discrimination before the NERC could hold a hearing on the finding. *Id.* The Ninth Circuit held that the plaintiff's joinder in this stipulation did not constitute a waiver of her objection to the exclusion of the NERC's finding, because she "was given no choice but to stipulate to the jury instruction in order to get the probable cause determination in front of the jury at all." *Id.* at 1484.

79. *Id.* at 1478.

80. *Id.* at 1482.

81. *Id.* at 1483.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986); *see also* Abbott, *supra* note 1, at 742 ("The . . . Ninth Circuit[] take[s] the view that EEOC determinations are so probative that their relevance to the charge of employment discrimination can never be outweighed by the concerns of unfair prejudice, confusing or misleading a jury or undue trial delay.").

86. *Heyne*, 69 F.3d at 1483. The court also held that the stipulated jury instruction did not satisfy the requirements of *Plummer*. The court stated: "The fact that the NERC findings were mentioned for the first time during the closing argument sufficiently detracted from its [sic] significance as to taint the verdict." *Id.* at 1484.

B. The View in Other Jurisdictions

Unlike the Ninth Circuit, most jurisdictions treat the admissibility of EEOC reasonable cause determinations as a matter committed to the trial court's discretion, to be decided on a case-by-case basis.[87] In *Barfield v. Orange County*,[88] for example, the Eleventh Circuit concluded that, given the variables involved in analyzing the admissibility of EEOC determinations,[89] the decision should be left to the discretion of the trial court.[90] The court acknowledged that such determinations may be highly probative,[91] but was "unwilling to say, as the Ninth Circuit seems to, that there can exist no EEOC determinations in which the . . . circumstances indicate lack of trustworthiness sufficient to justify exclusion from evidence."[92]

In the Eleventh Circuit's view, it is appropriate to consider whether a determination should be excluded for lack of trustworthiness under Rule 803(8)(C) of the Federal Rules of Evidence.[93] The trial court also should consider whether to exclude the determination under Rule 403[94] be-

---

87. *See* Crockett v. City of Billings, 761 P.2d 813, 820 (Mont. 1988). The Ninth Circuit has acknowledged that its view is out of step with the view prevailing in other jurisdictions. *See Gilchrist*, 803 F.2d at 1500; Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504 n.5 (9th Cir. 1981). Only the Fifth Circuit has adopted an approach approximating that of the Ninth Circuit. *See* Barfield v. Orange County, 911 F.2d 644, 649-50 (11th Cir. 1990) ("The Fifth Circuit approaches [the Ninth Circuit's] position, largely foreclosing a challenge under Fed. R. Evid. 403 but reserving the possibility that an EEOC determination could be excluded if 'the sources of information or other circumstances indicate a lack of trustworthiness,' the specific grounds provided in Rule 803(8)(C)."") (quoting McClure v. Mexia Indep. Sch. Dist., 750 F.2d 396, 400 (5th Cir. 1985)). The Fifth Circuit, however, has recently retreated from the Ninth Circuit's categorical view. *See, e.g.*, Cortes v. Maxus Exploration Co., 977 F.2d 195, 201-02 (5th Cir. 1992) (stating that *McClure* should not be read "as leaving district courts without discretion under Rule 403 to exclude such [determinations] if their probative value is substantially outweighed by prejudicial effect or other considerations enumerated in the rule").

88. 911 F.2d 644 (11th Cir. 1990).

89. The court indicated that the factors to be considered include whether the determination "contains legal conclusions in addition to its factual content," and whether it is of questionable trustworthiness. *Id.* at 650.

90. *Id.*

91. *Id.* On this point, the *Barfield* court was expressing agreement with the Ninth Circuit. *See also Plummer*, 656 F.2d at 505 (stating the view that such determinations may be highly probative).

92. *Barfield*, 911 F.2d at 650 (internal quotation marks omitted).

93. *Id.* The rule creates an exception to the hearsay rule for public records or reports, including "factual findings resulting from an investigation made pursuant to authority granted by law," unless the circumstances surrounding their preparation indicate a lack of trustworthiness. FED. R. EVID. 803(8)(C).

94. The rule states, in relevant part, that evidence otherwise admissible may be excluded "if its probative value is substantially outweighed by the danger of unfair

cause its probative value is outweighed by the risk of unfair prejudice.[95] Whether the case will be tried to the court or a jury should have no impact on the first inquiry because the trustworthiness of the determination is not affected by the identity of the trier of fact.[96] The difference, however, between jury trials and bench trials might well impact the inquiry under Rule 403.[97] As the *Barfield* court explained:

> The admission of an EEOC report, in certain circumstances, may be much more likely to present the danger of creating unfair prejudice in the minds of the jury than in the mind of the trial judge, who is well aware of the limits and vagaries of administrative determinations and better able to assign the appropriate weight and no more.[98]

The view expressed in *Barfield* appears to be shared by the First,[99] Second,[100] Third,[101] Fourth,[102] Sixth,[103] Seventh,[104] Eighth,[105] and Tenth[106] Circuits.[107] In addition, it was recently embraced by the Fifth

---

prejudice." FED. R. EVID. 403.

95. *Barfield*, 911 F.2d at 650.

96. *Id.* at 650-51.

97. *Id.* at 651; *see also* Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1554 (11th Cir. 1995) ("In particular, the distinction between a bench and a jury trial may affect the district court's analysis of a determination letter's admissibility under Federal Rules of Evidence 403.").

98. *Barfield*, 911 F.2d at 651.

99. Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106, 1113 (1st Cir. 1989).

100. Gillin v. Federal Paper Bd. Co., 479 F.2d 97, 99-100 (2d Cir. 1973).

101. Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977).

102. Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15 (4th Cir. 1972).

103. Heard v. Mueller Co., 464 F.2d 190, 194 (6th Cir. 1972).

104. Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153-54 (7th Cir. 1985).

105. Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984). For a general discussion of the Eighth Circuit's view, see Abbott, *supra* note 1, at 747-49.

106. Whatley v. Skaggs Cos., 707 F.2d 1129, 1136-37 (10th Cir. 1983); Nulf v. International Paper Co., 656 F.2d 553, 563 (10th Cir. 1981).

107. The Ninth Circuit's rule of per se admissibility has also been rejected by a number of state courts, including some within that circuit. *See, e.g.*, Cantu v. City of Seattle, 752 P.2d 390, 391-92 (Wash. Ct. App. 1988); Michail v. Fluor Mining & Metals, Inc., 225 Cal. Rptr. 403, 404 & n.1 (Ct. App. 1986). *But cf.* Mahan v. Farmers Union Cent. Exch., Inc., 768 P.2d 850, 862 (Mont. 1989) (Sheehy, J., concurring and dissenting) ("The better view, to be consistent with the Ninth Circuit, is to hold such reports admissible, and for the trial court to instruct the jury to give such reports only the weight they should be accorded."). Interestingly, several states have rejected both federal approaches in favor of a rule of per se *inadmissibility*. Humphrey v. Nebraska Pub. Power Dist., 503 N.W.2d 211, 219-20 (Neb. 1993); Crockett v. City of Billings, 761 P.2d 813, 820 (Mont. 1988); Tiemann v. Santarelli Enters., 486 A.2d 126, 131-32 (Me. 1984).

Circuit,[108] which had previously been in essential agreement with the Ninth Circuit.[109] Thus, among circuits that have considered the issue, the Ninth Circuit now stands alone in adhering to a rule of per se admissibility.[110]

III. THE IMPACT OF REASONABLE CAUSE DETERMINATIONS ON SUMMARY JUDGMENT PROCEEDINGS

A. *The Ninth Circuit View*

In the Ninth Circuit, the existence of an EEOC reasonable cause determination precludes summary judgment in favor of the employer.[111] The first case to squarely address this issue was *Gifford v. Atchison, Topeka & Santa Fe Railway Co.*,[112] where the court held that "an EEOC finding of reasonable cause is 'sufficient at least to create an issue of fact' requiring proceedings beyond the summary judgment stage."[113] The plaintiff in *Gifford* filed a sex discrimination charge with the EEOC when her employment was terminated.[114] After what the Ninth Circuit characterized as an "impartial investigation,"[115] the EEOC found reasonable

---

108. *See* Cortes v. Maxus Exploration Co., 977 F.2d 195, 201-02 (5th Cir. 1992).

109. *See* Barfield v. Orange County, 911 F.2d 644, 649-50 (11th Cir. 1990); *Cantu*, 752 P.2d at 392; *Michail*, 225 Cal. Rptr. at 404 n.1.

110. *See* Abbott, *supra* note 1, at 732 n.201, 743-45. District courts outside the Ninth Circuit occasionally have been receptive to the Ninth Circuit approach. *See* Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988); Strickland v. American Can Co., 575 F. Supp. 1111, 1112 (N.D. Ga. 1983). However, most district courts would now be precluded from adopting it by controlling precedent in their own circuits. *See generally* Thomas v. Heckler, 598 F. Supp. 492, 496 (M.D. Ala. 1984) (observing that "a district court . . . is bound to follow the law as announced by the . . . Circuit [in which it sits]").

111. In *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472 (9th Cir. 1986), the court stated that an "EEOC finding of reasonable cause to believe that [a] female plaintiff had been treated differently than similarly situated male employees was at least sufficient to create [an] issue of fact as to [the] employer's motive in terminating [the] plaintiff, rendering resolution of [the] issue on summary judgment improper." *Id.* at 1477 (citing Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1156 (9th Cir. 1982)). For a general discussion of *Proctor*, see Marcia Leitner, Summary, Proctor v. Consolidated Freightways Corporation of Delaware: *An Employer's Obligation to Make a Good Faith Effort to Accommodate an Employee's Religious Beliefs*, 17 GOLDEN GATE U. L. REV. 109 (1987).

112. 685 F.2d 1149 (9th Cir. 1982). The issue was lurking in *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066 (9th Cir. 1978), however, where the court reversed a summary judgment ruling in favor of the employer and indicated that, on remand, the trial court was to consider a reasonable cause determination it had stricken from the plaintiff's complaint. *Id.* at 1068-69.

113. Mitchell v. Office of Los Angeles County, 805 F.2d 844, 847 (9th Cir. 1986) (quoting *Gifford*, 685 F.2d at 1156).

114. *Gifford*, 685 F.2d at 1151.

115. *Id.* at 1156. The court's opinion actually contained no significant analysis of the

cause to believe the plaintiff was treated differently than similarly situated male employees who were not discharged.[116] In the ensuing Title VII litigation, the employer moved for summary judgment, arguing that the plaintiff failed to state a claim.[117] The plaintiff based her opposition to the motion on the existence of the EEOC's reasonable cause determination.[118] The trial court granted the employer's motion,[119] concluding that the plaintiff and the male employees treated more favorably were not similarly situated.[120] On appeal, the Ninth Circuit held that the EEOC's determination was sufficient to create an issue of fact on that question.[121] Thus, the trial court erred in granting the employer's motion for summary judgment.[122]

The Ninth Circuit reaffirmed *Gifford* in *Mitchell v. Office of Los Angeles County*.[123] The plaintiff in *Mitchell* brought a Title VII action alleging that the defendant declined to hire him because of his race.[124] Prior to instituting the action, he filed a charge of discrimination with the EEOC.[125] The Commission found "reasonable cause to believe that the

---

Commission's investigation, even though the Commission took more than nine years to issue a notice of right to sue. *Id.* The impartiality of EEOC investigations is not always a given. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241, 251 (N.D. Ill. 1980) (observing that the "appearance of partiality on the part of the Commission is palpable"), *aff'd*, 839 F.2d 302 (7th Cir. 1988). In apparent recognition of that fact, the Ninth Circuit has indicated that an employer is entitled to explore potential deficiencies in an EEOC investigation. *See* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 n.9 (9th Cir. 1981) ("The defendant [employer], of course, is free to present evidence refuting the findings of the EEOC determination on remand."). *But cf.* EEOC v. Keco Indus., 748 F.2d 1097, 1100 (6th Cir. 1984) ("It was error for the district court to inquire into the sufficiency of the Commission's investigation.").

116. *Gifford*, 685 F.2d at 1156. *See generally* Belissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985) ("A plaintiff alleging a discriminatory firing need show only that he was fired from a job for which he was qualified while others not in the protected class were treated more favorably.") (citing Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir. 1984)).

117. *Gifford*, 685 F.2d at 1152.

118. *Id.* at 1156.

119. *Id.* at 1152.

120. *Id.* at 1156. *See generally* Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) ("It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly-situated *in all respects*.").

121. *Gifford*, 685 F.2d at 1156.

122. *Id.*

123. 805 F.2d 844 (9th Cir. 1986).

124. *Id.* at 845.

125. *Id.*

[plaintiff's] allegation regarding the failure to hire is true."[126] Reasoning that the EEOC is "expert in the investigation of [discrimination] claims,"[127] the Ninth Circuit indicated that the EEOC determination was sufficient to raise an issue of fact requiring proceedings beyond the summary judgment stage.[128]

A district court in the Ninth Circuit has extended this analysis to the findings of a state employment discrimination agency.[129] In *Stewart v. Suwol*,[130] the plaintiff claimed that the defendants discriminated against him in violation of section 504 of the Rehabilitation Act of 1973[131] by

---

126. *Id.* at 847.

127. *Id.* The presumed expertise of EEOC investigators appears to be a significant factor underlying the Ninth Circuit's deferential treatment of EEOC determinations. *Cf.* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981) (stating that "EEOC determinations are prepared by professional investigators on behalf of an impartial agency"). *See generally* Smith v. Universal Servs., 454 F.2d 154, 157 (5th Cir. 1972):

> [T]o ignore the manpower and resources expended on [an] EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary.
> The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an unlawful practice has occurred, is highly probative of the ultimate issue involved in such cases. Its probative value . . . at least outweighs any possible prejudice to defendant.

Id.

However, other courts have been more circumspect. *See, e.g.*, Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984) ("EEOC determinations are not homogeneous products; they vary greatly in quality and factual detail."); *see also* Abbott, *supra* note 1, at 738 ("Merely because the EEOC has the capability of conducting quality investigations . . . does not mean its findings always reflect this expertise.").

128. *Mitchell*, 805 F.2d at 847 (citing Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1156) (9th Cir. 1982). However, the court's discussion of the issue was dictum, having occurred in the course of its analysis of the employer's claim for attorneys' fees, rather than in considering a motion for summary judgment. *See id.* at 846-48.

129. Not all district courts in the Ninth Circuit agree, however, with its treatment of reasonable cause determinations. In *Williams v. City and County of San Francisco*, No. C-88-1829-JPV, 1993 WL 165307 (N.D. Cal. May 7, 1993), for example, the court ignored *Gifford* and its progeny in granting the employer's motion for summary judgment in a Title VII case, despite the existence of an EEOC reasonable cause determination. *Id.* at *4. In addition, the district court in *Plummer* declined to follow *Bradshaw's* rule of per se admissibility. *Plummer*, 656 F.2d at 503 & n.3; *see also* Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986) (district court reluctant to follow its view of *Plummer*).

130. 55 Fair Empl. Prac. Cas. (BNA) 422 (D. Or. 1991).

131. 29 U.S.C. § 794 (1994). Section 504 prohibits federal agencies and recipients of federal financial assistance from discriminating against individuals with disabilities. *Id.* The Rehabilitation Act defines an "individual with a disability" to mean "any person

refusing to hire him because he was regarded as having a mental impairment.[132] The defendants moved for summary judgment,[133] arguing that the plaintiff was not hired because of unfavorable references from his prior employers.[134] In response, the plaintiff relied upon a finding by the Oregon Bureau of Labor and Industries[135] that there was "substantial evidence of [an] unlawful employment practice on the basis of handicap."[136] Citing *Gifford*, the court stated "the finding of the Bureau of Labor that there is substantial evidence that the defendants discriminated against [the plaintiff] on the basis of handicap is sufficient to raise a question of fact on this issue."[137] The court therefore denied the defendants' motion for summary judgment.[138]

B. The View in Other Jurisdictions

The Ninth Circuit's view of the impact of reasonable cause determinations on summary judgment proceedings is, like its view of the admissibility of such determinations, at odds with the view prevailing elsewhere.[139] In *Goldberg v. B. Green & Co.*,[140] for example, the plaintiff

---

who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.* § 706(8)(B) (1994).

132. *Stewart*, 55 Fair Empl. Prac. Cas. (BNA) at 423. The plaintiff's perceived disability allegedly arose out of treatment he received for stress. *See id.*; *cf.* Holihan v. Lucky Stores, 87 F.3d 362, 365 n.3 (9th Cir. 1996) (stating that stress "could be covered by the ADA"). For the author's consideration of various perceived disability discrimination issues, see Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345 (1996).

133. *Stewart*, 55 Fair Empl. Prac. Cas. (BNA) at 422-23.

134. *Id.* at 426. Unfavorable references provide a legitimate nondiscriminatory reason for a refusal to hire. *See, e.g.*, Martinez v. National Broad. Co., 877 F. Supp. 219, 229 (D.N.J. 1994); Piascik v. Cleveland Museum of Art, 426 F. Supp. 779, 784-85 & nn.11-12 (N.D. Ohio 1976). *See generally* Holder v. Old Ben Coal Co., 618 F.2d 1198, 1202 (7th Cir. 1980) ("A desire to hire . . . [a] better qualified applicant is a nondiscriminatory, legitimate [basis for] a hiring decision.").

135. The Oregon Bureau of Labor and Industries is the agency responsible for enforcing Oregon's unlawful employment practice laws. *See* Pace Consultants v. Roberts, 687 P.2d 779, 780 (Or. 1984) (providing overview of agency's responsibilities).

136. *Stewart*, 55 Fair Empl. Prac. Cas. (BNA) at 424, 426 (capitalization omitted).

137. *Id.* at 426.

138. *Id.*

139. This discrepancy undoubtedly is at least in part due to the Ninth Circuit's approach to the summary judgment issue as a corollary to its unique view that "a Title VII plaintiff has an absolute right to introduce the . . . determination into evidence."

brought suit under the ADEA after being terminated at the age of fifty.[141] The trial court granted the employer's motion for summary judgment, concluding that the plaintiff had produced no direct or circumstantial evidence of age discrimination.[142] On appeal, the plaintiff argued that he had presented sufficient evidence for a jury to infer age discrimination and cited a determination by the Maryland Commission on Human Relations[143] finding probable cause to believe that the employer had discriminated against him.[144] Although the Fourth Circuit assumed the Commission's determination was admissible,[145] it rejected the plaintiff's argument.[146] The court stated:

> [T]he Commission's findings are not sufficiently probative to create a genuine issue of material fact about [the employer's] intent to discriminate on the basis of age. The Commission's report merely repeats facts which [the plaintiff] himself alleges elsewhere in this case, and then states in conclusory fashion that those facts reflect age discrimination. Such facts, standing alone, are not enough to salvage [the plaintiff's] claim.[147]

Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1156 n.4 (9th Cir. 1982) (citing Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981)); *cf.* Stewart v. Personnel Pool of Am., Inc., No. Civ.A. 92-2581, 1993 WL 525575, at *5 (D.N.J. Dec. 16, 1993) (holding that an EEOC determination that "would not be admissible at trial" cannot preclude summary judgment), *aff'd*, 30 F.3d 1488 (3d Cir. 1994).

140. 836 F.2d 845 (4th Cir. 1988).

141. *Id.* at 846-47. The ADEA prohibits discrimination against individuals who are at least 40 years of age. 29 U.S.C. §§ 623(a), 631(a) (1994).

142. *Goldberg*, 836 F.2d at 847. The trial court also noted that the plaintiff had been replaced by an older individual. *Id.* at 848. Replacement by another individual in the ADEA's protected class is not fatal to an ADEA claim. *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996). Replacement by an older individual, however, may be. *See* Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984) ("Although proof of replacement by a person less than 40 years of age is not essential, the successor should ordinarily be substantially younger than the discharged [employee] he replaces to warrant an inference of age discrimination from the circumstance of age difference."). In the Ninth Circuit, however, "replacement by even an older employee will not necessarily foreclose prima facie proof if other direct or circumstantial evidence supports an inference of discrimination." Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981).

143. The Maryland Commission on Human Relations is the agency responsible for enforcing Maryland's employment discrimination laws. *See* Maryland Comm'n on Human Relations v. Mass Transit Admin., 449 A.2d 385, 386 n.2 (Md. 1982).

144. *Goldberg*, 836 F.2d at 848.

145. *Id.* While the court acknowledged that the admission of such a determination was within the trial court's discretion, it noted that in some cases a determination may be "more prejudicial than probative." *Id.* at 848 n.4.

146. *Id.* at 848.

147. *Id.* (citing Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984)).

District courts outside the Ninth Circuit have reached the same result.[148] In *Baumgardner v. Inco Alloys International*,[149] for example, the plaintiffs were retired employees of the defendant.[150] Shortly after the plaintiffs announced their retirements,[151] their employer adopted a new retirement plan and refused to permit them to rescind their retirements in order to qualify for the new plan's enhanced benefits.[152] The plaintiffs brought suit alleging that their exclusion from the new plan violated the ADEA.[153] The employer moved for summary judgment,[154] arguing that the plaintiffs failed to establish a prima facie case.[155] The plaintiffs responded by arguing that the EEOC's finding of probable cause[156] was sufficient to preclude summary judgment.[157] The court

148. In addition, another federal appellate court has stated, in dicta, that "any EEOC proceedings, while they may be relevant to summary judgment, are no substitute for an independent judgment on the part of the district court." Ross v. Communications Satellite Corp., 759 F.2d 355, 363 (4th Cir. 1985). On the other hand, trial courts outside the Ninth Circuit occasionally have been inclined to follow the Ninth Circuit's approach. *See, e.g.*, Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1552-53 (11th Cir. 1995) ("In denying the [employer's] summary judgment motion, the district court assumed the admissibility of the EEOC determination letter and found that the EEOC's determination was sufficient to establish a factual issue as to whether the [employer's] legitimate, non-discriminatory reason for [the plaintiff's] termination was pretextual.").

149. 746 F. Supp. 623 (S.D. W. Va. 1990).

150. *Id.* at 624.

151. *See id.*

152. *See id.* at 625.

153. *Id.* Under the ADEA, an employee benefit plan cannot require or permit involuntary retirements. 29 U.S.C. § 623(f)(2) (1994); Trans World Airlines v. Thurston, 469 U.S. 111, 124 (1985).

154. *Baumgardner*, 746 F. Supp. at 624.

155. *Id.* at 625. The court described the requirements of a prima facie case under the ADEA as follows:

> To maintain an action, the [p]laintiffs must establish that they (a) are employees covered by the ADEA; (b) have suffered an unfavorable employment action by an employer covered by the ADEA; (c) under circumstances in which the employees' age was a determining factor in the action such that "but for" their employer's motive to discriminate against them because of their age they would not have suffered the action.

Id. (citing Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982)). For the author's consideration of the plaintiff's prima facie case and the parties' respective burdens of proof in ADEA cases, see Michael D. Moberly, *Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases*, 24 N.M. L. REV. 89 (1994).

156. The EEOC concluded that the employer's refusal to permit the plaintiffs to

concluded that the EEOC determination merely restated the plaintiffs' allegations.[158] Relying on *Goldberg*, the court held that this was not sufficient to create a genuine issue of fact precluding summary judgment in favor of the employer.[159]

The court in *Kesselring v. United Technologies Corp.*[160] reached a similar conclusion.[161] The plaintiff in *Kesselring* brought suit under the ADEA claiming that his employment was terminated because of his age.[162] The employer moved for summary judgment,[163] arguing that the plaintiff was terminated as the result of a company-wide reduction in force,[164] and that age was not a factor in his termination.[165] The plaintiff argued that there was sufficient evidence to create an issue of fact as to the employer's true motivation for discharging him.[166] He relied on a determination issued by the Ohio Civil Rights Commission[167] finding it "probable that [the employer] . . . engaged in unlawful practices."[168]

---

postpone their retirements rendered the retirements involuntary. *Baumgardner*, 746 F. Supp. at 625.

157. *Id.*

158. *Id.*

159. *Id.*

160. 753 F. Supp. 1359 (S.D. Ohio 1991).

161. *Id.* at 1368-69.

162. *Id.* at 1361, 1363.

163. *Id.* at 1361.

164. The plaintiff's supervisor had been instructed to reduce the number of employees in the plaintiff's department because the employer was losing money due to a decrease in demand for its product. *Id.* at 1364. Such a cost-based reduction in force ordinarily constitutes a legitimate, nondiscriminatory reason for termination. *See, e.g.*, Pearlstein v. Staten Island Univ. Hosp., 886 F. Supp. 260, 269 (E.D.N.Y. 1995) ("A reduction-in-force is a legitimate nondiscriminatory reason to terminate an employee, provided that the decision regarding who to terminate is not tainted by unlawful discrimination.") (citations omitted).

165. *Kesselring*, 753 F. Supp. at 1363.

166. *Id.* at 1365.

167. The Ohio Civil Rights Commission is the agency responsible for administering and enforcing Ohio's civil rights laws and eliminating unlawful discrimination. *See* Brewer v. Republic Steel Corp., 513 F.2d 1222, 1223 (6th Cir. 1975); Ohio *ex rel.* Civil Rights Comm'n v. Gunn, 352 N.E.2d 654, 654 (Ohio Ct. App. 1975), *aff'd*, 344 N.E.2d 327 (Ohio 1976). The Commission is charged with duties similar to those of the EEOC. *See* Harden v. Dayton Human Rehabilitation Ctr., 520 F. Supp. 769, 774 (S.D. Ohio 1981), *aff'd*, 779 F.2d 50 (6th Cir. 1985). For example, like the EEOC, the Ohio Civil Rights Commission "receives and investigates charges of unlawful discriminatory practices, and . . . must attempt to eliminate violations by means of conference, conciliation, and persuasion." *Brewer*, 513 F.2d at 1223.

168. *Kesselring*, 753 F. Supp. at 1368. Citing *Heard v. Mueller Co.*, 464 F.2d 190, 194 (6th Cir. 1972), which left the admission of EEOC determinations to the trial court's discretion, the Ohio district court had previously held that "[f]indings of the Ohio Civil Rights Commission shall be admitted on the same basis . . . and shall be

Relying upon *Goldberg* and *Baumgardner*, the court held that the Commission's conclusory findings[169] were not sufficient to save the plaintiff's claim from summary judgment.[170] In reaching this result, the court relied in particular upon the fact that the Commission issued its determination without considering evidence substantiating the employer's articulated reason for the plaintiff's discharge.[171] The court stated that "where the administrative agency's findings merely repeat the plaintiff's allegations and make conclusory determinations of . . . discrimination, the agency's probable cause determination is not sufficient to preclude summary judgment."[172]

In *Bailey v. South Carolina Department of Social Services*,[173] a district court in South Carolina also relied on *Goldberg* to hold that a reasonable cause determination did not preclude summary judgment in favor of the employer.[174] The plaintiff in *Bailey* brought suit under Title VII alleging that he had been denied a promotion because of his race and gender.[175] In response to the employer's motion for summary judgment, the plaintiff argued that an EEOC determination, which found reasonable cause to believe he had not been promoted because of his race, was sufficient to create an issue of fact precluding summary judgment.[176] However, the court held that because the reasonable cause determination was internally inconsistent,[177] it lacked any probative value.[178] Because the determination was the only evidence the plaintiff had presented in

---

entitled to such weight as is deemed appropriate." *Harden*, 520 F. Supp. at 773-74.

169. The court noted that the Commission's report "summarily state[d] that 'Evidence substantiates that [the employer] retained similarly situated employees who were considered younger and less senior than charging party.'" *Kesselring*, 753 F. Supp. at 1369 (quoting the Commission's report).

170. *Id.*

171. *Id.* The employer apparently elected not to provide this evidence to the Commission during the course of its investigation. *See id.*

172. *Id.* (citing Goldberg v. B. Green & Co., 836 F.2d 845 (4th Cir. 1988) and Baumgardner v. Inco Alloys Int'l, 746 F. Supp. 623 (S.D. W. Va. 1990).

173. 851 F. Supp. 219 (D.S.C. 1993).

174. *Id.* at 221.

175. *Id.* at 220.

176. *Id.* at 221.

177. The determination stated both that none of the employees promoted in lieu of the plaintiff were less qualified than the plaintiff, and that the plaintiff was "clearly better qualified" than those same employees. *Id.*

178. *Id.*

response to the employer's motion, the employer was entitled to summary judgment.[179]

Goldberg was also followed in *Cary v. Carmichael.*[180] The plaintiff in *Cary* was terminated after refusing to consent to a drug testing policy agreed to by the employer and the plaintiff's union.[181] The plaintiff brought suit under Title VII alleging that his termination was unlawful because the employer failed to accommodate his religious beliefs.[182] The employer moved for summary judgment.[183] The plaintiff responded by citing an EEOC determination[184] that found reasonable cause to believe the plaintiff was "denied a religious accommodation and thereby unlawfully discharged."[185]

Citing *Goldberg*, the court stated that an EEOC reasonable cause determination "may not be sufficiently probative to create a genuine issue of material fact" precluding summary judgment in favor of the employer.[186] Significantly, the court relied upon the same distinction between Title VII reasonable cause determinations and ADEA letters of violation the Ninth Circuit recognized in *Gilchrist v. Jim Slemons Imports, Inc.*[187] to support that conclusion.[188] Because a reasonable cause determination merely reflects a tentative conclusion that there has been a statutory violation, it may be of minimal value in evaluating an employer's motion for summary judgment.[189] In addition, because the determination at is-

---

179. *Id.*

180. 908 F. Supp. 1334 (E.D. Va. 1995).

181. *Id.* at 1338. Although the plaintiff was not a member of the union, he was a member of the bargaining unit it represented, and thus was covered by the terms of the collective bargaining agreement establishing the drug testing policy. *Id.* at 1337. *See generally* Saunders v. Amoco Pipeline Co., 927 F.2d 1154, 1156 (10th Cir. 1991) ("Union membership . . . is irrelevant to the applicability of a collective bargaining agreement. Rather, an individual employed in a craft governed by a collective bargaining agreement is bound by the terms of that agreement, regardless of his union membership.") (citations omitted).

182. *Cary*, 908 F. Supp. at 1339-40, 1342. The plaintiff informed the employer that his refusal to consent to testing was based upon "his status as an ordained Baptist minister." *Id.* at 1338.

183. *Id.* at 1339.

184. *See id.* at 1341-42.

185. *Id.* at 1339. Title VII makes it unlawful for an employer to fail to "reasonably accommodate to an employee's or prospective employee's religious observance or practice." 42 U.S.C. §§ 2000e(j), 2000e-2(a) (1994).

186. *Cary*, 908 F. Supp. at 1341.

187. 803 F.2d 1488, 1500 (9th Cir. 1986).

188. *Cary*, 908 F. Supp. at 1341-42.

189. *Id.* at 1342; *cf.* Abbott, *supra* note 1, at 738 (stating that the characterization of a reasonable cause determination as "highly probative" is overstated because such a determination "is merely a preliminary finding that there is reason to believe there has been a violation of [the statute], rather than a conclusive finding of a violation"); *id.* at 744 ("[T]he fact that an EEOC determination is not a conclusive finding on

sue in *Cary* stated the Commission's finding in a conclusory fashion[190] and did not appear to have been based upon an independent investigation,[191] the court gave it little weight.[192] Thus, after an independent analysis of the case,[193] the court granted the employer's motion for summary judgment.[194]

IV. POLICY CONSIDERATIONS

The Ninth Circuit has never fully explored the ramifications of its treatment of reasonable cause determinations.[195] For example, the court has indicated that the potential prejudice to the employer resulting from its rule of per se admissibility is minimized by the employer's ability to introduce evidence disproving the EEOC's findings and to point out deficiencies in the EEOC determination.[196] Other courts, however, have concluded that employers are unable to confront EEOC determinations in the same way they can cross-examine adverse witnesses.[197] In addi-

---

whether a [statutory] violation has occurred should weigh against its probative value.").

190. *Cary*, 908 F. Supp. at 1341; *cf.* Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105 (8th Cir. 1988) (noting that EEOC determination "consisted only of two conclusory sentences"); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984) (stating that "the EEOC determination of reasonable cause . . . is supported factually by only two highly conclusory sentences").

191. *See Cary*, 908 F. Supp. at 1341. The court noted in particular that the factual recitation in the determination was "wholly based upon the . . . facts alleged by the plaintiff." *Id.*

192. *Id.* at 1342. *See generally* Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153 (7th Cir. 1985) (stating that "the trial judge has the discretion to give as much or as little weight to [EEOC determinations] as he deems appropriate").

193. *See Cary*, 908 F. Supp. at 1340-53. *See generally* Ross v. Communications Satellite Corp., 759 F.2d 355, 363 (4th Cir. 1985) (stating that "EEOC proceedings . . . are no substitute for an independent judgment on the part of the district court").

194. *Cary*, 908 F. Supp. at 1353. Among other things, the court concluded that because the plaintiff had "only state[d] his status as a Baptist minister as his reason for . . . objecting" to the drug testing policy, and had been "unwilling[] to elaborate on [his] belief to the employer," the employer had "no information to rely on to attempt to accommodate the employee." *Id.* at 1344. *See generally* Byrd v. Johnson, 31 Fair Empl. Prac. Cas. (BNA) 1651, 1668 (D.D.C. 1983) ("In order to establish a *prima facie* case of religious discrimination, a plaintiff must . . . demonstrate that he . . . communicated his [religious] belief to his . . . employer.").

195. *See* Abbott, *supra* note 1, at 744-45 (indicating that the Ninth Circuit has not weighed the competing costs and benefits of admitting reasonable cause determinations in evidence).

196. Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 n.9 (9th Cir. 1981).

197. *See, e.g.*, Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir.

tion, time spent exposing the weaknesses of an EEOC determination may unduly prolong the trial[198] and detract from the main purpose of the litigation, which is to determine whether the employer actually engaged in discriminatory conduct.[199]

Foremost among the reasons for the Ninth Circuit's reception of reasonable cause determinations[200] is its desire to make use of the professional expertise, and presumed impartiality, of EEOC investigators.[201] The court has stated that to exclude such "highly probative" evidence of discrimination "prepared by professional investigators on behalf of an impartial agency [would be] wasteful."[202]

The Ninth Circuit's view of the EEOC's impartiality is overstated.[203] The view originated in the Fifth Circuit's decision in *Smith v. Universal Services, Inc.*,[204] where the court concluded that reasonable cause determinations should be admissible because they are "not prepared in anticipation of litigation," and because the EEOC has no interest in the

---

1984); *see also* Abbott, *supra* note 1, at 744 ("[D]eficiencies in EEOC investigations may not be obvious from the face of a determination, or the investigators may not be available as witnesses. Thus, absent exclusion of the evidence, the potential for prejudice might go unchecked.").

198. *Johnson*, 734 F.2d at 1309; EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *see also* Abbott, *supra* note 1, at 744 (stating that the Ninth Circuit has "ignored the issue of whether presentation of deficiencies in an EEOC investigation might unduly lengthen the trial").

199. *See, e.g.*, Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1555 (11th Cir. 1995); EEOC v. Keco Indus., 748 F.2d 1097, 1100 (6th Cir. 1984); EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 975 (N.D. Ill. 1981); *E.I. DuPont de Nemours & Co.*, 373 F. Supp. at 1338. *See generally* Harden v. Dayton Human Rehabilitation Ctr., 520 F. Supp. 769, 773 (S.D. Ohio 1981) ("[T]he Court fails to comprehend how a conclusion reached by an administrative agency can render . . . the existence or non-existence of discrimination . . . either more or less probable. Rather, an assessment of these issues will depend upon the facts of a particular case, not upon an agency's conclusions regarding those facts."), *aff'd*, 779 F.2d 50 (6th Cir. 1985).

200. *See generally* Abbott, *supra* note 1, at 743-45 (discussing Ninth Circuit's position).

201. *See supra* notes 61 and 127 and accompanying text.

202. Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981).

203. *See, e.g.*, Abbott, *supra* note 1, at 737 ("Despite the EEOC's apparent interest in Title VII litigation, courts tend to refer to the agency as impartial."); White, *supra* note 13, at 1264 n.112 (stating that the EEOC's investigation of some charges "may not be neutral").

204. 454 F.2d 154 (5th Cir. 1972). The Ninth Circuit relied upon *Smith* in both *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066 (9th Cir. 1978) and *Plummer*, where *Smith* was described as "the first case to address this issue." *Plummer*, 656 F.2d at 504; *see also Smith*, 454 F.2d at 156 ("This is a case of first impression. Neither party has been able to cite any district or appellate case directly in point.").

litigation in which they may be offered.[205] This observation, however, was made prior to passage of the Equal Employment Opportunity Act of 1972,[206] which amended Title VII to authorize the EEOC to bring discrimination suits against employers,[207] and thus cast doubt on the validity of the analysis in *Smith*.[208] In fact, many EEOC investigators now view themselves as advocates for the charging party,[209] and their bias in that regard is occasionally evident.[210]

---

205. *Smith*, 454 F.2d at 158.

206. Pub. L. No. 92-261, 86 Stat. 103 (1972).

207. *See* White, *supra* note 13, at 1257 n.65. As originally enacted, Title VII limited the EEOC's function to investigating charges and attempting conciliation. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 358 (1977). If its conciliation efforts failed, the EEOC's involvement in the matter ended. *Id.* at 358-59. Enforcement could then be achieved only by the aggrieved party initiating private litigation against the employer. *Id.* at 359. The Equal Employment Opportunity Act of 1972 altered this scenario by authorizing the EEOC to bring suit on behalf of individuals aggrieved by unlawful practices. *Id.*; *see also* Henry v. City of Detroit Manpower Dep't, 739 F.2d 1109, 1112 (6th Cir. 1984), *vacated on other grounds*, 763 F.2d 757 (6th Cir. 1985); EEOC v. Great Atl. & Pac. Tea Co., 735 F.2d 69, 72 n.2 (3d Cir. 1984).

208. *See* White, *supra* note 13, at 1257 n.65 (stating the *Smith* court's observation that the EEOC can have no interest in litigation in which its reasonable cause determinations may be offered is "not always true today"); *id.* at 1264 n.112 (noting that some Commission investigations "are conducted in anticipation of litigation").

209. *See, e.g.*, EEOC v. Michael Constr. Co., 706 F.2d 244, 251 (8th Cir. 1983) (noting that the "EEOC specialist investigating [the] charge pursued the investigation at least 'partially' with the intent of achieving a monetary settlement even though . . . she saw no merit to [the] charge"); EEOC v. Jacksonville Shipyards, 696 F. Supp. 1438, 1440 (M.D. Fla. 1988) (describing the EEOC as the "representative of the charging parties"). *See generally* General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (stating that "the EEOC acts . . . at the behest of and for the benefit of specific individuals" as well as for the public); Marshall v. Sun Oil Co., 605 F.2d 1331, 1335 (5th Cir. 1979) (stating that the Secretary of Labor—the EEOC's predecessor in enforcing the ADEA—was "more than a mere proxy for each victim of . . . discrimination"); Abbott, *supra* note 1, at 736 ("Arguably, . . . [a reasonable cause] determination will reflect the agency's interest in pursuing the employer's compliance with Title VII.").

210. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241, 251 (N.D. Ill. 1980) (stating EEOC investigator's bias against employer was "palpable"), *aff'd*, 839 F.2d 302 (7th Cir. 1988); EEOC v. Raymond Metal Prods., 17 Fair Empl. Prac. Cas. (BNA) 206, 207 (D. Md. 1978) (noting EEOC questionnaire was "so suggestive as to the response sought" that the information obtained was of questionable reliability); *cf.* Bell v. St. Regis Paper Co., 425 F. Supp. 1126, 1134 (N.D. Ohio 1976) (declining to ascribe deficiencies in an EEOC investigation to an "intentional" effort by the EEOC investigator to weigh her determination in the plaintiff's favor). According to Abbott:

> Bias may . . . stem from partisan political or policy goals that an investigating agency seeks to implement. The EEOC has been entrusted with no less a task than guiding the fundamental change of "the patterns of employment

The Ninth Circuit's view of the probative value of reasonable cause determinations[211] is also exaggerated.[212] The EEOC's investigation of a charge of employment discrimination is neither binding nor adjudicative in nature.[213] Its purpose is merely to determine whether there is any basis for the charge.[214] Thus, the Commission is not required or even expected to conduct a full-scale adversarial investigation under the pertinent employment discrimination laws.[215] The nature and extent of the investigation are instead committed to the EEOC's discretion.[216] As a result, EEOC investigations vary greatly in scope and quality.[217]

In *Barfield v. Orange County*,[218] for example, the EEOC considered only the information the parties themselves chose to submit prior to issuing its determination.[219] Because employers are not generally re-

---

> discrimination that [have] become ossified in the labor market." EEOC investigators, charged with the responsibility of ferreting out employment discrimination in all its various forms, may be biased or pressured into finding violations.

Abbott, *supra* note 1, at 736 (footnotes omitted) (quoting J. LeVonne Chambers & Barry Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 242 (1985)).

211. *See supra* notes 23, 60-61, 85 and accompanying text (discussing probative value of EEOC determinations).

212. *See* Smith v. Universal Servs., Inc., 454 F.2d 154, 160 (5th Cir. 1972) (Dyer, J., dissenting) (referring to the "very questionable probative value . . . [of] EEOC reports"); Abbott, *supra* note 1, at 738 (stating that the characterization of a reasonable cause determination as "highly probative" is overstated because such a determination "is merely a preliminary finding that there is reason to believe there has been a violation of Title VII, rather than a conclusive finding of a violation").

213. Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 152 (7th Cir. 1985); *cf.* White, *supra* note 13, at 1250 ("The EEOC investigative process is not adversarial.").

214. EEOC v. Keco Indus., 748 F.2d 1097, 1100 (6th Cir. 1984). Consistent with that analysis, the reasonable cause determination that may result from an EEOC investigation is intended to notify the employer of the EEOC's view of the charge, and to provide a basis for later conciliation proceedings. *Id.* The determination "is not an adjudication of rights and liabilities." *Jacksonville Shipyards*, 696 F. Supp. at 1441.

215. EEOC v. American Mach. & Foundry, Inc., 13 Fair Empl. Prac. Cas. (BNA) 1634, 1640 (M.D. Pa. 1976). Indeed, the court in *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976), held that incomplete EEOC investigations are not particularly objectionable precisely because they are merely "directed toward a determination of whether or not there exists reasonable cause to believe that the charging party has suffered discrimination." *Id.* at 1134.

216. *Keco Indus.*, 748 F.2d at 1100; EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 975 (N.D. Ill. 1981) (stating that the EEOC's determination of reasonable cause is discretionary).

217. Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984); *see also* Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1555 (11th Cir. 1995) (referring to "the vagaries of [EEOC] determinations").

218. 911 F.2d 644 (11th Cir. 1990).

219. *Id.* at 651; *cf.* EEOC v. Michael Constr. Co., 706 F.2d 244, 252 (8th Cir. 1983)

quired to respond to EEOC charges,[220] such an investigation could often result in a determination based entirely on the plaintiff's contentions, without considering the employer's position.[221] A determination issued under those circumstances would be a particularly unreliable indication that discrimination has occurred,[222] and probably should be excluded from evidence under both Rule 403 and Rule 803(8)(C) of the Federal Rules of Evidence.[223] The fact that at least some EEOC determinations are unlikely to satisfy the standards for admission under these evidentiary rules (or even the theoretical possibility that such determinations

---

(finding that the employer responded to EEOC investigation by providing "only [the] information it chose"). This investigatory approach has been criticized. *See* Abbott, *supra* note 1, at 727 n.162.

220. *See* 29 C.F.R. § 1601.15(a) (1995) (stating that "the Commission will accept any statement of position [the employer] wishes to submit"). However, the Commission can require the employer to participate in a fact-finding conference, and can issue subpoenas requiring the attendance of witnesses and the production of documents. 42 U.S.C. § 2000e-9; 29 C.F.R. §§ 1601.15(c), 1601.16-.17; EEOC v. Shell Oil Co., 466 U.S. 54, 63 (1984); *Michael Constr. Co.*, 706 F.2d at 248.

221. *See, e.g.*, Cary v. Carmichael, 908 F. Supp. 1334, 1341 (E.D. Va. 1995) (stating that the reasonable cause determination was "wholly based upon the . . . facts alleged by plaintiff"); Harris v. Birmingham Bd. of Educ., 537 F. Supp. 716, 721 (N.D. Ala. 1982) (discussing EEOC issuance of reasonable cause determinations without considering evidence favorable to the employer), *aff'd in part and rev'd in part*, 712 F.2d 1377 (11th Cir. 1983); *cf.* Cortes v. Maxus Exploration Co., 758 F. Supp. 1182, 1183-84 (S.D. Tex. 1991) (finding that the probable cause determination was properly excluded because the EEOC issued a "no probable cause" determination "without interviewing [the] complainant"), *aff'd*, 977 F.2d 195 (5th Cir. 1992); Hicks v. ABT Assocs., Inc., 572 F.2d 960, 966 (3d Cir. 1978) ("Plaintiff . . . was never contacted by the EEOC investigator and indeed did not know that the investigation was proceeding until the final determination of no reasonable cause had been mailed to him.").

222. *See Michael Constr. Co.*, 706 F.2d at 252 (stating that employer's decision to provide "only what information it chose and to respond to specific factual allegations in the narrowest possible manner . . . would seriously hamper the EEOC in making an independent determination on [probable] cause"); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977) (referring to the "minimal probative value . . . [of] an ex parte EEOC evaluation of the ultimate factual issue in the case").

223. *Angelo*, 555 F.2d at 1176 (stating that, under Rule 403 of the Federal Rules of Evidence, the trial court could have concluded that the danger of unfair prejudice outweighed the probative value of the EEOC evaluation); *see also* Abbott, *supra* note 1, at 739-40 ("Determinations rendered after only an *ex parte* investigation by the EEOC have been excluded from jury consideration, for fear a jury may be unfairly influenced by a determination based on a one-sided assessment of the facts.").

could exist)[224] demonstrates the impropriety of the Ninth Circuit's categorical rule of per se admissibility.[225]

And even if such determinations are admissible, they should not, standing alone, be sufficient to permit plaintiffs to avoid summary judgment, even in the Ninth Circuit.[226] When reviewing summary judgment rulings in employment discrimination cases, the Ninth Circuit (like other circuits)[227] applies the United States Supreme Court's analysis in *Anderson v. Liberty Lobby, Inc.*[228] Under *Liberty Lobby*, "'there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'"[229] This standard suggests that a reasonable cause determination, standing alone, should be insufficient to preclude summary judgment in favor of the employer in many, if not most, employment discrimination cases.[230]

---

224. *See* Barfield v. Orange County, 911 F.2d 644, 650 (11th Cir. 1990) (rejecting the Ninth Circuit's apparent conclusion that "there can exist no EEOC determinations in which the . . . circumstances indicate lack of trustworthiness sufficient to justify exclusion from evidence") (internal quotation marks omitted).

225. *See* Abbott, *supra* note 1, at 709-12 (detailing three reasons why the per se admissibility approach adopted by the Fifth and Ninth Circuits should be rejected); *see also* White, *supra* note 13, at 1259 ("Mandatory admission of EEOC files in all cases is inconsistent with Federal Rule of Evidence 803(8)(C), which provides that public records are not admissible evidence when 'the sources of information or other circumstances indicate lack of trustworthiness.'") (quoting Fed. R. Evid. 803(8)(C)). Indeed, the frequency with which courts exercising discretion elect to exclude EEOC reasonable cause determinations on the grounds of unfair prejudice or untrustworthiness is itself a strong argument against the Ninth Circuit's position. *See* Abbott, *supra* note 1, at 755-56 (concluding that a balancing test under Rule 403 should replace the per se admissibility rule).

226. In *Williams v. City and County of San Francisco*, No. C-88-1829-JPV, 1993 WL 165307 (N.D. Cal. May 7, 1993), a district court in the Ninth Circuit granted the employer's motion for summary judgment on a discriminatory failure to hire claim under Title VII, despite the existence of an EEOC reasonable cause determination. *Id.* at *4. The court indicated that the EEOC's failure to inquire into the qualifications of the individual selected for the promotion "significantly weaken[ed] the probative force of the EEOC finding." *Id.*

227. *See, e.g.*, Marx v. Schnuck Markets, Inc., 76 F.3d 324, 328 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); Beard v. Whitley County REMC, 840 F.2d 405, 409-10 (7th Cir. 1988).

228. 477 U.S. 242 (1986); *see* Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1987).

229. *Robinson*, 847 F.2d at 1316 (quoting *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted)).

230. *See* Kesselring v. United Techs. Corp., 753 F. Supp. 1359, 1369 (S.D. Ohio 1991) (applying *Liberty Lobby* to grant employer's motion for summary judgment on the ground that state agency's probable cause determination was "merely colorable" and "not significantly probative").

For example, a reasonable cause determination issued without considering the employer's explanation for its conduct[231] would merely assist in establishing the plaintiff's prima facie case.[232] Establishing a prima facie case, however, is not necessarily sufficient to permit the plaintiff to avoid summary judgment.[233] In many cases, evidence of a legitimate, nondiscriminatory basis for the employer's actions is sufficient to rebut the inference of discrimination raised by the prima facie case.[234] In that event, the plaintiff can offer additional evidence to show that the employer's explanation for its conduct was pretextual, but cannot avoid summary judgment merely by "rest[ing] on the laurels of her prima facie case."[235]

---

231. *See supra* notes 218-21 and accompanying text.

232. The EEOC's own explanation of its reasonable cause standard confirms this. Under the three-step burden shifting procedure established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the plaintiff has the burden of establishing a prima facie case of discrimination and, if the employer articulates a legitimate, nondiscriminatory reason for its actions, of demonstrating that the employer's articulated reason is pretextual. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53. However, in evaluating a charge of discrimination to determine whether reasonable cause exists, the Commission inquires into whether there is evidence of pretext only if the employer has offered a defense to the charge. EEOC Compl. Man. (CCH) § 40.2 at ¶ 1062 (1988). If the employer offers no explanation for its conduct, the Commission's investigation is limited to ascertaining whether the "evidence . . . establishes, under the appropriate legal theory, a *prima facie* case." *Id.*; *see also* SCHLEI & GROSSMAN, *supra* note 13, at 374 (stating that "whether . . . there has been discrimination . . . [is] to be assessed by determining first whether a prima facie case exists, and then by analyzing any evidence of pretext if the respondent has put forward a 'viable defense'"). Establishing a prima facie case is, in fact, the reason for which most EEOC reasonable cause determinations are offered in evidence. *See, e.g.*, Sumner v. San Diego Urban League, Inc., 681 F.2d 1140, 1143 (9th Cir. 1982); *see also* Abbott, *supra* note 1, at 724 (observing that "[e]mployees use a determination of reasonable cause to support the prima facie case of discrimination"); *id.* at 730 (stating that "the purpose in introducing a determination is to lend evidentiary support to . . . the employee's prima facie case").

233. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987); Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 495-97 (8th Cir. 1990) (Stuart, J., concurring). *See generally* Blue v. United States Dep't of the Army, 914 F.2d 525, 535 (4th Cir. 1990) ("The cases in which summary judgment has been granted a Title VII defendant, even after [the] plaintiff was able to establish a prima facie case of discrimination, are numerous.").

234. *Grigsby*, 821 F.2d at 596.

235. *Id.*

This analysis applies in the Ninth Circuit,[236] as well as in other jurisdictions.[237] Thus, even under the Ninth Circuit's rule of per se admissibility, a discrimination claim unsupported by other admissible evidence should not be saved from summary judgment by the mere existence of a reasonable cause determination,[238] particularly where the determination was issued without considering the employer's position.[239]

V. CONCLUSION

The Ninth Circuit holds that EEOC reasonable cause determinations are so probative of discrimination that they are always admissible in employment discrimination litigation.[240] The better view, however, gives trial courts discretion to exclude such determinations when the circumstances surrounding their preparation suggest untrustworthiness, or when their potential for prejudicing a jury outweighs their probative value.[241] The latter approach permits courts to deal with the vagaries of EEOC investigations,[242] and therefore is more consistent with the statu-

---

236. *See, e.g.*, Steckl v. Motorola, Inc., 703 F.2d 392, 393-94 (9th Cir. 1983).

237. *See Haglof*, 910 F.2d at 495-96 (Stuart, J., concurring) (noting that "[t]he First and Eleventh Circuits have held in ADEA cases that establishment of a prima facie case does not in itself entitle a plaintiff to survive a motion for summary judgment," and that "[t]he Eighth Circuit has affirmed a summary judgment for a defendant where the plaintiff in an employment discrimination case established a prima facie case").

238. *See, e.g.*, Bailey v. South Carolina Dep't of Soc. Servs., 851 F. Supp. 219, 221 (D.S.C. 1993); *cf.* Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1002 n.67 (E.D. Mich. 1978) (giving EEOC determination "no weight" because it was "contrary to the [other] evidence in the record"), *rev'd on other grounds*, 608 F.2d 671 (6th Cir. 1979). *See generally* Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150, 153 (7th Cir. 1985) ("Even in [a] circuit[] in which EEOC determinations are *per se* admissible, the trial judge has the discretion to give as much or as little weight to them as he deems appropriate.").

239. *Cf.* Kesselring v. United Techs. Corp., 753 F. Supp. 1359, 1369 (S.D. Ohio 1991) (granting employer's motion for summary judgment where state agency's probable cause determination was issued "without the benefit of the documentation and testimony presented by [the employer]"); Williams v. City and County of San Francisco, No. C-88-1829-JPV 1993 WL 165307, at *4 (N.D. Cal. May 7, 1993) (granting employer's motion for summary judgment where EEOC failed to inquire into qualifications of individual selected for promotion).

240. *See supra* notes 43-86 and accompanying text.

241. *See supra* notes 87-110 and accompanying text.

242. *See supra* notes 211-25 and accompanying text.

tory employment discrimination scheme[243] and applicable evidentiary rules.[244]

The Ninth Circuit's view that the existence of a reasonable cause determination precludes summary judgment in favor of the employer should also be reconsidered.[245] If a reasonable cause determination can be excluded from evidence, its mere existence should not preclude summary judgment.[246] And even where a reasonable cause determination is found to be admissible, it should not preclude summary judgment if it is contrary to the other evidence presented to the trial court.[247]

243. Among other things, the legislative history of Title VII suggests that courts should not inquire into the propriety of reasonable cause determinations because "the issue of reasonable cause does not present a separate litigable issue." 110 CONG. REC. 15,895 (1964) (statement of Rep. Celler).

244. *See* Abbott, *supra* note 1, at 732-41, 751-53.

245. *See supra* notes 226-39 and accompanying text.

246. *See* Kesselring v. United Techs. Corp., 753 F. Supp. 1359, 1369 (S.D. Ohio 1991); Stewart v. Personnel Pool of Am., Inc., No. Civ.A. 92-2581, 1993 WL 525575, at *6 (D.N.J. Dec. 16, 1993), *aff'd*, 30 F.3d 1488 (3d Cir. 1994).

247. Bailey v. South Carolina Dep't of Soc. Servs., 851 F. Supp. 219, 221 (D.S.C. 1993); *Kesselring*, 753 F. Supp. at 1369; *cf.* Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1002 n.67 (E.D. Mich. 1978) (reasoning that EEOC determination, when contrary to other evidence at trial, was entitled to no weight), *rev'd on other grounds*, 608 F.2d 671 (6th Cir. 1979).