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Avoiding the Trap of Res Judicata: A Practitioner's Guide to Litigating Multiple Employment Discrimination Claims in the Third Circuit

Victoria L. Hooper

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AVOIDING THE TRAP OF *RES JUDICATA*: A PRACTITIONER'S
GUIDE TO LITIGATING MULTIPLE EMPLOYMENT
DISCRIMINATION CLAIMS IN THE THIRD CIRCUIT

I. INTRODUCTION

Res Judicata is a central principle of the United States judicial system.¹ It ensures the economical use of the courts and protects parties from having to defend the same action on multiple occasions.² Allowing plaintiffs to recover for wrongs is also a central feature of our judicial system.³ The judicial system supplies a forum for citizens to resolve disputes in a civil and consistent manner, rather than allowing haphazard solutions between citizens.⁴

1. See *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Application of [res judicata] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.").

2. See Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decision-making and Federal Civil Rights Claims*, 65 IND. L.J. 367, 370 (1990) ("The doctrines of *res judicata* . . . [and] claim . . . preclusion . . . serve important interests in assuring repose to disputes, finality and predictability of decisions, and in reducing costs associated with multiple adjudications of the same matter."); see also *Churchill v. Star Enters.*, 3 F. Supp. 2d 625, 630 (E.D. Pa. 1998) (noting that bringing all claims together promotes judicial economy and allowing separate claims is burdensome to defendants), *aff'd*, 183 F.3d 184 (3d Cir. 1999).

In many decisions, the terms "claim preclusion" and "res judicata" have been used interchangeably. See *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) ("Claim preclusion (res judicata) . . . is an affirmative defense."); *Heyliger v. State Univ. & Community College Sys. of Tenn.*, 126 F.3d 849, 854 (6th Cir. 1997) (using "res judicata" in section defining claim preclusion); *Board of Trustees of Trucking Employees v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992) (noting that claim preclusion was formerly referred to as res judicata); *Bieg v. Hovnanian Enters., Inc.*, No. CIV.A.98-5528, 1999 WL 1018578, at *2 (E.D. Pa. Nov. 9, 1999) (using res judicata as synonym for claim preclusion). Additionally, *Black's Law Dictionary* defines res judicata as the "[r]ule that a final judgment rendered on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). The definition given for claim preclusion is merely a cross-reference to "Res (*res judicata*)."^{Id.} at 248. The two terms, however, have been distinguished by noting that claim preclusion is a subset of res judicata. See *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 & n.4 (3d Cir. 1984) (noting that claim preclusion is one aspect of res judicata and that res judicata encompasses both claim and issue preclusion). For purposes of this Casebrief, claim preclusion and res judicata will be used interchangeably.

3. See, e.g., Eric James Moss, Note, *The Breadth of Complete Preemption: Limiting the Doctrine to its Roots*, 76 VA. L. REV. 1601, 1605 (1990) (noting that federal judicial system provides forum for consistent enforcement of federal laws).

4. See generally Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 542 (1969) (noting that courts function to institutionalize decision making); Yvonne T.

The issue of res judicata, or claim preclusion, is especially relevant in the area of employment discrimination because plaintiffs can often use more than one statutory claim to seek redress for wrongs.⁵ Although there are multiple bases for employment discrimination claims, not all statutes provide uniform procedures for filing claims.⁶ As a consequence of the varying procedures, the plaintiff runs an added risk of being unable to recover under multiple statutes.⁷ The plaintiff is in the odd position of having more than one claim with different statutes of limitations, while facing the potential ramifications of claim preclusion.⁸ The United States Court of Appeals for the Third Circuit in *Harding v. Duquesne Light Co.*⁹

Kuczynski, Note, *Administrative Res Judicata and the Age Discrimination in Employment Act*, 89 COLUM. L. REV. 1111, 1129 (1989) (discussing use of res judicata to conserve judicial resources).

5. See *Davis v. United States Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982) ("A single cause of action may comprise claims under a number of different statutory and common law grounds."); see also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 455 (1975) (discussing both Title VII and 42 U.S.C. § 1981 as bases for employee discrimination suit); *Churchill v. Star Enters.*, 183 F.3d 184, 184 (3d Cir. 1999) (bringing employment discrimination charges under Family and Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA") and Pennsylvania Human Relations Act ("PHRA")); *Molthan v. Temple Univ.*, 778 F.2d 955, 957-58 (3d Cir. 1985) (stating basis of claim under both Title VII and 42 U.S.C. § 1983); *Shannon v. City of Philadelphia*, No. CIV.A.98-5277, 1999 WL 126097, at *1 (E.D. Pa. Mar. 5, 1999) (analyzing FMLA, PHRA and ADA in employee discrimination suit); *Sicoli v. Nabisco Biscuit Co.*, No. CIV.A.96-6053, 1998 WL 614840, at *1 (E.D. Pa. Sept. 10, 1998) (alleging violations of FMLA, ADA and PHRA); *Lantz v. Hospital of the Univ. of Pa.*, No. CIV.A.96-2671, 1996 WL 442795, at *1-2 (E.D. Pa. July 30, 1996) (basing suit on ADA, PHRA and Age Discrimination in Employment Act ("ADEA")); *Harding v. Duquesne Light Co.*, No. CIV.A.95-589, 1995 WL 916926, at *1 (W.D. Pa. Aug. 4, 1995) (basing suit on Federal Rehabilitation Act of 1973, ADA and PHRA).

6. Compare Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) (requiring filing with Equal Employment Opportunity Commission ("EEOC") before bringing action based on ADA), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1994) (requiring filing with EEOC), with Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (1994) (allowing plaintiff to proceed to court without filing with EEOC), and 42 U.S.C. § 1981 (1994) (same). See also 118 CONG. REC. 7166, 7167 (1972) (discussing procedure for filing with EEOC for claim based on Title VII); Silver, *supra* note 2, at 383-84 ("Unlike section 1983, Title VII creates a scheme which requires a complaining party to give a state or federal agency an opportunity to resolve his complaint before he may file suit in federal court.").

7. See *Johnson*, 421 U.S. at 465-66 (finding that filing with EEOC for claim under Title VII does not toll statute of limitations for § 1981 claim, and that plaintiff must take necessary steps to preserve each claim separately); *Shannon*, 1999 WL 126097, at *4 n.4 (noting that filing discrimination charge with EEOC does not toll FMLA statute of limitations).

8. For a discussion of cases where plaintiffs have multiple lawsuits on the same cause of action, see *infra* notes 67-88 and accompanying text.

9. No. CIV.A.95-589, 1995 WL 916926 (W.D. Pa. Aug. 4, 1995).

and *Churchill v. Star Enterprises*,¹⁰ became one of the first circuits to provide guidance on this unique problem in employment discrimination.¹¹

Although some employment statutes require an Equal Employment Opportunity Commission ("EEOC") filing ("EEOC claims"), other statutes do not require such a filing ("non-EEOC claims").¹² Thus, while plaintiffs are waiting to exhaust the administrative remedies on their EEOC claims, the statute of limitations may run on their non-EEOC claims.¹³ Additionally, if the plaintiff brings the claims separately, he or she runs the risk of losing his or her right to sue under the doctrine of claim preclusion.¹⁴

In an attempt to clearly delineate this problem, Part II of this Casebrief will provide a general discussion of the doctrine of claim preclusion, the requisite administrative filing for the EEOC claims and employment discrimination jurisprudence in the Third Circuit.¹⁵ Part III will analyze recent cases and discuss the necessary steps that attorneys should take to litigate effectively in this area.¹⁶ Part IV will outline the other areas in employment discrimination jurisprudence where this issue may arise and highlight potential future complications for litigants.¹⁷

II. BACKGROUND

A. *The Problem of Balancing Statutes of Limitations for Plaintiffs with Multiple Claims*

When plaintiffs have multiple bases for recovery, they have an obligation to preserve all claims independently.¹⁸ A plaintiff may encounter claim preclusion when it is necessary to follow different procedures for each statutory claim.¹⁹ For example, in *Nernberg v. United States*,²⁰ the

10. 183 F.3d 184 (3d Cir. 1999).

11. See *Pavon v. Swift Trans. Co.*, 192 F.3d 902, 907 n.1 (9th Cir. 1999) (recognizing Third Circuit as one circuit that has answered question of claim preclusion in employment discrimination claim).

12. For examples of statutes with different administrative procedures, see *supra* note 6 and accompanying text.

13. For a discussion of potential problems with the statute of limitations, see *infra* note 61 and accompanying text.

14. See Allan D. Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 Nw. U. L. REV. 357, 358 (1967) (noting that claim preclusion applies when plaintiff attempts to bring second suit on same claim).

15. For a discussion on the principles of res judicata and administrative filing in the context of employment jurisprudence in the Third Circuit, see *infra* notes 18-93 and accompanying text.

16. For a discussion on the recent developments in the Third Circuit, see *infra* notes 94-151 and accompanying text.

17. For a discussion on the probable future applications and problems in employment jurisprudence, see *infra* notes 152-63 and accompanying text.

18. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (noting plaintiff's obligation to preserve all claims individually).

19. For examples of plaintiffs that have suffered from this dilemma, see *infra* notes 62-93 and accompanying text.

20. 463 F. Supp. 752 (W.D. Pa. 1979).

United States District Court for the Western District of Pennsylvania barred the plaintiffs from bringing a second lawsuit on the same cause of action, despite the fact that the plaintiffs could not have brought the actions together.²¹ The plaintiffs were in a difficult situation because if they had waited to bring both claims together after they exhausted their administrative remedies on one claim (a prerequisite to bringing the claim), the other claim would have been barred under the statute of limitations.²² Thus, a plaintiff, trying to recover under both administrative and non-administrative claims, is in a precarious position.²³

The United States Court of Appeals for the Third Circuit has offered some suggestions to aid plaintiffs, which include: 1) informing the court of any problem with awaiting administrative claims; or 2) asking for leave to amend rather than bringing a second claim.²⁴ This issue has become significant in the area of employment law.²⁵ For example, in *Churchill*, the Third Circuit resolved a similar issue as a matter of first impression regarding separate claims brought under the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA").²⁶

21. *See id.* at 754 (holding that claim was dismissed based on res judicata). The plaintiffs, Maurice and Nancy Nernberg, brought a suit against the United States based on the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *See id.* at 752. On July 1, 1977, the plaintiffs brought a claim against the United States for the same injury based on the Tucker Act, 28 U.S.C. § 1346(a)(2). *See id.* Six days later, the plaintiffs filed an administrative claim to secure their suit under the Federal Tort Claims Act. *See id.* at 753. The first claim was dismissed before the plaintiffs were able to exhaust their administrative remedies enabling them to bring the claim under the Federal Tort Claims Act. *See id.* (noting plaintiffs' reason for not bringing claims together).

22. *See id.* at 754 (noting that plaintiffs' failure to exhaust administrative remedies cannot justify burdening judicial system with multiple complaints).

23. *See id.* ("[W]e find that in the circumstances of this case the failure of the Plaintiffs to exhaust their administrative remedies on their claims . . . does not prevent the application of the doctrine of res judicata to dismiss their present action.").

24. *See id.* (noting options plaintiffs could have taken to preserve both claims). The Third Circuit found that the plaintiffs could have reasonably anticipated having another claim based on the same wrong. *See id.* ("When they filed their first suit, the Plaintiffs clearly could have anticipated that they would also seek relief under another federal statute . . ."). Thus, they should have notified the court of the progress on the administrative claims while litigating the first claim. *See id.* Additionally, the plaintiffs could have requested a leave to amend under Federal Rule of Civil Procedure 15(a) which states, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires." FED. R. CIV. P. 15(a); *see also Nernberg*, 463 F. Supp. at 754 (discussing use of F.R.C.P. 15(a)).

25. *See, e.g., Churchill v. Star Enters.*, 183 F.3d 184, 189-94 (3d Cir. 1999) (discussing problem of claim preclusion in employment discrimination).

26. *See id.* at 184 (noting that action is matter of first impression in Third Circuit).

B. *Res Judicata and Claim Preclusion*

There is a strong public policy favoring avoidance of "piecemeal" litigation in order to conserve judicial resources.²⁷ This is accomplished through the principle of *res judicata*, which prevents parties from relitigating claims that should or could have been raised in a previous action.²⁸ *Res judicata*, or claim preclusion, applies when the following factors are satisfied: 1) there is a final judgment in a prior suit; 2) the same parties or privities of those parties are involved; and 3) the subsequent suit is based on the same cause of action.²⁹

1. *Final Judgment*

The first element of the claim preclusion test is an inquiry into whether there was a final judgment on the merits of the previous case.³⁰ In many circumstances, this element is easily identified and met.³¹ In *Churchill*, the final judgment element was satisfied because a judgment had

27. See *id.* at 194 (discussing purpose of claim preclusion); *Bieg v. Hovnanian Enters.*, No. CIV.A.98-5528, 1999 WL 1018578, at *2 (E.D. Pa. Nov. 9, 1999) (noting that *res judicata* prevents piecemeal litigation); *Marshall v. Park Plaza Condominium Ass'n*, No. CIV.A.98-2912, 1999 WL 689735, at *2 (E.D. Pa. Sept. 3, 1999) (same); see also *Kuczynski*, *supra* note 4, at 1129 (discussing goals of *res judicata*).

28. See *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) (defining *res judicata*); *Churchill*, 183 F.3d at 194 (discussing purpose of *res judicata*); *Board of Trustees of Trucking Employees v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992) (defining *res judicata*); *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 964 (3d Cir. 1991) (noting purpose of *res judicata*, or claim preclusion); *McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 275 (3d Cir. 1989) (discussing claim preclusion [*res judicata*] as foreclosing litigation that could have been advanced earlier); *Bieg*, 1999 WL 1018578, at *3 (citing *Churchill*, 183 F.3d at 195); *Sicoli v. Nabisco Biscuit Co.*, No. CIV.A.96-6053, 1998 WL 614840, at *2 (E.D. Pa. Sept. 10, 1998) (defining *res judicata*); *Nernberg*, 463 F. Supp. at 753 (noting that *res judicata* supports interest of bringing all suits together).

Res judicata is an affirmative defense under the Federal Rules of Civil Procedure 8(c): "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, . . . *res judicata* . . . and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c). As an affirmative defense, the defendant has the burden of proof to demonstrate that *res judicata* applies in the case. See *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984) (noting that, for affirmative defense, defendant bears burden in *res judicata* acts); *Davis v. United States Steel Supply*, 688 F.2d 166, 170 (3d Cir. 1982) (same). Additionally, if a defendant fails to plead *res judicata* affirmatively, he or she may lose that defense. See *EEOC v. United States Steel Corp.*, 921 F.2d 489, 491 n.2 (3d Cir. 1990) (noting consequences of failing to comply with FED. R. CIV. P. Rule 8(c)).

29. See *Churchill*, 183 F.3d at 194 (stating that claim preclusion is dispositive when factors are met); *Centra*, 983 F.2d at 504 (listing test for claim preclusion); *Athlone*, 746 F.2d at 983 (same); *Sicoli*, 1998 WL 614840, at *2 (same); *Harding v. Duquesne Light Co.*, No. CIV.A.95-589, 1995 WL 916926, at *2 (W.D. Pa. 1995) (same).

30. See *Athlone*, 746 F.2d at 983 (listing elements of claim preclusion).

31. See *Churchill*, 183 F.3d at 195 (noting that final judgment element was clearly demonstrated); *Centra*, 983 F.2d at 504 (stating that first factor is easily met); *Harding*, 1995 WL 916926, at *2 (stating that defendant easily proved first factor).

been rendered in favor of the plaintiffs in the previous action.³² In *Harding*, summary judgment in favor of the defendants satisfied the final judgment element.³³ Additionally, a judgment entered by consent also qualifies as a final judgment.³⁴

2. *Same Parties*

The second element for claim preclusion is that the same parties must be involved in both actions.³⁵ To satisfy this element, the parties have to be the identical parties or be in privity with the identical parties from the previous action.³⁶ For example, in *Board of Trustees of Trucking Employees v. Centra*,³⁷ the United States Court of Appeals for the Third Circuit found that even though one party changed, this new party had acquired one of the previous parties, resulting in a privity relationship that satisfied the second element of claim preclusion.³⁸ Thus, similar to the first element, the second element is easily met.³⁹

3. *Same Cause of Action*

Unlike the first two elements, the third requirement for claim preclusion—that the suits be based on the same cause of action—is a difficult question.⁴⁰ In *United States v. Athlone*,⁴¹ the United States Court of Appeals for the Third Circuit noted that there is not a precise definition or a simple test to apply in determining whether the causes of action are the

32. See *Churchill*, 183 F.3d at 195 (“There had been a final judgment on the merits in *Churchill I.*”).

33. See *Harding*, 1995 WL 916926, at *2 (finding that summary judgment is final judgment).

34. See *Centra*, 983 F.2d at 504 (finding that judgment by consent satisfied first prong of claim preclusion).

35. For a discussion on the elements of claim preclusion, see *supra* note 29 and accompanying text.

36. See *Harding*, 1995 WL 916926, at *2 (noting that parties were exact parties from previous action).

37. 983 F.2d 495 (3d Cir. 1992).

38. See *id.* at 504 (noting that “the Fund was a party to the prior suit, and Centra, which acquired Mason-Dixon, is in privity with Mason-Dixon, the other party in the suit”).

39. See *Churchill v. Star Enters.*, 183 F.3d 184, 195 (3d Cir. 1999) (noting that defendant clearly demonstrated second element); *Bieg v. Hovnanian Enters.*, No. CIV.A.98-5528, 1999 WL 1018578, at *3 (E.D. Pa. Nov. 9, 1999) (finding that parties were clearly identical to previous action); *Harding*, 1995 WL 916926, at *2 (stating that the first and second elements are easily met).

40. See *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984) (noting that court has struggled with identifying causes of action); *Davis v. United States Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982) (stating that identifying same causes of action is more difficult element of res judicata); *Harding*, 1995 WL 916926, at *2 (“The third portion of the res judicata test is a more difficult determination.”).

41. 746 F.2d 977 (3d Cir. 1984).

same.⁴² The *Athlone* court compiled four factors to be considered in determining whether the two causes of action are identical.⁴³ The four factors are: 1) same acts and relief; 2) same theory of recovery; 3) same witnesses and documents; and 4) same material facts.⁴⁴ Generally, the analysis of determining the same cause of action focuses on whether the underlying events of the claims were essentially the same.⁴⁵

C. Procedure for Bringing a Claim Under the Equal Employment
Opportunity Commission

Title VII of the Civil Rights Act of 1964⁴⁶ ("Title VII") and the ADA⁴⁷ both require the plaintiff to pursue administrative remedies before filing suit.⁴⁸ Before a plaintiff can file suit, he or she must first file a complaint

42. See *Athlone*, 746 F.2d at 983 ("'[C]ause of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes.") (quoting *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 F.2d 583, 588 n.10 (3d Cir. 1975)); *Sicoli v. Nabisco Biscuit Co.*, No. CIV.A.96-6053, 1998 WL 614840, *2 (E.D. Pa. Sept. 10, 1998) (quoting *Protocomm Corp. v. Novell, Inc.*, No. CIV.A.94-7774, 1998 WL 351605, at *4 (E.D. Pa. Jun. 30, 1998)).

43. See *Athlone*, 746 F.2d at 984 (considering four factors to determine claim preclusion). Although the *Athlone* court noted that the factors were to be used in the instant case, the factors have been used in subsequent cases to determine same causes of action. See *Harding*, 1995 WL 916926, at *2-3 (using test articulated in *Athlone* to determine if two causes of action are identical).

44. See *Athlone*, 746 F.2d at 984 (listing four factors); *Harding*, 1995 WL 916926, at *2-3 (same). The factors were collected by previous decisions and added for purposes of the *Athlone* court. The first factor, accounting for same complaint and demand, was derived from *Gissen v. Tackman*. See *Gissen v. Tackman*, 401 F. Supp. 310, 312 (D.N.J. 1975) (analyzing if wrong in both actions was same), *vacated on other grounds* by 537 F.2d 784 (3d Cir. 1976). Similarly, the third factor regarding witnesses and documents was taken from *O'Shea v. Chrysler Corp.* See *O'Shea v. Chrysler Corp.*, 206 F. Supp. 601, 605-06 (D.N.J. 1962) (finding same cause of action if evidence supporting first cause of action would also support second cause of action). The second and fourth factors were derived by the *Athlone* court. See *Athlone*, 746 F.2d at 984 (discussing factors).

45. See *Churchill v. Star Enters.*, 183 F.3d 184, 194 (3d Cir. 1999) ("A determination of whether two lawsuits are based on the same cause of action 'turn[s] on the essential similarity of the underlying events giving rise to the various legal claims.'" (quoting *Athlone*, 746 F.2d at 983)). This analysis takes a broad view of the action, focusing on the facts of the cases, because there is not a precise test to determine if the actions are the same cause of action. See *id.* (noting purpose of looking at similarity of facts to determine same cause of action); see also Mathiason et al., *Interrelationship of Administrative, Local, State, and Federal Claims and Procedures, Issue Preclusion and Statute of Limitations Problems*, C780 A.L.I.-A.B.A. 981, 1008 (1993) (noting that res judicata did not preclude claim based on different facts from Title VII claim).

46. 42 U.S.C. §§ 2000e-2000e-17 (1994).

47. 42 U.S.C. §§ 12101-12213 (1994).

48. See 42 U.S.C. § 2000e-5(b) (1994) (explaining administrative procedures to be followed under Title VII); *Churchill*, 183 F.3d at 190 ("[A] party who brings an employment discrimination claim under Title I of the ADA must follow the administrative procedures set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5."); see also *Walters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984)

with the EEOC.⁴⁹ The plaintiff must file the complaint within 180 days of the alleged discriminatory act.⁵⁰ After filing, the plaintiff must wait for the

(noting that prior to filing Title VII suit, plaintiff must file with EEOC); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398 (3d. Cir. 1976) (stating that filing charges with EEOC is jurisdictional prerequisite for suit under Title VII); *Shannon v. City of Phila.*, No. CIV.A.98-5277, 1999 WL 126097, at *2 (E.D. Pa. Mar. 5, 1999) ("Prior to filing suit in federal court under the ADA, a plaintiff must exhaust her administrative remedies by filing a claim with the EEOC."); *Lantz v. Hospital of the Univ. of Pa.*, No. CIV.A.96-2671, 1996 WL 442795, at *2 (E.D. Pa. July 30, 1996) (noting lack of jurisdiction in federal courts for ADA and Title VII cases absent timely filing with EEOC); *Bishop v. Okidata, Inc.*, 864 F. Supp. 416, 424 (D.N.J. 1994) (noting that plaintiff with ADA claim, like Title VII claim, must file with EEOC as prerequisite to bringing suit).

Title VII of the Civil Rights Act of 1964 acts to eliminate discrimination in employment based on race, color, religion, sex or national origin. *See* 42 U.S.C. § 2000e-2(a)(1) (noting objective of Title VII); *see also* Charles C. Jackson et al., *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1485 (1981) (stating purpose of Title VII). Title I of the ADA prohibits employment discrimination against qualified individuals on the basis of a disability. *See* 42 U.S.C. §12112(a) (giving general rule regarding employment discrimination for disabled persons); *see generally*, 42 U.S.C. §12112(b) (defining discriminatory practices).

49. *See* 42 U.S.C. § 2000e-5(b) (explaining procedures for filing with EEOC prior to suit); *Walters*, 729 F.2d at 237 (stating requirement to file with EEOC); *Berkoski v. Ashland Regional Med. Ctr.*, 951 F. Supp. 544, 547 (M.D. Pa. 1997) (noting claim for unlawful discrimination under Title VII must be filed with EEOC); *Hughey v. North Phila. Health Sys.*, No. CIV.A.96-4695, 1996 WL 547396, at *1 (E.D. Pa. Sept. 25, 1996) ("Title VII requires that a plaintiff file charges with the Equal Employment Opportunity Commission ('EEOC') and receive a notice of the right to sue before filing a complaint in federal court."); Jackson, *supra* note 48, at 1485 (stating that plaintiff "must first file with . . . [the] EEOC which will investigate the charge"). The purpose for first requiring an EEOC filing is to attempt to reach conciliation between the parties and better prevent employment discrimination. *See* *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975) (noting purpose of filing with EEOC is to "promote voluntary compliance with the requirements of Title VII"); *Ostapowicz*, 541 F.2d at 398 (discussing purpose of administrative action to settle by conciliation and persuasion as preferential over formal court proceedings); *Schouten v. CSX Transp., Inc.*, 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999) (same).

50. *See* 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."); *see also* *Holmes v. Pizza Hut of Am., Inc.*, No. CIV.A.97-4967, 1998 WL 564433, at *3 (E.D. Pa. Aug. 31, 1998) (noting Title VII requirement to file with EEOC within 180 days); *Berkoski*, 951 F. Supp. at 547 (stating that time limit for filing claim under Title VII is 180 days). Although the federal standard is 180 days, adjustments are often made for state claims combined with federal claims. *See, e.g.*, 42 U.S.C. § 2000e-5(e)(1) (allowing plaintiff additional time to file with EEOC if they have filed with state agency first). Title VII of the Civil Rights Act of 1964 states:

[when plaintiff] initially instituted proceedings with a State or local agency . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . .

42 U.S.C. § 2000e-5(e)(1).

EEOC to make a determination before he or she can proceed.⁵¹ The plaintiff will typically face one of the following three results: 1) receive a right-to-sue letter from the EEOC and commence suit in federal court; 2) wait 180 days without hearing from the EEOC and begin an individual suit; or 3) learn that the EEOC has been successful in achieving a solution and resolving the claim.⁵²

Federal law requires an EEOC filing to ensure that the parties attempted a consensual solution to the alleged discrimination before filing suit.⁵³ Thus, a plaintiff will face negative consequences if he or she does

States, however, may have additional filing rules that a plaintiff must consider when filing with both state and federal agencies. *See Berkoski*, 951 F. Supp. at 547 (discussing state procedure alterations to federal procedures); *Lantz*, 1996 WL 442795, at *2 (discussing Pennsylvania procedure requiring plaintiff to wait 60 (as opposed to 30) days to pass without decision before being allowed to file with EEOC). The differences in procedure prove to be important when a plaintiff is suing under multiple federal and state statutes. *See generally Churchill*, 183 F.2d at 184 (exemplifying situation where plaintiff brings claims under two federal statutes and one state statute).

The 180-day time period for administrative filing begins on the day that the discriminatory act took place. *See Delaware State College v. Ricks*, 449 U.S. 250, 256 (1980) (noting that complaint must be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred") (quoting 42 U.S.C. § 2000e-5(e) (1972)). The date of filing can effect the timeliness of the action and, thus is often disputed. *See id.* at 259 (stating that there were three possible dates that discrimination took place).

51. *See Lantz*, 1996 WL 442795, at *2 (noting that plaintiff must wait to hear from EEOC before taking any additional action).

52. *See* 42 U.S.C. § 2000e-5(f)(1) (outlining commission outcomes). The statute states:

If a charge filed with the Commission pursuant to subsection (b) . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) . . . , whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Id. *See Churchill*, 183 F.3d 190 (stating "a party must wait 180 days after filing . . . before being able to forego the administrative process and file suit in court"); *Schouten*, 58 F. Supp. 2d at 616 (stating that plaintiff must receive right-to-sue letter before filing suit); *Bishop*, 864 F. Supp. at 424 (same).

53. *See Waiters*, 729 F.2d at 237 (noting purpose behind filing with EEOC); *Bishop*, 864 F. Supp. at 425 (noting purpose of EEOC procedures is to prevent litigation by promoting voluntary compliance). The rationale behind the 180-day limitation is that if the EEOC cannot reach a conciliation by that point and discrimination continues, it is unlikely that the EEOC will achieve a better result through mediation efforts. *See Waiters*, 729 F.2d at 237 (discussing purpose behind 180 day limitation).

not satisfy all administrative procedures.⁵⁴ Accordingly, the plaintiff has an obligation to exhaust all administrative remedies before bringing an action in court.⁵⁵ A failure to exhaust all administrative remedies can result in dismissal of the claim.⁵⁶ One way a plaintiff fails to exhaust all administrative remedies is if he or she brings an action prior to receiving a right-to-sue letter from the EEOC.⁵⁷ A plaintiff may also fail to exhaust all administrative remedies if he or she does not include all potential claims in the EEOC filing.⁵⁸

The many requirements and potential pitfalls for completing an EEOC filing can cause the process to take a significant amount of time.⁵⁹ Plaintiffs may experience complications because they are required to receive a right-to-sue letter to satisfy the requirement of exhausting all administrative remedies, but the EEOC is not bound by a time limit to

54. See *Ostapowicz*, 541 F.2d at 398 (holding that filing with EEOC is jurisdictional prerequisite to Title VII claims); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1277 n.12 (2d ed. 1990) (noting that employment discrimination claim can be dismissed for failure to timely file administrative complaint).

55. See *Holmes*, 1998 WL 564433, at *2 (stating plaintiff's obligation to "exhaust all administrative remedies"); *Bishop*, 864 F. Supp. at 424 (implying that plaintiff can be barred from bringing claim because of failure to exhaust all administrative remedies).

56. See *Bishop*, 864 F. Supp. at 424 (noting that plaintiff will be precluded from bringing claim if all administrative remedies are not met).

57. See *Shannon v. City of Phila.*, No. CIV.A.98-5277, 1999 WL 126097, at *2 (E.D. Pa. Mar. 5, 1999) (stating that plaintiff must have right-to-sue letter from EEOC before filing suit); *Hughey v. North Phila. Health Sys.*, No. CIV.A.96-4695, 1996 WL 547396, at *2 (E.D. Pa. Sept. 25, 1996) (finding "because the plaintiff does not have a right to sue letter, this Court must find that she has not exhausted her administrative remedies, and therefore lacks a legal claim upon which relief can be granted"); *Lantz v. Hospital of the Univ. of Pa.*, No. CIV.A.96-2671, 1996 WL 442795, at *2 (E.D. Pa. July 30, 1996) (noting that plaintiff must wait for EEOC right-to-sue letter before bringing claim in court).

58. See *Sosa v. Floyd*, No. CIV.A.98-CV-6602, 1999 WL 240070, at *3 (E.D. Pa. Apr. 23, 1999) (holding that because plaintiff did not include retaliation claim with racial discrimination claim in EEOC filing, he did not exhaust all administrative remedies). Additionally, a plaintiff has the obligation to plead properly that all administrative remedies were satisfied before bringing suit. See *Shannon*, 1999 WL 126097, at *2 (noting that plaintiff must include all claims under EEOC to satisfy a filing under EEOC).

59. See, e.g., *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358 (1977) (computing time period between plaintiff's filing with EEOC and EEOC filing suit as three years and two months, which resulted in claim being time-barred); *Harter v. GAF Corp.*, 967 F.2d 846, 847 (3d Cir. 1992) (noting that agency had not finished proceedings for more than two years, violating statute of limitations on plaintiff's non-EEOC claim); *Lantz*, 1996 WL 442795, at *1 (stating that right-to-sue was not issued almost two years after complaint was filed with EEOC). The 180 day time period for filing a complaint with the EEOC, however, was never intended to become a barrier to plaintiffs. See 118 CONG. REC. 7167-68 (1972) (noting that intention of time limitation was to "give the aggrieved person the maximum benefit of the law").

provide that letter.⁶⁰ Therefore, although the statute of limitations for EEOC claims tolls when a plaintiff files, the plaintiff may be unable to bring the EEOC claim for years while the EEOC is attempting conciliation—resulting in the barring of non-EEOC claims for violation of the statute of limitations.⁶¹

D. *When Res Judicata and Employment Jurisprudence Clash: The Development of Law in the Third Circuit*

In 1975, the United States Supreme Court, in *Johnson v. Railway Express Agency, Inc.*,⁶² set forth guidelines for an employment discrimination claim based on multiple statutes.⁶³ *Johnson* noted that a plaintiff is able to attempt recovery under multiple theories.⁶⁴ Additionally, the Court recognized that even though the statutory schemes of the employment discrimination acts are different, the plaintiff has an obligation to preserve each claim independently, while simultaneously avoiding the pitfall of

60. See *Occidental*, 432 U.S. at 360 (“[No] section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time.”).

61. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 465-67 (1975) (holding EEOC filing failed to toll § 1981 statute of limitations); *Shannon*, 1999 WL 126097, at *4 (noting that statute of limitations for FMLA does not toll with EEOC filing, and that FMLA action is time-barred because it was filed after two-year statute of limitations); *Sanders v. Hale Fire Pump Co.*, No. CIV.A.87-2468, 1987 WL 17748, at *3 (E.D. Pa. Sept. 30, 1987) (finding statute of limitations for § 301 of Labor Management Relations Act was not tolled by EEOC filing). There is strong precedence that filing one action does not toll the statute of limitations for the other potential actions. The Supreme Court of the United States has noted that submitting a grievance on a non-EEOC action does not toll the statute of limitations for filing with the EEOC. See *International Union of Elec. Radio & Mach. Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-37 (1976) (holding that submission of non-EEOC grievance under collective bargaining agreement did not toll period for filing Title VII charge under EEOC).

62. 421 U.S. 454 (1975).

63. See generally *id.* (analyzing suit based on Title VII and § 1981). In *Johnson*, the petitioner filed a charge with the EEOC based on his employer's alleged discriminatory practices regarding seniority and job assignments. See *id.* at 455 (discussing basis for EEOC filing). A few weeks after the filing, the employer terminated the petitioner who subsequently amended his charge to include discriminatory retaliation. See *id.* Approximately four years passed before the EEOC granted the petitioner a right-to-sue letter allowing him to file a civil action against his former employer. See *id.* at 455-56. Petitioner then filed an action with the United States District Court for the Western District of Tennessee alleging violation of Title VII and § 1981. See *id.* at 456. The district court ruled that the § 1981 claim was barred because it had a one-year statute of limitations, which had expired during the EEOC proceedings. See *id.* (noting finding of district court). The Supreme Court upheld this finding, holding that a petitioner cannot sleep on his or her rights concerning non-EEOC claims. See *id.* at 466 (holding that petitioner was barred from bringing § 1981 claim after expiration of statute of limitations).

64. See *id.* at 459 (“[T]he aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.”).

claim preclusion.⁶⁵ Many lower court decisions have since attempted to analyze and apply the fine balance established in *Johnson*.⁶⁶

1. *Pitfalls in Litigating Multiple Employment Jurisprudence Claims*

Res judicata is often used as an effective defense when plaintiffs try to litigate employment grievances in both state and federal courts.⁶⁷ In *Rider v. Commonwealth of Pennsylvania*,⁶⁸ for example, the United States Court of Appeals for the Third Circuit found that a Pennsylvania Commonwealth Court decision barred the plaintiff from bringing a Title VII claim in federal court.⁶⁹ The court noted that if the plaintiff's claim were settled by the holding in the Commonwealth court, the federal court was precluded from hearing the Title VII claim.⁷⁰ The United States Court of Appeals

65. See *id.* at 465-66 (holding that by waiting for administrative conciliation on Title VII to finish, plaintiff slept on § 1981 claim). Additionally, the Court addressed the plaintiff's obligation to ensure that all applicable claims were preserved. See *id.* at 466 ("We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently.").

66. For examples of applications of claim preclusion in employment jurisprudence in lower courts, see *infra* notes 89-93 and accompanying text.

67. See *Gregory v. Chehi*, 843 F.2d 111, 117 (3d Cir. 1988) ("When a plaintiff relies on both state and federal law, the Restatement advocates claim preclusion, provided that the first court to adjudicate the matter has jurisdiction to entertain the omitted claim." (citing RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982)); see also Robert P. Morris, *How Many Bites Are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott*, 55 TENN. L. REV. 205, 206-07 (1988) (noting Supreme Court decision giving state administrative decisions preclusive effect in federal court).

68. 850 F.2d 982 (3d Cir. 1988).

69. See *id.* at 988 (noting that state court judgment has preclusive effect on federal court actions). The Third Circuit based its decision on the Full Faith and Credit Clause of the Constitution. See 28 U.S.C. § 1738 (1994) (stating that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken"). The Third Circuit found that the plaintiff's claim was barred by claim preclusion because the "very issue . . . has been tried and decided, albeit by a state court." *Rider*, 850 F.2d at 995. Thus, when a state court has decided an issue, the federal court is precluded from hearing the same claim. See *id.* (precluding state-adjudicated discrimination action). But see, e.g., *Mathiason*, *supra* note 45, at 1005 (discussing case barring Title VII lawsuit when plaintiff had previously filed discrimination charge with state agency); Morris, *supra* note 67, at 228 (quoting Supreme Court decision that Congress did not intend for § 1738 to apply to state administrative agency findings); Silver, *supra* note 2, at 371-72 (noting that courts traditionally held res judicata inapplicable to state agency determinations, but administrative preclusion has since "seeped into the landscape of the law").

70. See *Rider*, 850 F.2d at 988-89 (noting that if state courts would have dismissed Title VII claim, it would be barred under res judicata). In *Rider*, male guards brought a claim because only female guards were being considered for certain positions at the State Correctional Institution in Muncy, Pennsylvania. See *id.* at 984-85. The State Correctional Institution placed only female guards in those positions to protect the female prisoners' privacy rights. See *id.* at 985 (stating basis of pending claim). The plaintiffs first brought their claim to a union arbitrator who found that the placing of the female guards violated Title VII be-

for the Third Circuit in *Bradley v. Pittsburgh Board of Education*,⁷¹ found that the Pennsylvania Supreme Court decision barred the plaintiff's federal claim.⁷² *Bradley* is unique because "the preclusion argument would apply equally to [plaintiff's] equal protection and retaliatory discharge claims even if *Bradley* had stated claims for relief."⁷³ Thus, Third Circuit courts are clear that state actions are preclusive for federal court claims.⁷⁴

Some of the res judicata problems that plaintiffs face when seeking relief under both state and federal claims are particular to employment discrimination as a result of the requirements to exhaust both state and federal administrative procedures.⁷⁵ If a plaintiff fails to exhaust all administrative remedies for a state claim, that claim will be dismissed.⁷⁶ Thus, if a plaintiff fails to file under both the EEOC and the state administrative agency, he or she can be barred from recovering under all of his or her claims.⁷⁷ The Third Circuit, however, does not require the plaintiff to perform the impossible.⁷⁸ In *McNasby v. Crown Cork & Seal Co.*,⁷⁹ for example, the United States Court of Appeals for the Third Circuit allowed the plaintiff to bring claims in both federal and state court when the plain-

cause it did not qualify as a privacy right protected as a Bona Fide Occupational Qualification ("BFOQ"). *See id.* at 985-86. The defendant then appealed the arbitrator's decision to the Pennsylvania Commonwealth Court, which subsequently vacated the arbitrator's decision. *See id.* at 986. While pending appeal on the Commonwealth court decision, the plaintiffs brought a Title VII action in the district court. *See id.* at 987. The district court dismissed the plaintiffs' claim because of res judicata, disagreeing with the plaintiffs' argument that the Commonwealth court decision did not rule on the merits of federal claims, thereby not having a preclusive effect. *See id.* at 987-88. The Third Circuit affirmed the district court's findings based on a belief that the lower court's decision was dispositive of the male guards' Title VII claims. *See id.* at 989 n.9.

71. 913 F.2d 1064 (3d Cir. 1990).

72. *See Bradley*, 913 F.2d at 1068-69 (noting preclusive effect of state claims).

73. *Id.* at 1069.

74. *See id.* (noting that state proceedings barred plaintiff's First Amendment federal claim).

75. For a discussion on state administrative procedures, see *supra* note 50 and accompanying text.

76. *See Schouten v. CSX Transp. Inc.*, 58 F. Supp. 2d 614, 617 (E.D. Pa. 1999) (finding that plaintiff's claim was barred under Pennsylvania Human Rights Amendment ("PHRA") for failure to exhaust all administrative remedies).

77. *See Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 876 (3d Cir. 1990) (noting state agency procedure requiring plaintiff who received right-to-sue letter from EEOC to refile with Pennsylvania Human Rights Commission to secure state claims). *But see Fosburg v. Lehigh Univ.*, No. CIV.A.98-CV-864, 1999 WL 124458, at *8 (E.D. Pa. Mar. 4, 1999) (rejecting argument that "mere filing with the EEOC did not deem the charge to have been filed with the PHRA").

78. *See McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 276 (3d Cir. 1989) (recognizing unfairness in precluding litigant from claim that he or she could not have raised in previous suit).

79. 888 F.2d 270 (3d Cir. 1989).

tiff was unable to bring her Title VII claim in state court for lack of jurisdiction.⁸⁰ Thus, the plaintiff's claim was not precluded.⁸¹

Additionally, plaintiffs must be careful when filing and pleading to preserve all claims in the filing stage.⁸² For example, in *Polay v. West Co.*,⁸³ the United States District Court for the Eastern District of Pennsylvania would not hear the plaintiff's claims because the right-to-sue letter was not granted for all claims.⁸⁴ Plaintiffs also must be careful not to trap themselves in a corner by pleading claims in one action that are pending in another action.⁸⁵ In *Molthan v. Temple University*,⁸⁶ the United States Court of Appeals for the Third Circuit found that a claim listed in a pre-trial memorandum barred the plaintiff from bringing that claim in a second action, even though the claim was never pled in the first action.⁸⁷ This holding was based on the fact that the court is able to try all complaints that are "fairly within the scope" of a prior EEOC complaint.⁸⁸

2. *Current Trend in Third Circuit for Claim Preclusion in Employment Jurisprudence*

Many decisions in employment jurisprudence addressing claim preclusion have left a complicated, and often confusing, body of law for Third Circuit practitioners to follow.⁸⁹ A plaintiff's EEOC claims are sometimes precluded even when he or she takes all the proper steps.⁹⁰ The main problem a plaintiff faces is that he or she may be barred from bringing

80. See *id.* at 277 ("Plaintiffs did not and could not have raised their Title VII claims before the PHRC."); see also RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (1982) (stating that "it is unfair to preclude [a plaintiff] from a second action in which he can present those phases of the claim which he was disabled from presenting in the first").

81. See *McNasby*, 888 F.2d at 279 (holding plaintiff was not barred from bringing Title VII action).

82. For a discussion regarding the importance of preserving all claims, see *infra* notes 129-32 and accompanying text.

83. 629 F. Supp. 899 (E.D. Pa. 1986).

84. See *id.* at 901-02 (noting that Title VII claim was being litigated by EEOC, barring plaintiff from including Title VII claim in personal claim). The Eastern District stated that they will consider all claims that could reasonably be included under the right-to-sue letter from the EEOC: "I will allow plaintiff to include in the complaint all her claims which pertain to discriminatory actions which allegedly occurred during plaintiff's employment." *Id.* at 901.

85. See, e.g., *Molthan v. Temple Univ.*, 778 F.2d 955, 958-60 (3d Cir. 1985) (discussing that action was included in pretrial motion and filed separately).

86. 778 F.2d 955 (3d Cir. 1985).

87. See *id.* at 959 ("It is my intention to try this case as it is reflected in the parties' pretrial memoranda filed in September and October 1982, which have governed this action until the present moment.").

88. *Id.* at 960 (quoting *Walters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984)).

89. For an analysis of current Third Circuit and district court opinions, see *infra* notes 89-118 and accompanying text.

90. See *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (holding that plaintiffs who had fully litigated individual claims with defendant were barred from recovery under EEOC filing).

claims based on separate theories in separate actions.⁹¹ In *Harding* the United States District Court for the Western District of Pennsylvania held that if multiple claims are based on the same cause of action, the plaintiff is required to bring all the claims in one action and must take steps to satisfy that requirement.⁹² This decision has been extended and supported in *Churchill* and, most recently, in *Boykins v. Lucent Technologies, Inc.*⁹³

III. ANALYSIS

A. *Interpretation of Claim Preclusion in Employment Jurisprudence*

The Third Circuit recently began to give plaintiffs instructions for recovering under multiple statutory bases in employment discrimination cases.⁹⁴ These instructions, however, are spread throughout multiple opinions, making it difficult for a practitioner to have a full picture of his or her client's rights and responsibilities in employment law.⁹⁵

1. *Third Circuit Application of Claim Preclusion*

In 1995, the United States District Court for the Western District of Pennsylvania addressed the problem of claim preclusion in employment jurisprudence.⁹⁶ In *Harding*, the plaintiff brought an action based on violation of the ADA and other statutes after receiving an unfavorable judgment ("Harding I") against the same defendant in a previous lawsuit

91. See *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 40-41 (2d Cir. 1992) (holding that Title VII claim was barred because it could have been brought in previous action based on Labor Management Relations Act). The plaintiff filed her Labor Management Relations Act ("LMRA") action while the administrative proceedings were still pending on her Title VII claim. See *id.* at 37. She brought the action at that time in order to prevent the statute of limitations from running on her LMRA claim. See *id.* (noting statute of limitations for LMRA claim). The district court found that the dismissal of her LMRA claim barred her Title VII claim because of res judicata. See *id.* at 38. Additionally, the Second Circuit rejected the argument that "res judicata should not apply to situations like the one presented here because application of the doctrine would be inconsistent with the scheme of Title VII." See *id.* at 39. The Second Circuit based their decision on the principle and purpose of res judicata, preventing litigation that could have been brought in the same action from being brought in a separate action. See *id.* (holding that purpose of Title VII does not prevent application of res judicata in this case).

92. See *Harding v. Duquesne Light Co.*, No. CIV.A.95-589, 1995 WL 916926, at *3-4 (W.D. Pa. Aug. 4, 1995) (finding that ADA claim was barred because it was based on same cause of action as previous claim); see also *Kelley v. TYK Refractories Co.*, 860 F.2d 1188, 1196 (3d Cir. 1988) (finding that claim is not precluded when issues are distinct).

93. 78 F. Supp. 2d 402 (E.D. Pa. 2000).

94. See *Churchill v. Star Enters.*, 183 F.3d 184, 191 (3d Cir. 1999) (discussing plaintiff's options to preserve all claims); *Harding*, 1995 WL 916926, at *4.

95. For a discussion of the many different opinions, see *infra* notes 96-118 and accompanying text.

96. See *Harding*, 1995 WL 916926, at *2 (holding that claim is barred on basis of res judicata).

bought under the Employee Retirement Income Security Act ("ERISA").⁹⁷ The district court in *Harding* found that the previous suit had resulted in a final judgment on a single cause of action.⁹⁸

After the dismissal of *Harding I*, the plaintiff, in *Harding*, brought a second action (*Harding II*) against the same defendants based on the Federal Rehabilitation Act of 1973, Title I of the ADA and the Pennsylvania Human Relations Act ("PHRA").⁹⁹ The district court found that these claims were based on the same cause of action as *Harding I*, and were therefore subject to claim preclusion.¹⁰⁰ Additionally, the district court rejected the plaintiff's argument that because he was seeking recovery on different theories of employment law, the claims could not be precluded.¹⁰¹ The district court reiterated the current trend in dealing with claim preclusion, explaining that "the Third Circuit Court of Appeals has taken a broad view of what amounts to an identity of causes of action, with the focus being on the underlying events in both actions."¹⁰²

Additionally, the district court rejected the plaintiff's argument that he was unable to bring the second claim with the first because of time restraints and administrative remedies.¹⁰³ Although the court recognized

97. *See id.* at *1 (discussing previous case (*Harding I*) and its preclusive effect). The plaintiff based his cause of action on his termination from defendant company on January 11, 1993, after he tested positive for using a controlled substance. *See id.* In *Harding I* the plaintiff alleged that he was entitled to severance pay and employee benefits because he was terminated as a result of his disability, which fell under ERISA. *See id.* The Western District of Pennsylvania granted the defendant's motion for summary judgment, dismissing the case. *See id.* (stating finding of *Harding I*).

98. *See id.* ("Defendant's Motion as to Plaintiff's ERISA claims was granted and a final judgment on the merits thereby issued.").

99. *See id.*

100. *See id.* at *2-3 (holding that *Harding I* and *Harding II* are based on same cause of action and are thus subject to claim preclusion). The district court first analyzed the three requirements of claim preclusion: 1) final judgment in previous suit; 2) same parties from previous suit; and 3) same cause of action. *See id.* at *2. For a discussion on the factors of claim preclusion, see *supra* notes 29-45 and accompanying text. In analyzing those factors, the Western District found that the claims consisted of the same cause of action and were therefore subject to res judicata. *See Harding*, 1995 WL 916926, at *3 ("Comparing *Harding I* and *Harding II* . . . I find that both suits constitute the same 'cause of action.'").

101. *See Harding*, 1995 WL 916926, at *3 (holding that differing theories of recovery was ineffective defense to res judicata); see also Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499, 509-10 (1997) ("The court stated that the question of whether two causes of action are the same for res judicata purposes does not depend on the legal theory invoked, but on the 'primary right' involved in the two actions.").

102. *Harding*, 1995 WL 916926, at *3.

103. *See id.* at *4 ("I have considered and rejected Plaintiff's contention that he could not have included his *Harding II* claim with his previous cause of action involving his termination due to statutory requirement for initial administrative review by EEOC, OFCCP, and PHRC.").

time constraints imposed on the plaintiff, it denied recovery on this theory because of the strong principle of *res judicata*.¹⁰⁴

The Third Circuit revisited the *Harding* holding four years later in *Churchill*.¹⁰⁵ As a matter of first impression in the Third Circuit, the court precluded a claim based on the ADA and the PHRA because of a prior court decision based on the FMLA.¹⁰⁶ Churchill had been employed by the defendant company for five years when she was diagnosed with oral cancer.¹⁰⁷ After requesting accommodations under the FMLA to deal with her illness, she was terminated from her position.¹⁰⁸

On May 20, 1997, Churchill brought her first claim against Star Enterprises based on the FMLA ("Churchill I").¹⁰⁹ The United States District Court for the Eastern District of Pennsylvania entered judgment in favor of the plaintiff on February 17, 1998, based on the FMLA claim.¹¹⁰ During Churchill I, the plaintiff exhausted her administrative remedies with the Pennsylvania Human Relations Commission ("PHRC") and the EEOC for the PHRA and ADA claims.¹¹¹ She had commenced the filing on February 26, 1997 (prior to filing in court for Churchill I), and received her right-to-sue letter from the EEOC on April 26, 1998.¹¹² Thus, she received her right-to-sue letter approximately two months after a decision was rendered on Churchill I.¹¹³

On April 2, 1998, Churchill filed a complaint against the defendants based on the ADA, the PHRA and other statutes ("Churchill II").¹¹⁴ The

104. *See id.* (finding that permitting plaintiff to split his cause of action would violate *res judicata*).

105. *See Churchill v. Star Enters.*, 183 F.3d 184, 195 (3d Cir. 1999) (noting that claims were based on identical causes of action and, therefore, subject to *res judicata*).

106. *See id.* at 184 (noting that, as matter of first impression, claims brought under current case were barred because of judgment on claims in previous case).

107. *See id.* at 187.

108. *See id.* Churchill immediately notified the defendant of her illness and her need to undergo treatment. *See id.* (describing facts and procedural history). A couple of months after her diagnosis, Churchill underwent several surgical operations and radiation procedures, but continued to work. *See id.* (discussing extent of medical treatment). She made many requests to defendant for reasonable accommodations for her injury that were never addressed; she then requested leave under the FMLA, which precipitated her termination. *See id.* (discussing defendant's response to complaints under FMLA).

109. *See id.* at 187-88 (noting content of Churchill I).

110. *See id.* (recounting lower court decision in favor of plaintiff). Churchill was awarded double-liquidated damages and interest, and the Court ordered that she be reinstated to an equivalent position. *See id.* (detailing damages for plaintiff). Additionally, Churchill received partial attorney's fees and costs. *See id.*

111. *See id.* (noting plaintiff's separate claims).

112. *See id.* Before she received a right-to-sue letter from the EEOC, the PHRC dismissed the state claim on November 14, 1997. *See id.*

113. *See id.* (noting time period between Churchill I and exhaustion of administrative remedies).

114. *See id.* at 188-89 (listing bases for Churchill II).

defendants immediately asserted the affirmative defense of res judicata based on the proceedings and the final judgment on Churchill I.¹¹⁵ The district court found in favor of the defendants on the basis of claim preclusion.¹¹⁶ On appeal, the plaintiff argued that Churchill II should not be precluded because a plaintiff should not have to wait for the exhaustion of administrative proceedings in order to bring all claims together, if waiting results in stale non-EEOC claims.¹¹⁷ The Third Circuit, however, rejected this argument, noting that because the two suits were based on the same cause of action, the plaintiff was required to consolidate all claims into one case.¹¹⁸

2. *Advice for Future Plaintiffs*

Although the district courts and the Third Circuit have been strict in not allowing plaintiffs to bring separate claims for the same cause of action, they have provided guidelines to aid subsequent plaintiffs in avoiding the pitfalls of res judicata in employment jurisprudence.¹¹⁹ In *Harding*, the district court gave instructions for future plaintiffs facing a statute of limitations on one claim and exhaustion of administrative remedies on others.¹²⁰ According to the court, the "[p]laintiff could easily have taken one of several possible steps to insure compliance with the two year statute of limitations . . . without splitting his cause of action."¹²¹ The first remedy is for the plaintiff to file claims before the statute of limitations runs and to ask the court for a stay while administrative proceedings are pending.¹²² The second remedy is for the plaintiff to be more assertive and request a right-to-sue letter shortly after the expiration of the administrative period and either: 1) bring both claims together; or 2) ask for leave to amend the initial complaint.¹²³

115. See *id.* at 189 (noting defendant's motion to dismiss and court's entry for judgment on pleadings).

116. See *id.* at 189 (discussing procedural history); *Churchill v. Star Enters.*, 3 F. Supp. 2d 625, 628 (E.D. Pa. 1998) ("We conclude that Churchill I and Churchill II involve the same cause of action because the underlying events in both cases are the same.").

117. See *Churchill*, 183 F.3d at 190 (noting plaintiff's argument for finding against claim preclusion).

118. See *id.* at 191 (stating "Churchill should have moved to consolidate").

119. See *id.* (explaining options to bring all claims together); *Harding v. Duquesne Light Co.*, No. CIV.A.95-589, 1995 WL 916926, at *4 (W.D. Pa. Aug. 4, 1995) (discussing alternatives to splitting cause of action).

120. See *Harding*, 1995 WL 916926, at *4 (suggesting solutions for claim preclusion problem).

121. *Id.*

122. See *id.*

123. See *id.* (suggesting that plaintiff request right-to-sue letter early and amend complaints); see also FED. R. Civ. P. 15(a) (stating that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires").

In *Churchill*, the Third Circuit provided similar solutions for plaintiffs who have both EEOC and non-EEOC claims pending and fear that the statute of limitations will run or that the non-EEOC claim will become stale.¹²⁴ First, in a case similar to *Churchill*, where the claims were only two months apart, a plaintiff can request to consolidate the claims by joining the EEOC claims with the non-EEOC claims.¹²⁵ Second, the plaintiff can request a right-to-sue letter after the administrative period has expired.¹²⁶ The EEOC is required to issue the right-to-sue letter on request after the time period has expired.¹²⁷ Third, the plaintiff could have requested a stay in the proceedings while she awaited the right-to-sue letter.¹²⁸

B. *Practitioners' Formula for Preserving Claims in Employment Discrimination Suits in the Third Circuit*

Through its rulings, the Third Circuit has developed a formula for practitioners to follow when litigating an employment discrimination claim with multiple statutory bases.¹²⁹ The practitioner must act carefully to secure preservation of all employment discrimination claims.¹³⁰ Additionally, a plaintiff's practitioner has to follow the appropriate administrative procedures where applicable.¹³¹ In order to secure all claims and not violate the doctrine of res judicata, a practitioner should adhere to the following general formula.¹³²

124. See *Churchill*, 183 F.3d at 191 (providing methods plaintiff can use to consolidate actions).

125. See *id.* at 191 (noting timing of EEOC actions). The Third Circuit noted that "prior to the start of the trial in *Churchill I*, *Churchill* knew that the PHRC had dismissed her PHRA complaint, and accordingly she could have brought an action on that claim about three months before *Churchill I* went to trial." *Id.*

126. See *id.* (explaining plaintiff's right to request right-to-sue letter).

127. See *id.* ("Thus . . . well before the *Churchill I* trial, [plaintiff] could have requested a right to sue letter."). The court noted that *Churchill* sat on her rights by not requesting the right-to-sue letter in time to bring both actions together. See *id.* (discussing results of failure to act on time). Thus, she was barred from bringing the claim in a second action. See *id.* (noting that *Churchill* waited for EEOC to issue right-to-sue letter).

128. See *id.* (discussing alternative to request stay).

129. For a discussion of the Third Circuit's formula, see *infra* notes 133-51 and accompanying text.

130. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (recognizing plaintiff's obligation to take necessary steps in preserving all applicable claims).

131. For a discussion on administrative remedies in employment discrimination claims, see *supra* notes 46-61 and accompanying text.

132. For a list of steps practitioners should take in order to preserve all claims, see *infra* notes 133-51 and accompanying text.

1. *Step One—Proper Pleading and Filing to Secure Multiple Claims*

The first pitfall practitioners must avoid when pursuing multiple claims is the failure to plead and file claims properly.¹³³ If a practitioner does not file a claim in a timely manner, the claim may be time-barred.¹³⁴ Additionally, if the plaintiff's practitioner fails to complete the filing with the EEOC, the administrative remedies may not be exhausted for all of the potential claims.¹³⁵ A court is allowed to consider all reasonable claims that might have been subject to investigation under the EEOC charges for which a right-to-sue letter was issued, but courts will not permit a plaintiff to pursue substantially different claims for which a letter has not been issued.¹³⁶ Thus, a litigant must be careful to include all potential claims in the pleadings and administrative filings to prevent preclusion from bringing any one of the claims.¹³⁷

2. *Step Two—Early Request of Right-to-Sue Letter*

The Third Circuit has clearly stated that a claim is not ripe until the plaintiff receives a right-to-sue letter.¹³⁸ A problem that the *Churchill* plaintiff faced was that she was waiting for her right-to-sue letter before filing her EEOC suit.¹³⁹ Although the EEOC requires a plaintiff to possess a right-to-sue letter, the plaintiff can request a right-to-sue letter after the EEOC has reviewed the claim for 180 days.¹⁴⁰ In fact, if requested, the EEOC is obligated to issue a right-to-sue letter after the 180-day time period.¹⁴¹ Thus, if the non-EEOC claim will not be time-barred 180 days

133. See, e.g., Wayne N. Outten, *What a Plaintiff's Lawyer Looks for When Evaluating a Potential Lawsuit*, 562 PLI/LIT, Apr. 1997, at 23, 44 (discussing that plaintiff should include all colorable federal and state claims in complaint when litigating multiple causes of action).

134. See *Boykins v. Lucent Techs., Inc.*, 78 F. Supp. 2d 402, 409 (E.D. Pa. 2000) (holding that plaintiff's § 1981 claim was barred by statute of limitations).

135. See *Polay v. West Co.*, 629 F. Supp. 899, 902 (E.D. Pa. 1986) (finding that Title VII action was not allowed because plaintiff failed to obtain right-to-sue letter).

136. See *id.* (noting that court can consider all claims reasonably subject to investigation under EEOC charge).

137. See, e.g., *id.* (refusing to hear claims for which right-to-sue letter has not been issued).

138. For a discussion on the necessity of securing a right-to-sue letter in the Third Circuit, see *supra* notes 53-61 and accompanying text.

139. See *Churchill v. Star Enters.*, 183 F.3d 184, 190 (3d Cir. 1999) (noting EEOC requirements).

140. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975) (holding that if EEOC has not resolved or filed complaint within 180 days, plaintiff may "demand a right-to-sue letter and institute the Title VII action himself without waiting for the completion of the conciliation procedures"); *Digests of Recent Opinions: Churchill v. Star Enterprises*, PA. L. WKLY., July 26, 1999, at 20 (noting that plaintiff could have requested right-to-sue letter from EEOC).

141. See *McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 274 n.3 (3d Cir. 1989) ("If a charge filed with the EEOC is dismissed or if the EEOC has not filed a

from the EEOC filing, the practitioner can wait, request a right-to-sue letter and bring the EEOC and the non-EEOC actions together.¹⁴²

3. *Step Three—Requesting Leave to Amend*

If, however, the statute of limitations on the non-EEOC charge will run in fewer than 180 days, the plaintiff's practitioner must bring that claim separately from the EEOC claim.¹⁴³ Thus, a practitioner must secure all claims separately.¹⁴⁴ If faced with this situation, a practitioner could file the non-EEOC action, wait for the 180-day period to expire, and then ask for a leave in order to amend to include the EEOC claims.¹⁴⁵ Under the Federal Rules of Civil Procedure, the Third Circuit will grant leave to amend freely as justice requires.¹⁴⁶

4. *Step Four—Requesting a Stay on the Proceedings of the First Action*

In addition to asking leave to amend, a practitioner can file the non-EEOC claim and then request that the lawsuit on the first claim be stayed, pending results from the EEOC.¹⁴⁷ The Eastern District of Pennsylvania has noted that a balance must be weighed between prejudicing the plaintiff by not allowing a recovery on all actions and prejudicing the defendant by delaying the cause of action.¹⁴⁸ If, however, the plaintiff has met his or her burden in demonstrating that a hardship will exist if the stay is denied, that showing will outweigh the prejudice to the defendant.¹⁴⁹ When re-

civil action against the party . . . within 180 days after the charge was filed, the EEOC must, if requested, issue a right-to-sue letter to the complainant.”).

142. See *Churchill*, 183 F.3d at 191 (explaining plaintiff's obligation to request right-to-sue letter and consolidate all claims in one cause of action); see also *Moberly*, *supra* note 101, at 526 (noting that plaintiff must be able to consolidate multiple claims with same cause of action in same forum).

143. See *Johnson*, 421 U.S. at 466 (discussing importance of filing non-EEOC claim (§ 1981) prior to running of statute of limitations). This separate filing is a necessity because filing for one claim will not toll the statute of limitations for the outstanding claims. See *id.* (holding that administrative filing for Title VII did not toll statute of limitations for § 1981).

144. See *id.* (explaining plaintiff's obligation to preserve all claims independently).

145. See *Nernberg v. United States*, 463 F. Supp. 752, 754 (W.D. Pa. 1979) (discussing plaintiff's ability to advise court of administrative proceedings and request leave to amend).

146. See FED. R. CIV. P. 15(a) (allowing judge freedom to grant leave to amend).

147. See *Johnson*, 421 U.S. at 465 (acknowledging option for plaintiff to “ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed”). The Court does note, however, that this option is not the most favored option for plaintiffs. See *id.* (noting that requesting stay is not “highly satisfactory”).

148. See *Sicoli v. Nabisco Biscuit Co.*, No. CIV.A.96-6053, 1998 WL 614840, at *1-2 (E.D. Pa. Sept. 10, 1998) (noting potential prejudice to defendant if stay is granted).

149. See *id.* at *2 (finding that plaintiff met burden to prove hardship because subsequent EEOC claim would be precluded).

questing a stay, the practitioner must make a clear request before the trial begins or the stay may be denied.¹⁵⁰ In *Churchill*, although the court was made aware of the potential EEOC claims, that knowledge did not consist of a proper request for a stay.¹⁵¹

IV. POTENTIAL FUTURE APPLICATIONS AND UNANSWERED ISSUES

Churchill was a matter of first impression in the Third Circuit because it was the first occasion where the Third Circuit reviewed a case already litigated under the FMLA.¹⁵² The *Churchill* court noted, however, that although the facts were new, the applicable law was not.¹⁵³ Thus, it is likely that when the Third Circuit faces future, similar cases based on different fact patterns or based on different employment statutes, the result will be similar to *Churchill*. This prediction is further supported by the Eastern District of Pennsylvania's recent decision in *Boykins*. In *Boykins*, the Eastern District of Pennsylvania held that the plaintiff was barred from bringing a § 1981 claim with a Title VII claim because the statute of limitations for the § 1981 claim had run while the plaintiff was exhausting administrative remedies for the Title VII claim.¹⁵⁴ The district court gave very little explanation when dismissing the § 1981 claim.¹⁵⁵ Thus, the effective rules for lawsuits based on both EEOC and non-EEOC claims are becoming fixed; therefore, it is probable that, although *Churchill* was technically a matter of first impression, future cases with both EEOC and non-EEOC claims will yield similar results.¹⁵⁶

Although the claim preclusion principles in *Churchill* produce a formula for similar cases, inevitably there will be cases that will fall outside the formula, causing additional problems for litigants and courts in the

150. See *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999) (noting that reference to administrative claims during side-bar conference was insufficient as request for stay and that request should be made prior to trial).

151. See *id.* ("While these evidentiary proceedings demonstrate that the court was aware of the administrative claims, they surely do not include a motion for a stay.").

152. See *id.* 189 (noting that this was first occasion that any circuit was presented with assertion of claim preclusion barring claim previously litigated under the FMLA).

153. See *id.* ("Yet while the constellation of facts in this case is new, the principles of the doctrine of claim preclusion are familiar.").

154. See *Boykins v. Lucent Techs.*, 78 F. Supp. 2d 402, 409 (E.D. Pa. 2000) (holding § 1981 claim was time-barred). The plaintiff avoided running into claim preclusion by bringing his Title VII, PHRA, and § 1981 claims together in one action. See *id.* at 405 (listing statutory bases for plaintiff's claim). While the plaintiff was correct in bringing all the claims together, he did not satisfy the requirement of preserving all claims when they accrued. See *id.* at 409 (noting that plaintiff failed to bring complaint for two years after discriminatory conduct, thereby failing to satisfy statute of limitations).

155. See generally *id.* (concluding that only § 1981 claim was time-barred).

156. See *id.* (holding plaintiff was barred from bringing non-EEOC claim).

Third Circuit.¹⁵⁷ Specifically, this Casebrief has dealt with claim preclusion when an individual brings multiple claims.¹⁵⁸ A Third Circuit practitioner, however, may have to concern himself or herself with claim preclusion when the EEOC decides to litigate the EEOC action, and the plaintiff has additional individual non-EEOC actions against the same defendant.¹⁵⁹

This problem was identified in *EEOC v. United States Steel Corp.*¹⁶⁰ The EEOC decided to bring a suit against the defendants, and the Third Circuit ruled that employees who had previously fully litigated on individual claims were precluded from receiving benefits secured by the EEOC action.¹⁶¹ Conversely, a plaintiff who recovers under an EEOC action is barred from bringing an individual action after resolution of a claim brought by the EEOC.¹⁶² Thus, when the EEOC brings a claim against the defendant, an individual plaintiff has to choose which claim he or she wishes to recover under—either the EEOC claim or the non-EEOC claim—because the second claim will be precluded by the first.¹⁶³ The Third Circuit has yet to rule on this issue since its decision in *Churchill*, and it remains to be seen if a similar formula will be developed for practitioners who find themselves in this unique position.

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157. See, e.g., *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) (addressing claim preclusion in case where plaintiffs had individual claims and EEOC brought claim on plaintiffs' behalf).

158. For a discussion on the problems facing plaintiffs with multiple individual employment discrimination claims, see *supra* notes 67-88 and accompanying text.

159. See 42 U.S.C. § 2000e-5(f)(1) (1994) (noting that EEOC may bring civil action against respondents if conciliation efforts fail after 30 days); see also Annotation, *Res Judicata Effect of Judgment in Class Action Upon Subsequent Action in Federal Court*, 48 A.L.R. FED. 675, 679 (1980) ("While it is true that a person cannot ordinarily be bound (or estopped) by the results of any judicial proceeding to which he is not a party . . . class actions are a recognized exception to the general rule."). It has been recognized that when the EEOC is bringing a claim on behalf of a class, its actions can bar members of the class from recovering on other grounds. See *id.* at 680 (discussing EEOC as proper representative of class to bar members from further claims (citing *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978))).

160. 921 F.2d 489 (3d Cir. 1990).

161. See *id.* at 495 ("The underlying policy of res judicata . . . surely applies with no less force in those instances in which the individual has actually litigated on his own behalf than in those in which the preclusive litigation seeking private benefits was conducted by a representative.").

162. See *id.* ("Moreover, as previously noted, the doctrine of representative claim preclusion generally applies equally regardless of the sequence of litigation.").

163. See *id.* at 496 (holding that plaintiffs were precluded from recovering under both EEOC action and individual claim to "prevent undue hardship to the defendant").

