UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	No. 05c 0208
Plaintiff,	Judge Honorable James B. Zagel
vs.	Magistrate Martin C. Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	
Defendant.	

MOTION FOR LIMITED RECONSIDERATION OR, IN THE ALTERNATIVE, CERTIFICATION FOR INTERLOCUTORY REVIEW

Defendant Sidley Austin Brown & Wood LLP ("Sidley") moved for partial summary judgment, seeking dismissal of claims for individual relief brought by the Equal Employment Opportunity Commission ("EEOC") as time-barred under *EEOC v. North Gibson School Corp.*, 266 F.3d 607 (7th Cir. 2001). In its Memorandum Opinion and Order of June 9, 2005 ("Order"), this Court denied the motion. Sidley hereby moves for limited reconsideration of the Order or in the alternative for certification of the Order for interlocutory review under 28 U.S.C. § 1292(b).

I. This Court Should Reconsider Its Order Of Disposition Under The Rule That Circuit Precedent Must Be Followed Unless Expressly Overruled.

In moving for limited reconsideration, Sidley does not ask this Court to revisit its substantive analysis, but only its order of disposition. This Court acknowledged that "[i]f there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred," and the Court "would be compelled to

grant Sidley's motion." Order at 3. This Court nonetheless concluded that the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), "put an end to the distinction recognized in earlier cases, like *North Gibson*, between the EEOC's ability to seek individual monetary relief and its ability to seek injunctive relief," Order at 4, and that it is "clear enough from the holdings in *Waffle House* and [*EEOC v. Board of Regents*, 288 F.3d 296 (7th Cir. 2002)] that the privity arguments seen in *North Gibson* are no longer applicable and that *Waffle House* does in fact overrule that decision." *Id.* at 5. The Order concludes by stating that "Sidley's Motion for Summary Judgment is DENIED." *Id.* at 7.

Sidley respectfully submits that, even though this Court has determined that the rationale of *North Gibson* is irreconcilable with *Waffle House*, it nonetheless must apply *North Gibson* and leave to the Seventh Circuit the decision whether to overrule its own precedent. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Supreme Court held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484; *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) (adhering to decision that was inconsistent with rule established in later Supreme Court cases because the earlier decision had not been "expressly overruled" by the Court), *reversed on other grounds*, 522 U.S. 3, 20 (1997) (praising the Seventh Circuit's adherence to precedent even as it overruled that precedent and reversed the judgment). The Seventh Circuit has adopted the *Rodriguez de Quijas* rule to govern the manifest duty of a district court to follow current circuit precedent that has not been expressly overruled. *Donohoe v. Consolidated Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir. 1994). If a precedent should be overruled, the district court should report its "conclusions

while applying the existing law of the circuit." *Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993). The Seventh Circuit has declared that a district court commits "fundamental error" when it fails to follow binding circuit precedent:

> In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow the decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree.

Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1301 (2005); *see also Paul v. HCI Direct, Inc.*, 2003 U.S. Dist. LEXIS 12170, at *18-*19 (C.D. Cal. July 14, 2003) (applying *Rodriguez* and adhering to circuit precedent despite claims of inconsistency with later Supreme Court and Ninth Circuit decisions) (attached as Exhibit A).

Here, this Court has acknowledged that *North Gibson* is directly on point and would require that partial summary judgment be granted in favor of Sidley. *North Gibson* has not been expressly overruled by either the Seventh Circuit or the Supreme Court. This Court has determined that *North Gibson*'s logic was rejected in *Waffle House* and *Board of Regents*, but a district court may not declare *North Gibson* overruled because it "rest[s] on reasons rejected in" a later decision. *Rodriguez de Quijas*, 490 U.S. at 484. Given its conclusion that *North Gibson* is controlling of its own force, the proper course is for this Court to apply *North Gibson*, but explain that *North Gibson* cannot be reconciled with *Waffle House* and *Board of Regents*.

II. This Court Should Certify The Order For Interlocutory Review

Although Seventh Circuit law requires reconsideration of the Order, this Court should certify the Order to the Seventh Circuit for interlocutory review under 28 U.S.C.

§ 1292(b), regardless of whether it grants or denies partial summary judgment.[1] Section 1292(b) authorizes certification of an order for interlocutory appeal if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 675 (7th Cir. 2000) ("there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation").

A. Whether The EEOC Is In Privity With An Individual Employee For Purposes Of Determining The Timeliness Of Claims For Individual Relief Is A Question of Law.

The term "'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact." *Ahrenholz*, 219 F.3d at 676. Here, the question of whether the EEOC is in privity with individuals for the purpose of determining the timeliness of ADEA claims for individual-specific relief is a pure question of statutory interpretation, and it is a controlling legal issue within the meaning of section 1292(b).

The standard for determining whether a question of law is "controlling" is a pragmatic, "flexible" standard. A question of law is controlling "'even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.'" *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (quoting 16 Wright *et al.*, *Federal Practice & Procedure* § 3930, at 159-60 (1977)). Here, the

[1] Although certification is warranted whether this Court denies or grants summary judgment, this motion for certification is in the alternative because it would be incumbent upon the EEOC to request interlocutory review if the motion for reconsideration is granted.

privity question is clearly controlling under any definition, for as this Court noted, if *North Gibson* remains valid, this Court would be compelled to grant Sidley's motion for partial summary judgment. Order at 3.

B. There Is Substantial Ground For Difference Of Opinion Over The Continuing Validity Of *North Gibson*.

Contestability is established when there is a possibility that controlling circuit precedent should be overruled in light of later decisions. Thus, in *Reiser*, the Seventh Circuit, while criticizing the district court's failure to apply circuit precedent, praised the district court for "sensibly" certifying the issue for interlocutory review. 380 F.3d at 1029. Likewise, in *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the district court decided (correctly) to follow binding Seventh Circuit precedent, but "certif[ied] its order for interlocutory appeal" due to "[t]he possibility that recent ... [Supreme Court] decisions would lead [the Seventh Circuit] to abandon" its prior precedent. *Id.* at 609. *North Gibson* is controlling until expressly overruled, but this Court's determination that the reasoning of *North Gibson* does not survive *Waffle House* and *Board of Regents* provides "substantial ground for difference of opinion," 28 U.S.C. § 1292(b), as to the continuing vitality of *North Gibson*.

Although this Court's ruling that *North Gibson* conflicts with later binding precedents alone warrants certification, interlocutory review is further justified because there is substantial ground for a difference of opinion over whether such a conflict exists. First, the Supreme Court's ruling in *Waffle House* was predicated in large part on its prior holding in *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980), that the EEOC was "not merely a proxy for the victims of discrimination." *Id.* at 326; *see Waffle House*, 534 U.S. at 288, 298. But *General Telephone* was decided before *North Gibson*, and indeed was cited by the earlier Seventh Circuit decision on which *North Gibson* was based (*EEOC v. Harris Chernin,*

Inc., 10 F.3d 1286, 1291 (7th Cir. 1993)). Thus, reasonable minds may differ over whether *Waffle House*'s application (in the specific context of arbitration agreements) of the long-acknowledged rule that the EEOC is not a mere proxy for the victim undermines *North Gibson.* This is particularly so when the Seventh Circuit was familiar with the *General Telephone* rule, and nonetheless held, under "the distinctive enforcement scheme" of the ADEA, that the "EEOC [is] in privity with the individual for whom it seeks relief" for purposes of determining the timeliness of claims for individual relief. *North Gibson*, 266 F.3d at 615.

Second, *Waffle House* did not establish a blanket rule that there could never be privity of any kind for any purpose between the EEOC and the individual employee. *See* 534 U.S. at 297 (noting only that "[w]e have recognized several situations in which the EEOC does not stand in the employee's shoes").[2] Indeed, the Supreme Court cited with approval the holding of *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990), that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Waffle House*, 534 U.S. at 297. Because res judicata in this context depends on privity, *Vines v. University of La. at Monroe*, 398 F.3d 700, 706 (5th Cir. 2005) *petition for certiorari filed*, 04-1615 (U.S. May 31, 2005), it certainly can be argued with some force that *Waffle House* recognizes that the EEOC may be in privity for purposes of determining an individual's *entitlement to relief*, even if the employee cannot trump the

[2] The concept of privity has many meanings in the law depending on context. Privity is a legal conclusion, and in a general sense persons may be privies if they are "partakers or have an interest in any action or thing, or any relation to another" that allows one to be bound by a judgment against (or actions of) another. *Black's Law Dictionary* 1196 (6th ed. 1990) (six kinds of privies); *id.* at 1199-1200 (privity) (discussing and distinguishing privity of blood, contract, estate, and possession); *Restatement (Second) of Judgments* § 75 cmt. a (1982) (noting that privity may include "relationships that are explicitly representative," successors in interest, and an "array of substantive legal relationships ... in which one of those involved in the relationship is treated as having the capacity to bind the other to a judgment in an action to which the latter is not a party"); *Vines v. University of La. at Monroe*, 398 F.3d 700, 706 (5th Cir. 2005).

"EEOC's exclusive authority over the choice of forum." 534 U.S. at 298. Indeed, the Supreme Court in *Waffle House* was careful to note that "no question concerning the validity of his claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum is presented by this record," and "[t]he only issue before this Court is whether the fact that [the employee] has signed a mandatory arbitration agreement limits the remedies available to the EEOC." *Id.* at 297. Because *U.S. Steel* (which the Supreme Court approved in *Waffle House*) and *North Gibson* are based on identical interpretations of the ADEA, *see North Gibson*, 266 F.3d at 616-17; *Harris Chernin*, 10 F.3d. at 1291; Def.'s Mem. 9-12, there is at least substantial ground for difference of opinion as to whether *Waffle House* overruled *North Gibson*.[3]

Finally, the contestability of the privity issue is verified by decisions of other courts that have reached different conclusions from this Court. *See Trans States Airlines v. Pratt & Whitney Can., Inc.*, 86 F.3d 725 (7th Cir. 1996). Most notably, even after *Waffle House*, the

[3] For the sake of clarification, Sidley has not taken the position that the *Waffle House* analysis can never apply to an ADEA claim (see *Order* at 4-5 n.1). That position would be flatly irreconcilable with *Board of Regents*. In *Board of Regents*, the Seventh Circuit rejected a wooden claim of blanket privity that would have deprived the federal government of its traditional power to enforce federal law against a state government, and would have turned the constitutional scheme on its head by subjecting the federal government to the sovereign immunity of the States. *See* 288 F.3d at 299 (stating general rule that the federal government is not limited by state sovereign immunity). Along with those constitutional defects, such a position would have contravened *Waffle House*'s express recognition that there are "several situations in which the EEOC does not stand in the employee's shoes," and the settled proposition that the EEOC is not a mere "proxy for the individual." 534 U.S. at 297-98. Moreover, as the Seventh Circuit pointed out, the State's arguments were at odds with the holding of *Waffle House* that the EEOC was master of its own complaint and charged with vindicating the public interest. *Board of Regents*, 288 F.3d at 300. Significantly, the *Board of Regents* panel did not suggest that either *Harris Chernin* or *North Gibson* was defunct in the aftermath of *Waffle House*. Sidley does not question the validity of *Board of Regents* or the applicability of *Waffle House* to many issues that may arise under the ADEA. Rather, Sidley's position is that the holding of *Waffle House* does not affect the holding of *North Gibson* on the different issue of the timeliness of claims for individual relief and the EEOC's ability to prosecute such claims, which was not addressed in either *Waffle House* or *Board of Regents* and is based on the specific structure of the ADEA.

United States Court of Appeals for the Fifth Circuit held that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that place it in privity with those individuals," citing *U.S. Steel* and *Harris Chernin*. *Vines*, 398 F.3d at 707-08. Another judge in this district has recognized the continuing validity of *North Gibson* in resolving the analogous issue of whether the EEOC was limited to representing only individuals whose time to file had not expired when the EEOC received its first charge (and thereby obtained jurisdiction). *EEOC v. Custom Companies, Inc.*, 2004 WL 765891, at *11 (N.D. Ill. Apr. 7, 2004) (attached as Exhibit B). Given the substantial basis for difference of opinion on this issue, the Seventh Circuit should have the opportunity to resolve the question, with the benefit of this Court's analysis.

C. A Ruling By The Seventh Circuit That *North Gibson* Is Still Good Law Will Materially Advance The Ultimate Termination Of This Litigation.

As this Court held, if *North Gibson* applies, the EEOC's claim for individual relief "would certainly be barred." Order at 3. As to the third element of section 1292(b), therefore, there is no doubt that an immediate appeal and decision favorable to Sidley would materially advance the ultimate termination of the case.

Given the breadth of the individual relief the EEOC is pursuing, application of *North Gibson* would have a profound impact on the nature and scope of this case. The EEOC seeks individual relief in the form of reinstatement, restoration of partner status or front pay, and back pay for a largely unidentified class of former partners, none of whom has complained of discrimination.[4] Litigation of those issues will require fact-intensive and highly individualized

[4] The EEOC has identified 32 former partners as alleged victims of alleged discrimination. It has asked Sidley to identify any partner who withdrew from Sidley for any reason since 1994, along with information on their compensation, billing rate, practice group and reasons for separation. This group will include hundreds of partners, including many who joined Sidley in connection with the Brown & Wood merger in 2001.

discovery regarding the circumstances relating to each such individual's withdrawal. Each such decision involved at least the Management and Executive Committees of Sidley in place at the time (approximately 30 people) and, most often, the head of the individual's Practice Group and other partners. Damages discovery will focus on the feasibility of reinstating partners who left the practice of law years ago, estimates of back pay based on assumptions relating to billable hours and client billings and mitigation, including the reasons that former partners declined the positions offered by Sidley and their current income from other sources. Such discovery also implicates the profound privacy interests of individuals who have thus far expressed no interest in becoming involved in this litigation.

Thus, discovery into the EEOC's claims for individual relief alone will likely involve a significant number of fact depositions which would take a substantial period to complete. (Indeed, before discovery even began the EEOC told Sidley that it believes more than 100 depositions will be necessary, which if accurate would likely take more than a year to complete.) This does not include the additional discovery (and trial time and resources) necessary to try individual damages. Trial on these individual issues could take months.

An immediate Seventh Circuit decision upholding *North Gibson* would eliminate the need for most if not all of this, and would materially advance the ultimate termination of this case by greatly streamlining and simplifying the issues in the case. *See, e.g., EEOC v. Dial Corp.*, 2001 WL 1945088, *4 (N.D. Ill. Dec. 27, 2001) (Urbom, J.) (immediate appeal may materially advance termination of litigation where reversal would "significantly limit" the scope, and "substantially reduce" the length, of the case in part by "eliminat[ing] . . . individual claims") (attached as Exhibit C); *In re Brand Name Prescription Drugs Antitrust Litigation*, 1996 WL 267752, *4 (N.D. Ill. May 17, 1996) (Kocoras, J) (statutory element satisfied where reversal of

decision "would result in a substantial savings of both judicial and party resources" because "[t]he magnitude of the plaintiffs' damages claims would be vastly diminished" and "the relevance and propriety of certain (often sensitive) information" would be negated) (attached as Exhibit D), *appeal accepted and rev'd on other grounds*, 123 F.3d 599, 602 (7th Cir. 1997). If the Seventh Circuit upholds *North Gibson*, the only claims remaining in the case would be for declaratory and injunctive relief, thus resulting in considerable "sav[ings of] time for the district court, and time and expense for the litigants," *Johnson*, 930 F.2d at 1206. Even assuming that the EEOC prevails on other arguments, such as mootness, statute of limitations and laches, a bench trial to determine whether there is sufficient evidence of discrimination to warrant injunctive relief would be substantially shorter and less complex than a trial addressing individual relief.

In summary, the statutory criteria for an interlocutory appeal are amply satisfied. Because of the importance of section 1292(b) to judicial economy, the Seventh Circuit has "emphasize[d] the duty of the district court and of our court as well to allow an immediate appeal to be taken when the statutory criteria are met." *Ahrenholz*, 219 F.3d at 677.

This Court should grant reconsideration, or in the alternative certify the Order for interlocutory review under section 1292(b).

Respectfully submitted,

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EXHIBIT A

LEXSEE 2003 US DIST. LEXIS 12170

TERI PAUL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Plantiff, vs. HCI DIRECT, INC., A DELAWARE CORPORATION, Defendant.

CASE NO. CV 03-3104 DT (JTLx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2003 U.S. Dist. LEXIS 12170

July 14, 2003, Decided
July 14, 2003, Filed; July 16, 2003, Entered

DISPOSITION: [*1] Defendant's Motion to Dismiss Complaint for Failure to State a Claim denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consumer brought an action against defendant, a mail-order vendor, alleging that the vendor had violated *39 U.S.C.S. § 3009* by mailing unordered merchandise and then demanding payment. The vendor filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

OVERVIEW: The consumer alleged that the vendor had mailed a package of unordered pantyhose and had sent two collection letters demanding immediate payment. Relying on a Ninth Circuit case as precedent, the consumer sought to invoke federal question jurisdiction by reading a limited private remedy into *39 U.S.C.S. § 3009*, although Congress did not expressly give aggrieved persons who received unordered merchandise a private right of action to enforce § 3009 in federal court. The vendor challenged the validity of the cited case as precedent for a private right of action, observing that the underlying test that was used to decide the case had been modified with regard to other areas of law. The court, in denying the motion to dismiss, held that stare decisis compelled it to follow precedent from the Ninth Circuit. A district court could not disagree with its court of appeals on a controlling legal issue. The concept of anticipatory overruling lacked merit; lower courts could not conclude that more recent cases had, by implication, overruled an earlier precedent.

OUTCOME: The court denied the vendor's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

[HN1] Fed. R. Civ. P. 12(b)(6) provides that a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. Dismissal is proper under Rule 12(b)(6) only where there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. Therefore, it is only the extraordinary case in which dismissal is proper. Generally, orders granting motions to dismiss are without prejudice unless allegations of other facts consistent with the challenged pleading could not possibly cure the defect.

Antitrust & Trade Law > Federal Trade Commission Act

[HN2] Under *39 U.S.C.S. § 3009*(a), the mailing of unordered merchandise is an unfair trade practice in violation of *15 U.S.C.S. § 45*, except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions. *39 U.S.C.S. § 3009*(b) states in part, with regard to all unordered merchandise, even free samples and merchandise mailed by charities, the recipients may treat it as a gift and may dispose of it in any manner that the recipient sees fit, without any obligation whatsoever to the sender.

Antitrust & Trade Law > Federal Trade Commission Act

[HN3] The factors used in determining that a limited private right of action is available under *39 U.S.C.S. § 3009* are, first, is the plaintiff one of the class for whose especial benefit the statute was enacted; that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law. The first factor is satisfied because § 3009 is specifically designed to protect the recipients of unordered merchandise. The second factor is satisfied even though Congress did not consider the question of a private right. A limited private right of action for declaratory and restitutionary relief is consistent with the purpose of the statute. As to the fourth factor, § 3009 was within Congress' power to enact and a limited private right furthers the purposes Congress sought to serve.

Governments > Courts > Judicial Precedents

[HN4] Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quieta movere -- to stand by and adhere to decisions and not disturb what is settled. Under the doctrine of stare decisis a case is important only for what it decides -- for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts.

Governments > Courts > Judicial Precedents

[HN5] A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower in the judicial hierarchy. A district judge may not respectfully disagree with his own court of appeals who have ruled on a controlling legal issue; case law on point is the law; it must be followed unless and until overruled by a body competent to do so.

Governments > Courts > Judicial Precedents

[HN6] The U.S. Supreme Court has dismissed the concept of anticipatory overruling. Lower courts should not conclude that more recent cases have, by implication, overruled an earlier precedent.

COUNSEL: For TERI PAUL, plaintiff: Eric H Gibbs, Rosemary M Rivas, Girard Gibbs & De Bartolomeo, San Francisco, CA.

For HCI DIRECT INC, defendant: James E Daniels, Joseph W Morledge, Hall Dickler Kent Goldstein & Wood, New York, NY. Lawrence B Steinberg, Theodore J Bro, Hall Dickler Kent Goldstein & Wood, Beverly Hills, CA.

JUDGES: Dickran Tevrizian, Judge, United States District Court.

OPINIONBY: Dickran Tevrizian

OPINION:

ORDER **DENYING** DEFENDANT, HCI DIRECT, INC.'S MOTION TO DISMISS THE COMPLAINT.

I. Background

A. Introduction

This case was brought by Teri Paul, acting Individually and purportedly as Class Representative ("Plaintiff"), against HCI Direct Inc. ("Defendant") concerning the marketing of pantyhose in violation of *39 U.S.C. § 3009*: Mailing of Unordered Merchandise and *28 U.S.C. § 2001* request for Declaratory Relief. Defendant now brings the current Motion to Dismiss under *F.R.C.P. 12(b)(6)* for failure to state a claim. Defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place [*2] of business located in Bensalem, Pennsylvania. Plaintiff is a citizen of California.

B. Factual Summary

The following facts are alleged in Plaintiff's Complaint:

In or around October 2002, Defendant, the manufacturer of "Silkies" brand pantyhose, mailed to Plaintiff a package which contained at least two pairs of pantyhose. Plaintiff did not ask for or consent to receive

the pantyhose from Defendant. (Plaintiff's Class Action Complaint for Equitable Relief ("Complaint"), P1.) Subsequently, Defendant sent two collection letters threatening to report Plaintiff as a delinquent creditor if the pantyhose were not paid for immediately. (Id.) Plaintiff outlines a program by which Defendant, following a similar pattern, acquires customers and extracts payment from thousands of consumers for unordered pantyhose.

Based on the above, Plaintiff alleges that Defendant is in violation of *39 U.S.C. § 3009* by mailing unordered merchandise within the meaning of the section and then demanding payment of said merchandise. (Id. at PP14, 26-30) Plaintiff relies on *Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977)*, to invoke federal [*3] question jurisdiction by reading a limited private remedy into *§ 3009*. (Id. at P25.)

C. Procedural History

On May 2, 2003, Plaintiff filed her Class Action Complaint and demand for jury trial with this Court.

On May 27, 2003, Defendant filed a Notice of Motion, and Motion of to Dismiss the Complaint, which is presently before this Court.

II. Discussion

A. Standard of Review for *F.R.C.P. 12(b)(6)* Motion to Dismiss for Failure a State a Claim

Rule 12(b)(6) of the Federal Rules of Civil Procedure [HN1] provides that a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Pursuant to *Rule 12 (b)(6)*, the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980)*. The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support [*4] of his claim. See *Cabo Distributing Co., Inc. v. Brady, 821 F. Supp. 601 (N.D. Cal. 1992)*. Dismissal is proper under *Rule 12(b)(6)* only where there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. See *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. See *United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1977)*; *McKinney v. DeBord, 507 F.2d 501, 503 (9th Cir. 1974)*. Therefore, it is only the extraordinary case in which dismissal is proper. See *Corsican Productions v. Pitchess, 338 F.2d 441, 442 (9th Cir. 1964)*.

Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." See *Schreiber Dist. v. Serv-Well Furniture, 806 F.2d 1393, 1401 (9th Cir. 1986)*.

B. Analysis

Under [*5] *39 U.S.C. § 3009(a)*, [HN2] the mailing of unordered merchandise is an unfair trade practice in violation of *15 U.S.C.A. § 45*, except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions. *39 U.S.C. § 3009(b)* states in part, with regard to all unordered merchandise, even free samples and merchandise mailed by charities the recipients may treat it as a gift and may dispose of it in any manner that the recipient sees fit, without any obligation whatsoever to the sender.

Plaintiff seeks a declaratory judgment that all unordered merchandise mailed from Defendant may be treated as a gift by the recipient, and she seeks restitution for all monies acquired by Defendant under the program described in her Complaint.

Defendant seeks to dismiss this action and contends that Plaintiff does not have a private right of action because 1) no such right is expressly provided for in *39 U.S.C. § 3009*; 2) the Ninth Circuit case that established a limited private right of action has been repudiated by subsequent rulings and is [*6] no longer valid; and 3) there is no evidence of Congressional intent that would allow this Court to imply a private right of action for *§ 3009*. This Court addresses each of these arguments.

1. *Section 3009* Does not Expressly Provide for a Private Federal Action

Both parties agree that Congress did not expressly give aggrieved persons who received "unordered merchandise" a private right of action to enforce *§ 3009* in federal court. (See Motion to Dismiss ("Motion"), p. 5; Opposition to Motion to Dismiss ("Opp."), p. 6). Therefore, this Court does not need to address this first argument. Furthermore, Plaintiff stipulates to striking the prayer for injunctive relief included in the Complaint. (Opp. at 8).

2. Under Stare Decisis this Court is Compelled to Follow Kipperman

Defendant states that in the thirty-two years since enactment of *39 U.S.C. § 3009*, only two federal courts have published opinions on whether small monetary claims by consumers over allegedly unordered

merchandise can be brought before a federal court. It claims that *Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977)* is the only case "to [*7] divine the existence of a private action" under *§ 3009*, despite the fact that Congress chose not to invest such a right when it adopted the statute.

In Kipperman, the Ninth Circuit held that a limited private right of action was available under *§ 3009*. *Kipperman 554 F.2d at 380*. In order to make its ruling, the Court first looked at *Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)*. Id. [HN3] The Cort factors used by Kipperman were:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law...

Id. The Court found the first factor was "clearly satisfied" because *§ 3009* is specifically designed to protect the recipients of unordered merchandise. Id. The Court [*8] also found the second factor was satisfied even though Congress did not consider the question of a private right. Id. It stated that in normal cases a violation of *§ 3009* would be "self executing . . . if you receive merchandise that was not asked for, you will keep it." Id. However, the Court acknowledged that there may be times where application of *§ 3009* requires "interpretation before a recipient's rights can be determined." Id. It went on to explain that Congress was only thinking about the self-executing procedure and did not address the unusual case where a right must be defined by the courts, which is why it "neither explicitly permitted nor barred private suits." Id. As to the third factor, the Court stated that a limited private right of action for declaratory and restitutionary relief was consistent with the purpose of the statute, in order to protect a person's rights and secure relief. Id. However, the court ruled injunctive relief would interfere with the Federal Trade Commission's power to enforce *§ 3009* pursuant to *subsection (a)*. Id. As to the fourth factor, the Court held that *§ 3009* was within Congress' power to enact and finding a limited [*9] private right will further the "purposes Congress sought to serve." Id.

Defendant argues that since Kipperman in 1977, subsequent holdings in the United States Supreme Court and the Ninth Circuit involving the very same analytical issues arising out of different statutes dictate a contrary result. It contends that the doctrine of *stare decisis* requires that federal district courts adhere to the controlling decisions of the United States Supreme Court and that when a district court is faced with a decision of the Supreme Court that contradicts a decision by the court of appeals for that circuit, it is compelled to follow the Supreme Court decision.

Specifically, Defendant argues that Kipperman is outmoded and erroneous jurisprudence that has been implicitly overruled, because the underlying test that was used to decide the case has been modified by subsequent Supreme Court and Ninth Circuit decisions. It claims that the Kipperman Court based its holding on the first and third Cort factors: that the recipient-plaintiff was within the class of persons Congress sought to protect when enacting *§ 3009* and that the proposed private remedy was consistent with the [*10] statutory purposes. It asserts that the Ninth Circuit made a leap when it inferred that had Congress thought about the situation where a plaintiff would need to assert its rights it would have been its intent to allow a private right of action. Rather, Defendant argues, Congressional silence weighs heavily against the existence of a private right of action. It claims that after Kipperman, the Ninth Circuit has held that the Cort factors are not given equal weight, but that the critical inquiry for a court is to ascertain Congressional intent. Therefore, Defendant argues, the Supreme Court and the Ninth Circuit have impliedly overruled Kipperman, and this Court is bound to apply the Cort factors as modified by the subsequent decisions.

Defendant relies on *Vukasovich, Inc. v. Commissioner of Internal Revenue, 790 F.2d 1409 (9th Cir. 1986)*, as authority for a lower court to recognize when parallel authority has implicitly overruled a precedent. In Vukasovich, a taxpayer had prevailed in a lower court because that court had felt it was bound by a 1926 Supreme Court decision. The Ninth Circuit overturned the lower court case and held that the Supreme [*11] Court had implicitly overruled the 1926 holding. Id. It stated precedent that is contradicted by subsequent developments in Supreme Court jurisprudence need not be followed:

> The taxpayer argues that we must follow [the 1926 holding] in the absence of a Supreme Court decision specifically

> overruling it. However, the Supreme Court has long held that 'a later decision in conflict with prior ones [has] the effect to overrule them, whether mentioned or not.' . . . We conclude that the courts of appeal should decide cases according to their reasoned view of the way the Supreme Court would decide the pending case today.

Vukasovich, 790 F.2d at 1416. Applied here, Defendant argues that while Kipperman has not been explicitly overruled (primarily because no cases have arisen out the Ninth Circuit so that it may correct its early mistake), it has been implicitly overruled.

Plaintiff argues that Defendant is trying to evade the consequences of *stare decisis* by stating Kipperman is outmoded and erroneous jurisprudence, and she asserts that under *stare decisis*, a district court must follow precedent set by the court of appeals for its district. [*12] Therefore, Plaintiff argues, this Court is bound by the Kipperman holding that there is an implied private right of action for declaratory and restitutionary relief under *§ 3009*. Plaintiff further argues Defendant is trying to focus this Court's attention on the rationale of the Kipperman case but that under *stare decisis*, it is the holding of an appellate court that is binding on a district court, and not the underlying rationale. Therefore, she contends that this Court is bound by the Kipperman holding that there is a limited private right of action for declaratory and restitutionary relief under *§ 3009*.

In this instance, this Court has been asked to recognize that the Kipperman holding is no longer valid and that a private right of action does not exist under *§ 3009*. This Court declines to do so. This Court is not aware of any authority that permits a district court to disregard the ruling of its circuit and apply its own conclusions. Rather, this Court is bound by the doctrine of *stare decisis* regardless of this Court's personal opinions. To do otherwise would be judicial arrogance.

> [HN4] *Stare decisis* is the policy of the court to stand by precedent; [*13] the term is but an abbreviation of *stare decisis et non quieta movere* -- 'to stand by and adhere to decisions and not disturb what is settled. . . . Under the doctrine of *stare decisis* a case is important only for what it decides -- for the 'what,' not for the 'why,' and not for the 'how.' Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996). The Ninth Circuit determined in Kipperman that a limited private right of action exists under *§ 3009*. As such Kipperman is precedent for this case. [HN5] A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower in the judicial hierarchy. Id. "A district judge may not respectfully disagree with . . . his own court of appeals who have ruled on a controlling legal issue . . .case law on point is the law. . . it must [*14] be followed unless and until overruled by a body competent to do so." Id. Thus, this Court finds that Plaintiff may bring a private right of action under *§ 3009*.

Defendant's reliance on Vukasovich is unpersuasive. In Vukasovich, the issue before the appellate court was whether discharge of indebtedness ("DOI") should be treated as ordinary income in the tax year in which it occurred. *Vukasovich, 790 F.2d at 1414*. The taxpayer relied on a previous holding by the Supreme Court that had two prongs: the first - defining income in a specific manner, which did not apply to DOI at the time; the second - providing for a transactional approach to taxation which prohibited treating DOI as income where the cancellation occurs in a different year from the underlying transaction. *Id. at 1415*. Later Supreme Court decisions gave a broader definition of income, which encompassed DOI, and completely did away with the second prong, without specifically overturning the earlier rule. Id. As such, in Vukasovich, the issue before the Court was a narrow one, i.e., can a taxpayer rely on a previous Supreme Court holding concerning DOI that, while not [*15] expressly overruled by later Supreme Court decisions, was implicitly overruled. Id. The Vukasovich Court, in holding against the taxpayer, pointed to the Supreme Court's long standing view that its "later decision in conflict with prior ones [has] the effect to overrule them, whether mentioned and commented on or not." *Id. at 1416*. Here, unlike Vukasovich, the implied private right of action under *§ 3009* has been addressed by only four courts in thirty years, and the only court in the Ninth Circuit to speak on point about this issue is Kipperman, which this Court is obligated to follow under the doctrine of *stare decisis*. Defendant has offered no authority on point which has overruled Kipperman.

Defendant also relies on *Olson v. Paine, Weber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir.*

1986), to argue that this Court may anticipatorily overrule Kipperman because, as discussed above, later holdings by the Supreme Court and the Ninth Circuit make it almost certain that a higher court would repudiate the doctrine if given a chance to do so. This Court finds Defendant's argument is unpersuasive. Defendant's theory [*16] is that if the case were before the Ninth Circuit today, that body n1 would, based on its current interpretation of the Cort factors, overrule Kipperman itself. It claims that in anticipating such a ruling, this Court would be promoting judicial economy. However, after Olson was decided, [IIN6] the Supreme Court dismissed the concept of anticipatory overruling in *Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)*. In Rodriguez, a previous Supreme Court decision held that a pre-dispute agreement to arbitrate claims under the *Securities Act of 1933* ("1933 Act") was unenforceable under a section of that act. *Rodriguez de Quijas, 490 U.S. at 479-481*. A later Supreme Court decision held that a similar anti-waiver provision found within the *Securities and Exchange Act of 1934* ("1934 Act") did not prevent the enforcement of pre-dispute agreements to arbitrate claims. Id. A split ensued among the circuit courts with some following the earlier ruling, finding the pre-dispute agreements unenforceable, and with other courts, including district courts, finding the agreements enforceable because [*17] the subsequent decision reduced the prior one to "obsolescence". Id. The Court ultimately held that pre-dispute agreements were enforceable and reversed its earlier opinion, but it also commented "we do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing [the earlier decision]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id. at 484*; see also *Agostini v. Felton, 52 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)*("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). The Ninth Circuit has adopted the language of Rodriguez. See *Pizzuto v. Arave, 280 F.3d 949, 976 (9th 2002)*; *Nonnette v. Small, 316 F.3d 872, 877 (9th Cir. 2002)*.

n1 Body is the appropriate term here in that a panel may not overrule a decision by a previous panel; only a court *in banc* has such authority. *In re Osborne, 76 F.3d at 309*.

Applying Rodriguez, this Court must be presented with authority that either the Supreme Court or the Ninth Circuit has overturned the Kipperman holding. In this instance, Defendant cites to cases where the Supreme Court and the Ninth Circuit have shifted the weight of the Cort factors from an even distribution, as first applied in Cort and Kipperman, to one where much more weight is given to one factor- Congressional intent. However, none of the cases cited by Defendant dispositively addresses the finding of an implied right of action under *§ 3009*. For example, in the case relied on by Defendant, *Stupy v. United States Postal Service, 951 F.2d 1079, 1081 (9th Cir. 1991)*, the issue before the court was whether a private right of action could be found in *39 U.S.C. § 1006*. The Stupy Court, after reviewing the evidence, ruled that "it would be improper to hold that Congress intended to confer a private right of action" under *§ 1006*. *Id. at 1082*. However, the Stupy Court's analysis was limited to how other circuits had interpreted *§ 1006* and its own interpretation of the legislation. Even though other [*19] courts have used a modified version of the Cort test subsequent to Kipperman, this Court does not have the authority to overrule the specific holding of Kipperman because those courts were interpreting different statutes. The issue before this Court is whether a limited private right of action can be implied under *§ 3009*, and it has been decided in Kipperman.

Finally, Defendant relies on another district circuit case, *Howe v. Reader's Digest Association, Inc., 686 F. Supp. 461, 466 (S.D.N.Y. 1988)*, and argues that in Howe, the District Court rejected an implied private right of action under *§ 3009*. However, Defendant's reliance on this case is misplaced because it does not provide this Court with authority to ignore Kipperman. As correctly stated by Plaintiff, the District Court in Howe ruled that (1) there was no express private right of action for damages or injunctive relief under *§ 3009* and (2) plaintiff did not show any damage or continuing misconduct to justify the Court's consideration of whether an implied right of action for damages or injunctive relief existed. The District Court in Howe cited to the holding in Kipperman [*20] and noted that a claim for declaratory or restitutionary relief could be pursued, while a claim for injunctive relief could not. *Howe 686 F. Supp. at 466*. Furthermore, even if Howe was directly on point, a case from the Southern District of New York is not binding on this Court; rather, Kipperman remains the binding precedent. Therefore, where Defendant allegedly mailed unordered merchandise to Plaintiff and then sought payment for such merchandise, Plaintiff may maintain an action in this Court under *39 U.S.C. § 3009* to obtain declaratory and restitutionary relief.

3. This Court will not Rule on Whether a Limited Private Federal Action can be Implied in *Section 3009*

Based on this Court's determination that this Court is bound by the decision in Kipperman, this Court need not address Defendant's third contention that there is no evidence of Congressional intent to imply a private right of action under *§ 3009*. Absent the decision reached in Kipperman this Court cannot and should not second guess binding Ninth Circuit authority and substitute its own opinion as to judicial interpretation of Congressional intent.

[*21] **III. Conclusion**

This Court **denies** Defendant's Motion to Dismiss the Complaint for Failure to State a Claim.

IT IS SO ORDERED.

DATED: 7/14/03

Dickran Tevrizian, Judge

United States District Court

EXHIBIT B

Westlaw.

Not Reported in F.Supp.2d

Page 1

2004 WL 765891 (N.D.Ill.), 93 Fair Empl.Prac.Cas. (BNA) 1450

(Cite as: 2004 WL 765891 (N.D.Ill.))

H

Motions, Pleadings and Filings

United States District Court,
N.D. Illinois, Eastern Division.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Catherine COPELLO and Allison Kennedy, Plaintiffs-Intervenors,
v.
CUSTOM COMPANIES, INC., and Custom Distributor Network, Inc. Defendants.
No. 02 C 3768, 03 C 2293.

April 7, 2004.

John C. Hendrickson, Deborah Lois Hamilton, Richard John Mrizek, U.S. Equal Employment Opportunity, Beth A. Miller, Pontikes & Garcia, Chicago, IL, Noelle Christine Brennan, Brennan & Monte, Ltd., Chicago, IL, for Plaintiff.

Martin K. Denis, Daniel R. Madock, Maureen Kay Feldman, Jessica E. Huebsch-Lynott, Barlow Kobata & Denis, Chicago, IL, for Intervenors.

Jason Robert Bent, Bennett L. Epstein, Diane E. Gianos, Eric M. Phillips, Foley & Lardner, Chicago, IL, Daniel P. Colling, Walter B. Connolly, Jr., Jeffrey S. Kopp, Foley & Lardner, Detroit, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, J.

*1 Before the Court are Defendants' Motions to Limit the Class in Case Nos. 02-C-3768 and 03-C-2293. (These cases were consolidated on July 7, 2003.) For the following reasons, the Motions are granted in part and denied in part.

I. *BACKGROUND*

A. The Sexual Harassment Class Action (Case No. 02-C-3768)

Custom Companies, Inc. ("Custom") employed Catherine Copello ("Copello") as a sale representative from 1994 until her discharge in November 1999. On January 14, 1999, Copello filed a timely charge of discrimination with the United States Equal Employment Opportunity Commission (the "EEOC"), alleging that throughout her employment she and other female employees at Custom were subjected to sexual discrimination, sexual harassment, and retaliation. In November 1999, Copello filed an amended charge of discrimination with the EEOC, alleging that Custom retaliated against her for filing the initial EEOC charge. In April 2000, Copello filed a second amended charge with the EEOC alleging retaliation and sexual discrimination.

The EEOC investigated Copello's charge of discrimination and issued a Determination letter on September 6, 2001, finding that the evidence gathered in the investigation established reasonable cause to believe that Custom had discriminated against a class of female employees "by subjecting them to a sexually hostile, offensive work environment, in violation of Title VII." The EEOC's conciliation efforts failed, and it thereafter filed a civil action against Custom under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The amended complaint contains class-wide allegations of both discriminatory treatment under 42 U.S.C. § 2000e-5 ("Section 706") and pattern and practice allegations under 42 U.S.C. § 2000e-6 ("Section 707"). The EEOC alleges that "[s]ince at least 1994," Custom "engaged in a pattern or practice of unlawful employment practices." Am.Compl.¶ 7. These purported practices include pressures to "entertain"

customers at "strip clubs," company outings attended by strippers, groping and sexual touching, pornographic materials on-display on work computers, and lewd sexual language. *See id.*

B. The Retaliation Class Action (Case No. 03-C-2293)

Corrine Miller ("Miller") began her employment at Custom in 1995. In early 1999, and again in mid-1999, she testified in support of a complainant in an internal sexual harassment investigation at Custom. On December 27, 1999, Custom discharged Miller. On June 26, 2000, Miller filed a charge of discrimination with the EEOC alleging that Custom had discriminated against her and terminated her in retaliation for her participation in the internal sexual harassment investigation. Following an investigation of Miller's charge, and failed conciliation efforts, the EEOC filed the present action against Custom on April 2, 2003. The EEOC alleges "retaliatory practices" on behalf of a class of female employees, claiming that since at least 1998, Custom has altered job duties, reduced compensation, disciplined, and discharged class members in retaliation for employees "opposing sex harassment." *See* Compl. ¶ 8.

C. The Court's October 27, 2003 Ruling

*2 On October 27, 2003, this Court denied Plaintiff-Intervenor Allison Kennedy's ("Kennedy") motion to intervene under Federal Rule of Civil Procedure 24(a)(1). *See Custom Companies, Inc. v. EEOC,* 2003 WL 22455510 (N.D.Ill.2003). Custom employed Kennedy as a sales representative between August 17 and October 20, 1998. She claimed that she faced a sexually hostile environment during these two months of employment. Custom terminated Kennedy in October or November 1998. This Court held that Kennedy could not intervene in the retaliation class action because her claims were time-barred. Specifically, the Court found that the retaliation class action was bound by the 300-day time frame preceding Miller's June 26, 2000 EEOC charge. Therefore, any claims preceding August 31, 1999, including Kennedy's claims, were time-barred. The Court also held that Kennedy could not avail herself to the "single-filing" doctrine to piggyback onto Miller's claim because this doctrine is available only to those parties who could have filed a claim with the EEOC based on the same unlawful conduct within the required statutory period. *See id.*

II. *DISCUSSION*

A. Limits on the Class in the Sexual Harassment Action

1. Rearward time limits on the class

In Illinois, a plaintiff alleging Title VII violations must file charges with the EEOC within three hundred days of the alleged discriminatory employment practice (the "filing period"). *See* 42 U.S.C. § 2000e-5(e)(1); *Koelsch v. Beltone Elecs. Corp.,* 46 F.3d 705, 707 (7th Cir.1995). One of the issues raised in these Motions is whether a hostile work environment claim that includes continuing violation allegations can include claims of employees who did not work at Custom during the filing period (*i.e.,* more than 300 days before Copello filed her EEOC charge or March 20, 1998). In other words, can the class of plaintiffs here include employees who were not exposed to any discriminatory acts during the filing period because Custom no longer employed them. (The Court recognizes that EEOC enforcement actions brought on behalf of a class of individuals are not "true" Federal Rule 23 class actions, *see General Telephone Co. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), but for purpose of clarity, it will use such terms as "class action" and "class membership.")

Custom argues that a continuing violation claim cannot revive otherwise stale claims, and, accordingly, class membership must be limited to those individuals who were employed at some point during the filing period. Under Custom's view, employees who left Custom before March 20, 1998 "could not have been subjected to any allegedly hostile work environment during the 300-day limitations period, and therefore could not have timely filed an EEOC charge on January 14, 1999 [the date that Copello filed her charge]." Defs. Br. at 6. The EEOC, in turn, contends that under a continuing violation theory, Custom can be liable for acts that predate the 300-day filing period, and therefore class membership cannot be so limited. *See*

Pls. Resp. Br. at 4-8.

*3 As a preliminary matter, Custom relies heavily on this Court's October 27, 2003 ruling ("prior ruling") to support its argument. At issue in the prior ruling was whether a plaintiff-intervenor could rely on the "single filing" doctrine to revive her state claim. The Court held that it could not, based, in part, on the problems of notice to employers and "long-standing notions of finality and prompt resolution of claims." *Custom Companies, Inc.*, 2003 WL 22455510 at *4. At that point, however, the Court did not have the opportunity to consider the crucial issue here: whether the continuing violation doctrine could allow claims of class members that occurred entirely outside of the filing period. Accordingly, the prior ruling informs the present opinion, but does not control the outcome here.

a. The case law supports Custom's position

Turning now to the case law, the Court must begin with a discussion of the fairly-recent United States Supreme Court decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), which the EEOC contends is controlling authority here. The EEOC relies heavily on *Morgan* to support its proposition that a hostile work environment claim that contains continuing violation allegations allows a court to "look beyond the 300-day charge filing period and impose liability based on the claims of class members employed outside 300 days." Pls. Resp. Br. at 4. Custom argues vigorously that *Morgan* simply "clarified the continuing violation doctrine solely as it applies to an individual's hostile work environment claim" and "does not permit a plaintiff, simply by alleging a continuing violation, to resurrect the time-barred claims of former employees." Defs. Reply Br. at 6.

Custom has the better view of *Morgan*. In *Morgan*, the plaintiff filed an individual complaint, alleging racial discrimination, consistent harassment, and retaliation from his former employer. *See Morgan*, 536 U.S. at 105-06. Plaintiff did not raise class allegations, and the EEOC did join in the suit. *See id.* The issue in *Morgan* was whether the employer could be liable for acts that occurred more than 300 days before plaintiff filed the EEOC charge. In deciding which acts could be considered, the Supreme Court distinguished between discrete retaliatory acts, such as termination, failure to promote, or denial of transfer, and the continuous acts of harassment that constitute a hostile work environment. *See id.* at 114-16. Specifically, hostile environment claims, unlike discrete acts of discrimination, depend by nature "on the cumulative effect of individual acts" across time, and a single act of harassment often is not actionable on its own. *Id.* at 115. In other words, "a hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' " *Id.* at 116. Relying upon the unique nature of hostile environment claims, the *Morgan* Court held that an employer may be liable for acts occurring outside of the 300-day filing period, provided that (1) at least one act contributing to the claim occurs within the filing period and (2) the acts falling outside of the 300-day filing period are part of the same actionable hostile environment claim. *See id.* at 117, 120-21. Discrete acts outside the filing period, however, are not actionable under a continuing violation theory, although they may be used as evidence of a hostile environment claim. *See id.*

*4 Thus, *Morgan* stands solely for the proposition that under an individual hostile work environment theory, an employer may be liable for acts of harassment *against the same individual plaintiff* that occurred before the filing period, provided that such acts are part of the same continuing pattern of harassment. *Morgan* is silent on whether a class can include class members who did not experience any acts of harassment during the filing period. (Further, *Morgan* did not alter the "single filing" doctrine, which, under this Court's reasoning in the October 27, 2003 ruling, would bar the inclusion of class members whose employment ended outside of the filing period.)

Having dispensed with the sole Supreme Court authority cited by the parties, the Court now addresses the parties' Seventh Circuit authority. Unfortunately, as shown below, there is competing

Seventh Circuit authority on this issue, which provides ammunition for both parties. Custom initially points to *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1248, 1256 (7th Cir.1980) (hereinafter *"Movement"*), which this Court relied upon in its prior ruling. In *Movement,* the Seventh Circuit held that the determination of class action claims depended on "which individual charges apply to which class claims in order to determine the earliest charge filed relative to each class." *See id.* at 1248. The *Movement* court noted that "it is not necessary that each class member have filed a charge with the EEOC for support; however, only those who could have filed a charge at or after the time a charge was filed by the class representative can be included in the charge." *See id* (citations omitted). Thus, *Movement* provides controlling authority for the proposition that class membership must be tethered to the earliest underlying EEOC charge. Here, the only charge in the sexual harassment class action is Copello's January 14, 1999 charge, and therefore, under *Movement,* class membership should be limited to only those employees who could have filed a charge in the preceding 300 days. (As discussed below, the EEOC seeks to distinguish *Movement* on the basis that the lawsuit there sought to vindicate solely private, rather than public, rights.)

Custom also relies on *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir.1978) (hereinafter *"Airlines"); rev'd in part on other grounds, sub nom by Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In *Airlines,* a female flight cabin attendant brought a class action alleging Title VII sex discrimination because of an airline policy to ground all pregnant female employees. Siding with a defendant airline, the Seventh Circuit declined to extend the continuing violation theory and excluded from the class all employees who were terminated more than 90 days prior to the date that the EEOC charge was filed (90 days was the governing filing period at the time of this case). *See id.* at 1147. The court noted: "it is the continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases." *Id.* at 1149.

***5** EEOC seeks to distinguish *Airlines* on the basis that (1) the Supreme Court purportedly overturned the Seventh Circuit's ruling, and (2) *Airlines* did not address hostile environment claims brought by the EEOC, but rather involved solely private litigants. The EEOC's claim that the Supreme Court overturned the Seventh Circuit's ruling pertaining to the application of the continuing violation doctrine is incorrect. In *Zipes,* the Supreme Court overturned only the Seventh Circuit's determination that the timely filing requirement was jurisdictional, and hence not subject to a waiver analysis. *See Zipes,* 455 U.S. at 392-99. The Supreme Court did not review the Seventh Circuit's reasoning pertaining to the continuing violation doctrine, and, as a result, it remains viable Seventh Circuit law. (The Court will address below the EEOC's argument relating to the fact that *Airlines* involved only private litigants.)

Custom also relies on several district court cases from this circuit (and other circuits) to support its argument that class membership is limited to only those employees who could have filed an EEOC charge during the filing period. *See, e.g., EEOC v. Harvey L. Wainer & Assoc.*, 1995 WL 470233 (N.D.Ill.1995) (hereinafter *"Walner I"), aff'd on other grounds, EEOC v. Harvey L. Walner,* 91 F.3d 963 (7th Cir.1996) (hereinafter *"Walner I"); Daniels v. Federal Reserve Bank of Chicago,* 194 F.R.D. 609 (N.D.Ill.2000). *Walner I* is perhaps Custom's strongest case because of the similarities to the present case. In *Walner I,* the EEOC filed a complaint alleging that "a class of female employees" had been subjected to a hostile environment based on sexual harassment by an employer law firm. *See Walner,* 1995 WL 470233 at * 1; *Walner,* 91 F.3d at 965. The EEOC also included allegations of a continuing violation. *See* Walner, 91 F.3d at 969-70. Defendants sought to exclude certain former employees from the class because they failed to file discrimination charges with the EEOC within the requisite 300 days, and were terminated well before the filing period. *See id.* at *1. The court agreed, holding that the while the EEOC has the authority to bring class claims arising out of an investigation of an individual EEOC

charge, it cannot "resurrect untimely claims" because such "a result would improperly expand the substantive rights of the individuals which the EEOC represents and would render the 300- day filing period effectively meaningless." *See id.* at *4. The court noted the "anomaly" that would result if the procedural device of class actions could expand substantive rights by reviving otherwise time-barred claims:

> Courts which have considered the question directly have uniformly held that only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class.

Id., quoting Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (C.A.D.C.1976). The *Walner I* court also noted that "the rule permitting a Title VII class action based on only a single EEOC filing to proceed is inapplicable to the claims of former employees" because the primary justification for such a rule--that the employer has sufficient notice from a single charge--does not apply in the case of long-deserted employees. *See id.*

*6 Finally, the *Walner I* court held that the continuing violation theory did not permit time-barred claims from former employees:

> The EEOC is attempting to bootstrap [the former employees'] state claims onto [plaintiff's] timely charge by alleging these individuals' claims are merely part of a continuous and ongoing course of discriminatory conduct which extends, through [plaintiff's] allegations, well into the applicable 300-day limitations period.

Id. at *6. The court's refusal to entertain the continuing violation doctrine was based on its conclusion that the EEOC's pattern and practice allegations were merely "a conglomeration" of "recognizable and independently actionable occurrences" and "not the type of continuing violation which would permit this Court to consider the stale claims of parties who elect not to file charges with the EEOC within the requisite 300-day period." *Id.; see also id.* at *8, n. 2. Thus, *Walner I* confusingly appears to leave the door open, albeit in *dicta*, for the argument that some types of continuing violations may resurrect stale claims. (The EEOC does not rely on this language, and, in any event, its persuasive value is extremely limited, given the discussion below.)

To limit *Walner I*, the EEOC argues that "the Seventh Circuit explicitly rejected" the district court's approach in *Walner I*. *See Walner*, 91. F.3d at 970. This is not accurate. The Seventh Circuit affirmed the district court's decision, but did so on the grounds that the EEOC lacked standing to bring the complaint because there was *no* viable charge to base its claims upon. *See id.* The EEOC focuses on the following *dicta* to support its contention:

> The district court examined the viability of the claims presented by these five women as potential bases for the EEOC's complaint. As we have noted above, this was not required under a continuing violation theory of discrimination under Title VII had the EEOC satisfied the administrative prerequisites with respect to [plaintiff's] charge.

Id. In essence, the EEOC argues that this statement shows that the Seventh Circuit held that as long one timely charge exists, the viability of other time-barred claims is irrelevant under a continuing violation theory. The EEOC has this *dicta* passage perform too much work. All that the Seventh Circuit "noted above" was the general rule that a single viable charge is all that is normally required to support a class complaint containing continuing violations allegations. It is true that the fact pattern in *Walner* included time-barred claims, but the Seventh Circuit was focused here on solely whether there was *any* basis to support the EEOC's standing. It did not engage in any substantive review of whether the continuing violation doctrine could revive the time-barred claims of other potential plaintiffs - nor could it, as the EEOC had abandoned its continuing violation argument on appeal. *See id.* at 969. As a result, stretching this *dicta* language into a holding that a class action containing a continuing violation theory can revive time-barred claims is untenable.

*7 Custom also relies on *Daniels*, where plaintiffs sought to bring a class action employment discrimination case that would include all affected employees since 1964. The defendant argued that

only those employees who could have filed a timely suit should be included in the class. *See Daniels*, 194 F.R.D. at 617. Plaintiffs, in turn, contended that the continuing violation doctrine applied, such that "all claims from 1964 to the present" were properly before the court. *See id.* Relying on *Movement* and *Walner I*, the court held that continuing violation doctrine permits only the inclusion of additional, but otherwise time-barred *claims*--not the inclusion of otherwise time-barred *parties*. *See id.* at 617-18.

The EEOC, in turn, points out that there are several district court cases within this circuit that hold that class membership can include employees employed outside the 300-day filing period. *See, e.g., EEOC v. Chicago Miniature Lamp Works*, 640 F.Supp. 1291 (N.D.Ill.1988) (hereinafter *"Lamp Works"*); *EEOC v. Mitsubishi Motor Manf. of America, Inc.*, 990 F.Supp. 1059 (C.D.Ill.1998) (hereinafter *Mitsubishi*); *EEOC v. Dial Corp.*, 156 F.Supp. 926 (N.D.Ill.2001). In *Lamp Works*, an employee and the EEOC raised class allegations of employment discrimination covering an eleven-year period. The defendant argued that only those employees who were discriminated against, during the filing period could become members of the class. *See id.* at 1293- 94. The EEOC argued in response that the defendant had engaged in a "continuing violation" and therefore every victim throughout the eleven-year period could be a class member. *See id.* The court noted that "[c]ourts applying the 'continuing violation' notion to the longstanding-discriminatory-practice situation may effectively treat the EEOC filing as relating back to the onset of that period, bringing earlier acts of discrimination within the limitations period." *Id.* at 1294. Relying on a Second Circuit decision, the court held that "[b]ecause [defendant] engaged in a continuing course of discrimination against black persons, even persons who suffered discrimination during the earlier part of that continuous period (and not just within the 300 days) can become class members entitled to relief." *Id.* at 1296.

The EEOC also points to *Mitsubishi* and *Dial* for support. These cases provide the EEOC with an alternate theory to include otherwise time-barred claims. Specifically, the EEOC argues that *Mitsubishi* and *Dial* establish that the 300-day filing period in Section 706 cases does not apply to Section 707 "pattern or practice" cases. In *Mitsubishi*, a Commissioner's charge initiated a Section 707 "pattern or practice" discrimination action. The defendant argued, among other things, that employees who left the company more than 300 days before the Commissioner filed his charge should be time-barred. *See Mitsubishi*, 990 F.Supp. at 1083. The court held that the 300-day limitations period did not apply to pattern or practice cases, and thus claims before the 300-day filing period were not time-barred. *See id.* at 1085. The *Mitsubishi* court placed great emphasis on the fact that the case before it was initiated by a Commissioner's charge, rather than an individual charge:

> ***8** By its nature, the Commissioner's charge alleging a pattern or practice of sexual harassment is not filed within 300 days of any particular incident of sexual harassment, because it is not based on an individual charge, but rather on the evidence gathered over a course of time showing a pattern of harassment against many individuals.... Without any single incident of discrimination, from which to start the 300-day clock running, a court cannot determine when a Commissioner's charge is timely filed."

Id. at 1085. Thus, according to the court, a Section 707 pattern or practice case is "not amenable to a timeliness determination." *Id.*

In *Dial*, the defendant claimed that the 300-day limitations period barred class members from obtaining individual relief for discrimination occurring before the period, despite the EEOC's allegations of a continuing violation. *See Dial*, 156 F.Supp.2d at 966. Relying exclusively on the *Mitsubishi* court's reasoning (even though the case before it was based on an individual charge and not a Commissioner's charge), the *Dial* court held that "in pattern-or-practice litigation, the 300-day requirement is arbitrary as to these individual claims since 'the purpose of the limitations period is to prevent the filing of stale claims.' " *See id.* at 968, *quoting Mitsubishi*, 990 F.Supp. at 1085. Under the *Dial* court's reasoning, because of the continuous nature of the discriminatory policy, "an employer

that maintains a continuing violation neither deserves nor obtains repose." *See id., quoting EEOC v. City of Chicago,* No. 85 C 7281, 1989 WL 134788 at * 9 (N.D.Ill.1989).

Custom devotes a significant portion of its opening brief attempting to show that *Mitsubishi,* and its progeny, *Dial,* are inapposite and, in any event, wrongly decided. Custom relies primarily on a Virginia district court case that disagreed with the analysis in *Mitsubishi. See EEOC v. Optical Cable Corp.,* 169 F.Supp.2d 539 (W.D.Va.2001). In *Optical Cable,* the EEOC brought a pattern or practice case under Section 707 against an employer. The employer argued that the EEOC complaint was untimely with respect to those individuals who did not suffer an adverse employment action within the governing 180-day filing period, even in the face of a continuing violation allegation. *See id.* at 544-45. The court first considered whether the 180-day period governing Section 706 claims applied to Section 707 pattern or practice claims. *See id.* at 546-47. Relying on the plain language of the statute, the court held that the same limitations period governs both Section 706 and Section 707 claims. *See id.* The court also suggested, without reaching a final decision, that a continuing violation could not revive stale claims and to hold otherwise would allow "the court-made continuing violation doctrine" to nullify the statutory period of limitations. *See id.* at 549.

This Court is persuaded by the reasoning in *Optical Cable.* The plain language of the Title VII statute dictates that Section 706's 300-day filing period applies to Section 707 actions: "[a]ll such [Section 707] actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [Section 706] of this title." 42 U.S.C. § 2000e-6(c); *see Optical Cable,* 169 F.Supp.2d at 547. *Mitsubishi* can be distinguished by, among other reasons, its dependency on a Commissioner's charge. *See Mitsubishi,* 990 F.Supp. at 1083. This predicate fact caused great concern to the *Mitsubishi* court that any consideration of timeliness would be arbitrary. *See id.* In contrast, Copello's individual charge here clearly establishes the parameters of the 300-day filing period. *Dial* is unpersuasive because it wholesale adopts *Mitsubishi's* reasoning without considering that the *Mitsubishi* court relied heavily on the presence of a Commissioner's charge--a fact that did not exist in *Dial,* which was based on an individual charge. *See Dial,* 156 F.Supp.2d at 966.

***9** Thus, the Court is presented with somewhat contradictory district court opinions. Neither party convincingly distinguishes these cases on sound analytic grounds. (And the Court fares no better.) For instance, the EEOC seeks to distinguish Custom's authority on the basis that none of Custom's cases addresses the situation "where a Court has Limited the class when there is a continuing violation, or a pattern or practice, of hostile environment sexual harassment." Defs. Surreply Br. at 6. (*Walner I* did, in fact, address such a situation, but the EEOC contends, incorrectly, that *Walner II* overruled the pertinent reasoning.) Setting aside the EEOC's erroneous view regarding *Walner I,* this distinction has little significance. The EEOC certainly provides no authority for the proposition that hostile environment sexual harassment allegations *per se* are afforded a unique application of the continuing violation doctrine, as opposed to other types of hostile environment or other discriminatory conduct. That is, the crucial issue here is the ability of the continuing violation doctrine to revive stale claims involving *any sort* of continuing discriminatory conduct.

Custom's attempt to distinguish the EEOC's case law is similarly unavailing. For instance, Custom argues that the EEOC's cases address only "discrete acts," which no longer constitute a continuing violation following the recent *Morgan* decision. This argument, however, misses the key analytic issue presented in these cases: whether the continuing violation doctrine itself can somehow revive stale claims of *any sort.* That *Morgan* limited the category of acts that can be subjected to a continuing violation analysis does not *ipso facto* undermine the reasoning contained in these opinions, as applied to non-discrete acts.

At the end of the road, the Court finds that

Custom's authority is stronger and more-consistent with the policy underlying Title VII's procedural requirements. Custom at least cites some controlling authority from the Seventh Circuit that supports its argument. *See Movement,* 622 F.2d 1235; *In re Airlines,* 582 F.2d 1142. The EEOC does not cite any controlling authority for its position. In addition, the district court cases cited by Custom are analytically more-sound and in greater harmony with the policies underlying Title VII, as shown below.

b. Policy considerations favor Custom's position

Custom's argument is also more-consistent with Title VII policy (as well as this Court's prior ruling). The relatively short filing period in Title VII is not by accident: Congress intended a short limitations period to encourage prompt processing and resolution of employment discrimination claims. *See Morgan,* 536 U.S. at 108, *citing Mohasco Corp. v. Silver,* 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). Lower courts "are compelled by the text of statute" and should not alter the timely filing requirements of Title VII. *Id.* When taken to its logical conclusion, the EEOC's argument would eviscerate *any* limitations period in Title VII cases, so long as the plaintiff alleges a continuing violation. Any employer accused of a continuing violation or pattern or practice hostile environment allegations faces exposure to unlimited claims from long-departed employees. This Court cannot nullify the statutory provisions of 42 U.S.C. § 2000e-5(c)(1) in this manner.

***10** The Court acknowledges that the very nature of hostile environment claims encompass acts that are sufficiently subtle to go undetected for long periods of time. *See Morgan,* 436 U.S. at 115-16. As the *Morgan* court noted:

> The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts.

Id. at 115. As a result, there may be employees who experience *some* of the effects of a hostile work environment, but yet have no legal recourse because the conduct has not reached sufficient "cumulative effect" to be actionable until after the employee departs. *Id.* Ultimately, however, this reflects nothing more than a variation on the inherent tension behind any statute of limitations:

> Statutes of limitations ... represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.... [T]hey protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), *quoting Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349, 64 S.Ct. 582, 88 L.Ed. 788 (1944) (internal citation omitted). Accordingly, the Court must uphold the limitations provisions outlined in Title VII.

The EEOC raises one final argument, essentially couched in policy terms, in which it argues that cases where "the EEOC is seeking enforcement of Title VII on behalf of the public good" are "different because the plaintiff is not merely a private litigant." Pls. Resp. Brief at 10. For instance, the EEOC points out that EEOC enforcement actions containing class allegations are not subject to Rule 23 of the Federal Rules of Civil Procedure. *See General Telephone Co. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980); *In re Bemis Co., Inc.,* 279 F.3d 419, 421 (7th Cir.2002). Relying primarily on *General Telephone,* the EEOC claims that its ability to vindicate public rights entitle it to avoid procedural limitations that may otherwise encumber private litigants. To a certain degree, this is true, but the EEOC does not provide any controlling authority permitting it to expand substantive rights, such as reviving stale claims. *See Walner I,* 1995 WL 470233 at *4; *cf. EEOC v. Newspapers, Inc.,* 1985 WL 5252 (E.D.Wis.1985). And the Court finds no

controlling authority for the proposition that the EEOC's laudable public mandate allows it to alter substantive individual rights. On the contrary, the EEOC's public enforcement actions have only a minimal focus on such individual rights:

> ***11** The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation.

In re Bemis Co., 279 F.3d at 421. Thus, barring the claims of those employees who were employed outside of the filing period here would do little to frustrate the primary public purpose of the EEOC's enforcement action because it would not impede the EEOC's ability to end Custom's purported hostile environment through injunctive remedies. *See EEOC v. North Gibson School Corp.,* 266 F.3d 607, 616 (7th Cir.2001) (contrasting the "high level of public interest served when the EEOC seeks an injunction with the minimal public interest served by an individual monetary award").

2. Forward time limits on the class

Custom also seeks to limit class membership in the forward-looking direction. According to Custom, the appropriate cut-off date here is the date the representative charge was filed. (Custom calculates this to be June 26, 2000.) Custom argues that the "piggyback" doctrine only allows the joinder of other claims if they arise out of similar discriminatory treatment in the same time frame. *See Hipp,* 252 F.3d at 1217. To hold otherwise would purportedly frustrate the requirements of notice to the employer (and the EEOC). *See id.* at 1225. The EEOC, in turn, argues that there is no Seventh Circuit authority supporting Custom's position. Indeed, the EEOC notes that Seventh Circuit authority shows that it is not limited to the allegations in the filed charge, but rather may bring an action based on any claims that arise in the course of a reasonable investigation. *See, e.g., EEOC v. Temple Steel Co.,* 723 F.Supp. 1250, 1252 (N.D.Ill.1989); *Walner II,* 91 F.3d at 968. By analogy, the EEOC argues that it may therefore include any additional claims of sex harassment from additional parties that it uncovers during its investigation. *See id.*

Ironically, the strongest support for the EEOC's position can be traced back to the principal opinion that Custom relies upon, *Hipp,* rather than the case law cited by the EEOC. In *Hipp,* the Eleventh Circuit limited the forward scope of an opt-in class to the date the representative charge was filed. *See Hipp,* 252 F.3d at 1225. The court noted that the primary purpose of the charge-filing requirement was to put the employer (and the EEOC) on notice of claims. *See id.* In holding that the representative charge at issue did not put the employer on notice of subsequent claims, the *Hipp* court specifically noted that the charge "did not explicitly allege that the violation was continuing." *See id.* at 1225, n. 20. Thus, *Hipp* can be distinguished on the basis that the governing charge did not encompass continuing violation allegations. *See id.* More significantly, the *Hipp* plaintiffs argued that the after-the-charge claims they sought to include in the class "related to or grew out of the allegations" in the governing charge--an argument very similar to the one offered by the EEOC here. *See id.* at 1225-26. The *Hipp* court acknowledged that there was authority supporting this position--and specifically cited Seventh Circuit case law for this proposition--but declined to follow such authority. *See id.* at 1226, *citing McDonald v. United Air Lines, Inc.,* 587 F.2d 357, 361 (7th Cir.1979); *Levine v. Bryant,* 700 F.Supp. 949, 957 (N.D.Ill.1988).

***12** Curiously, neither party cites to this Seventh Circuit authority, but it nonetheless guides the decision here. In *McDonald,* plaintiffs brought a class action challenging an airline's no-marriage rule for flight attendants. In determining the period of recovery for the class, the Seventh Circuit held that the temporal limits of the class extended beyond the date of the filed charges and up to the date that the no-marriage policy ended. *See McDonald,* 587 F.2d at 361. The court reasoned that the "ruling is not unfair to United, for it was put on notice by [earlier plaintiffs'] filings that aggrieved stewardesses were challenging its no-marriage rule policy." *See id.* Similarly, in *Levine,* the district court allowed a plaintiff to opt-in the class after the governing charge was filed because the initial plaintiff's "EEOC charge put [defendant] on notice that someone was challenging

its alleged age discrimination." *See Levine,* 700 F.Supp. at 957.

Custom cites no Seventh Circuit authority for its forward limit argument, and this Court sees no reason to contravene the authority provided in this circuit. Adopting *McDonald* and *Levine'* s reasoning is consistent with the policy underlying charge-filing requirements, which provide an employer and the EEOC with notice about claims and conciliation opportunities. *See Horton v. Jackson County Bd. of Com'rs,* 343 F.3d 897, 899 (7th Cir.2003). Especially in class actions, one charge typically suffices to alert the employer that other charges might follow. *See id.* Here, Custom cannot seriously argue that it lacks notice of potential subsequent claims arising from the EEOC's investigation. Nor can Custom argue that it is deprived of conciliation opportunities, given the two prior failed conciliation efforts. Moreover, the concerns about prejudice to the defendants that arise from stale claims, such as loss of evidence, memory, and witnesses, are not present here because of the relatively recent (and short) forward-looking time frame. Accordingly, the requirement that any additional claims go through the charge-filing procedure would not serve the purpose of this requirement and would merely lead to an increased burden for both the EEOC and the employer. *See id.*

B. Limits on the Class in the Retaliation Action

Custom also seeks rearward and forward limits on the class in the retaliation action. This requires little extended discussion as the *Morgan* decision effectively nullifies the EEOC's position here (and the above discussion limiting the continuing violation doctrine also applies to defeat the EEOC's argument). Specifically, *Morgan* forbids the application of the continuing violation doctrine to discrete acts of retaliation. *See Morgan,* 536 U.S. at 114-16. The EEOC "concedes that if the Court were to find its retaliation allegations constitute 'discrete acts' under *Morgan* there could be no continuing violation." EEOC Resp. Br. at 5, n.3. However, the EEOC contends that the Court cannot impose any limitations until after discovery. *See id.* Specifically, the EEOC "expects that discovery in the instant case will reveal a *policy* of retaliation constituting a continuing violation." *See id.* (emphasis in original).

***13** Assuming *arguendo* that such a "policy" could render otherwise discrete acts subject to a continuing violation analysis after *Morgan,* the retaliation complaint does not contain any allegations of a particular retaliatory policy. The EEOC had opportunity to investigate these claims prior to filing the complaint and did not include such allegations. Instead, the complaint unmistakably alleges solely discrete retaliatory practices such as alteration of job duties, reduction in compensation, discipline, and discharge. *See* Compl. ¶ 8. These are precisely the sort of discrete acts that fall squarely under *Morgan's* purview. *See Morgan,* 536 U.S. at 113. As a result, the EEOC cannot rely on the continuing violation doctrine to extend the limitations period in the retaliation action. (And, as indicated above, the continuing violation theory does not revive stale claims in any event.) Accordingly, the rearward limits proposed by Custom are appropriate here.

For the reasons noted above, however, the forward limit proposed by Custom is not applicable in the retaliation action.

III. *CONCLUSION*

For the foregoing reasons, Custom's Motions to limit the Class in Cases Nos. 02-C-3768 and 03-C-2293 are GRANTED with regard to rearward time limits but DENIED with regard to forward time limits.

IT IS SO ORDERED.

2004 WL 765891 (N.D.Ill.), 93 Fair Empl.Prac.Cas. (BNA) 1450

Motions, Pleadings and Filings (Back to top)

• 2004 WL 1685805 (Trial Motion, Memorandum and Affidavit) Defendants' Response to Plaintiff EEOC's Motion for Entry of a Protective Order and Motion to Compel Defendant Custom Companies to Produce a Witness Pursuant to 30(B)(6) Notice

(Jun. 24, 2004)

• 2004 WL 1608626 (Trial Motion, Memorandum and Affidavit) Defendant the Custom Companies, Inc.'s Memorandum of Law in Support of Its Motion for Partial Summary Judgment (May. 21, 2004)

• 2004 WL 1685894 (Trial Pleading) Defendant Custom Distribution Network, Inc.'s Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

• 2004 WL 1685895 (Trial Pleading) Defendant Custom Executive Group Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

• 2004 WL 1685896 (Trial Pleading) Defendant the Custom Companies, Inc. Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

• 2004 WL 1685892 (Trial Pleading) First Amended Complaint (Mar. 10, 2004)

• 2004 WL 1685803 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Surreply in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Feb. 18, 2004)

• 2004 WL 1608624 (Trial Motion, Memorandum and Affidavit) Custom's Corrected Reply Memorandum of Law in Support of Its Motion to Limit the Class in Case No. 03 C 2293 (Feb. 04, 2004)

• 2004 WL 1685801 (Trial Motion, Memorandum and Affidavit) Custom's Corrected Reply Memorandum of Law in Support of Its Rule 12(C) Motion for Partial Judgment on the Pleadings (Feb. 04, 2004)

• 2004 WL 1608622 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Motion to Limited the Class in Case No. 03 C 2293 (Feb. 03, 2004)

• 2004 WL 1608623 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Rule 12(c) Motion for Partial Judgment on the Pleadings (Feb. 03, 2004)

• 2004 WL 1685800 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Motion to Limit the Class in Case No. 02 C 3768 (Feb. 03, 2004)

• 2004 WL 1685798 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Response in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Jan. 20, 2004)

• 2004 WL 1685799 (Trial Motion, Memorandum and Affidavit) Plaintiff-Intervenor Allison Kennedy's Response in Opposition to Defendants' Motion for Partial Judgment on the Pleadings (Jan. 20, 2004)

• 2004 WL 856445 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Response in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Jan. 20, 2004)

• 2003 WL 23415988 (Trial Motion, Memorandum and Affidavit) Notice of Motion (Dec. 02, 2003)

• 2003 WL 23683298 (Trial Motion, Memorandum and Affidavit) Defendants' Rule 12(C) Motion for Partial Judgment on the Pleadings (Dec. 02, 2003)

• 2003 WL 23683303 (Trial Motion, Memorandum and Affidavit) Defendants' Motion to Limit the Class in Case No. 02 C 3768 (Dec. 02, 2003)

• 2003 WL 23683291 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Law In Support of Their Motion to Bar Evidence of Treatment, Symptoms, or Conditions of Emotional Distress (Oct. 06, 2003)

• 2003 WL 23668046 (Trial Motion, Memorandum and Affidavit) Intervenor Kennedy's Response to Defendant's Objection to Plaintiff-Intervenor's Motion to Intervene (Oct. 02, 2003)

• 2003 WL 23668413 (Trial Pleading) Defendant the Custom Companies, Inc.'s Answer to Complaint of U.S. Equal Employment Opportunity Commission (Aug. 07, 2003)

• 2003 WL 23668407 (Trial Pleading) Complaint (Apr. 02, 2003)

• 1:03CV02293 (Docket)
(Apr. 02, 2003)

• 2003 WL 23683285 (Trial Motion, Memorandum and Affidavit) Plaintiffs-Intervenors' Response Regarding Protective Order (Jan. 13, 2003)

• 2002 WL 32600960 (Trial Motion, Memorandum and Affidavit) Custom Distribution Network, Inc. Response to EEOC's Motion for Protective Order (Dec. 17, 2002)

• 2002 WL 32600964 (Trial Motion, Memorandum and Affidavit) The Custom Companies, Inc. Response to EEOC's Motion for Protective Order (Dec. 17, 2002)

• 2002 WL 32602062 (Trial Pleading) Defendant Custom Distribution Network's Answer to Plaintiffs-Intervenors' Complaint (Sep. 19, 2002)

• 2002 WL 32602071 (Trial Pleading) Defendant the Custom Companies' Answer to Plaintiffs-Intervenors' Complaint (Sep. 19, 2002)

• 2002 WL 32602056 (Trial Pleading) Plaintiffs-Intervenors' Complaint (Aug. 20, 2002)

• 2002 WL 32602042 (Trial Pleading) Defendant Custom Distribution Network, Inc.'s Answer to Complaint of Equal Employment Opportunity Commission (Jul. 29, 2002)

• 2002 WL 32602050 (Trial Pleading) Defendant the Custom Companies' Answer to Complaint of Equal Employment Opportunity Commission (Jul. 29, 2002)

• 2002 WL 32602035 (Trial Pleading) Complaint (May. 28, 2002)

• 1:02CV03768 (Docket)
(May. 28, 2002)

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EXHIBIT C

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Page 1

2004 WL 765891 (N.D.Ill.), 93 Fair Empl.Prac.Cas. (BNA) 1450

(Cite as: 2004 WL 765891 (N.D.Ill.))

H

Motions, Pleadings and Filings

United States District Court,
N.D. Illinois, Eastern Division.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Catherine COPELLO and Allison Kennedy, Plaintiffs-Intervenors,
v.
CUSTOM COMPANIES, INC., and Custom Distributor Network, Inc. Defendants.
No. 02 C 3768, 03 C 2293.

April 7, 2004.

John C. Hendrickson, Deborah Lois Hamilton, Richard John Mrizek, U.S. Equal Employment Opportunity, Beth A. Miller, Pontikes & Garcia, Chicago, IL, Noelle Christine Brennan, Brennan & Monte, Ltd., Chicago, IL, for Plaintiff.

Martin K. Denis, Daniel R. Madock, Maureen Kay Feldman, Jessica E. Huebsch-Lynott, Barlow Kobata & Denis, Chicago, IL, for Intervenors.

Jason Robert Bent, Bennett L. Epstein, Diane E. Gianos, Eric M. Phillips, Foley & Lardner, Chicago, IL, Daniel P. Colling, Walter B. Connolly, Jr., Jeffrey S. Kopp, Foley & Lardner, Detroit, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, J.

***1** Before the Court are Defendants' Motions to Limit the Class in Case Nos. 02-C-3768 and 03-C-2293. (These cases were consolidated on July 7, 2003.) For the following reasons, the Motions are granted in part and denied in part.

I. *BACKGROUND*

A. The Sexual Harassment Class Action (Case No. 02-C-3768)

Custom Companies, Inc. ("Custom") employed Catherine Copello ("Copello") as a sale representative from 1994 until her discharge in November 1999. On January 14, 1999, Copello filed a timely charge of discrimination with the United States Equal Employment Opportunity Commission (the "EEOC"), alleging that throughout her employment she and other female employees at Custom were subjected to sexual discrimination, sexual harassment, and retaliation. In November 1999, Copello filed an amended charge of discrimination with the EEOC, alleging that Custom retaliated against her for filing the initial EEOC charge. In April 2000, Copello filed a second amended charge with the EEOC alleging retaliation and sexual discrimination.

The EEOC investigated Copello's charge of discrimination and issued a Determination letter on September 6, 2001, finding that the evidence gathered in the investigation established reasonable cause to believe that Custom had discriminated against a class of female employees "by subjecting them to a sexually hostile, offensive work environment, in violation of Title VII." The EEOC's conciliation efforts failed, and it thereafter filed a civil action against Custom under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The amended complaint contains class-wide allegations of both discriminatory treatment under 42 U.S.C. § 2000e-5 ("Section 706") and pattern and practice allegations under 42 U.S.C. § 2000e-6 ("Section 707"). The EEOC alleges that "[s]ince at least 1994," Custom "engaged in a pattern or practice of unlawful employment practices." Am.Compl.¶ 7. These purported practices include pressures to "entertain"

customers at "strip clubs," company outings attended by strippers, groping and sexual touching, pornographic materials on-display on work computers, and lewd sexual language. *See id.*

B. The Retaliation Class Action (Case No. 03-C-2293)

Corrine Miller ("Miller") began her employment at Custom in 1995. In early 1999, and again in mid-1999, she testified in support of a complainant in an internal sexual harassment investigation at Custom. On December 27, 1999, Custom discharged Miller. On June 26, 2000, Miller filed a charge of discrimination with the EEOC alleging that Custom had discriminated against her and terminated her in retaliation for her participation in the internal sexual harassment investigation. Following an investigation of Miller's charge, and failed conciliation efforts, the EEOC filed the present action against Custom on April 2, 2003. The EEOC alleges "retaliatory practices" on behalf of a class of female employees, claiming that since at least 1998, Custom has altered job duties, reduced compensation, disciplined, and discharged class members in retaliation for employees "opposing sex harassment." *See* Compl. ¶ 8.

C. The Court's October 27, 2003 Ruling

*2 On October 27, 2003, this Court denied Plaintiff-Intervenor Allison Kennedy's ("Kennedy") motion to intervene under Federal Rule of Civil Procedure 24(a)(1). *See Custom Companies, Inc. v. EEOC,* 2003 WL 22455510 (N.D.Ill.2003). Custom employed Kennedy as a sales representative between August 17 and October 20, 1998. She claimed that she faced a sexually hostile environment during these two months of employment. Custom terminated Kennedy in October or November 1998. This Court held that Kennedy could not intervene in the retaliation class action because her claims were time-barred. Specifically, the Court found that the retaliation class action was bound by the 300-day time frame preceding Miller's June 26, 2000 EEOC charge. Therefore, any claims preceding August 31, 1999, including Kennedy's claims, were time-barred. The Court also held that Kennedy could not avail herself to the "single-filing" doctrine to piggyback onto Miller's claim because this doctrine is available only to those parties who could have filed a claim with the EEOC based on the same unlawful conduct within the required statutory period. *See id.*

II. *DISCUSSION*

A. Limits on the Class in the Sexual Harassment Action

1. Rearward time limits on the class

In Illinois, a plaintiff alleging Title VII violations must file charges with the EEOC within three hundred days of the alleged discriminatory employment practice (the "filing period"). *See* 42 U.S.C. § 2000e-5(e)(1); *Koelsch v. Beltone Elecs. Corp.,* 46 F.3d 705, 707 (7th Cir.1995). One of the issues raised in these Motions is whether a hostile work environment claim that includes continuing violation allegations can include claims of employees who did not work at Custom during the filing period (*i.e.,* more than 300 days before Copello filed her EEOC charge or March 20, 1998). In other words, can the class of plaintiffs here include employees who were not exposed to any discriminatory acts during the filing period because Custom no longer employed them. (The Court recognizes that EEOC enforcement actions brought on behalf of a class of individuals are not "true" Federal Rule 23 class actions, *see General Telephone Co. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), but for purpose of clarity, it will use such terms as "class action" and "class membership.")

Custom argues that a continuing violation claim cannot revive otherwise state claims, and, accordingly, class membership must be limited to those individuals who were employed at some point during the filing period. Under Custom's view, employees who left Custom before March 20, 1998 "could not have been subjected to any allegedly hostile work environment during the 300-day limitations period, and therefore could not have timely filed an EEOC charge on January 14, 1999 [the date that Copello filed her charge]." Defs. Br. at 6. The EEOC, in turn, contends that under a continuing violation theory, Custom can be liable for acts that predate the 300-day filing period, and therefore class membership cannot be so limited. *See*

Pls. Resp. Br. at 4-8.

***3** As a preliminary matter, Custom relies heavily on this Court's October 27, 2003 ruling ("prior ruling") to support its argument. At issue in the prior ruling was whether a plaintiff-intervenor could rely on the "single filing" doctrine to revive her state claim. The Court held that it could not, based, in part, on the problems of notice to employers and "long-standing notions of finality and prompt resolution of claims." *Custom Companies, Inc.*, 2003 WL 22455510 at ***4**. At that point, however, the Court did not have the opportunity to consider the crucial issue here: whether the continuing violation doctrine could allow claims of class members that occurred entirely outside of the filing period. Accordingly, the prior ruling informs the present opinion, but does not control the outcome here.

a. The case law supports Custom's position

Turning now to the case law, the Court must begin with a discussion of the fairly-recent United States Supreme Court decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), which the EEOC contends is controlling authority here. The EEOC relies heavily on *Morgan* to support its proposition that a hostile work environment claim that contains continuing violation allegations allows a court to "look beyond the 300-day charge filing period and impose liability based on the claims of class members employed outside 300 days." Pls. Resp. Br. at 4. Custom argues vigorously that *Morgan* simply "clarified the continuing violation doctrine solely as it applies to an individual's hostile work environment claim" and "does not permit a plaintiff, simply by alleging a continuing violation, to resurrect the time-barred claims of former employees." Defs. Reply Br. at 6.

Custom has the better view of *Morgan*. In *Morgan*, the plaintiff filed an individual complaint, alleging racial discrimination, consistent harassment, and retaliation from his former employer. *See Morgan*, 536 U.S. at 105-06. Plaintiff did not raise class allegations, and the EEOC did join in the suit. *See id.* The issue in *Morgan* was whether the employer could be liable for acts that occurred more than 300 days before plaintiff filed the EEOC charge. In deciding which acts could be considered, the Supreme Court distinguished between discrete retaliatory acts, such as termination, failure to promote, or denial of transfer, and the continuous acts of harassment that constitute a hostile work environment. *See id.* at 114-16. Specifically, hostile environment claims, unlike discrete acts of discrimination, depend by nature "on the cumulative effect of individual acts" across time, and a single act of harassment often is not actionable on its own. *Id.* at 115. In other words, "a hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' " *Id.* at 116. Relying upon the unique nature of hostile environment claims, the *Morgan* Court held that an employer may be liable for acts occurring outside of the 300-day filing period, provided that (1) at least one act contributing to the claim occurs within the filing period and (2) the acts falling outside of the 300-day filing period are part of the same actionable hostile environment claim. *See id.* at 117, 120-21. Discrete acts outside the filing period, however, are not actionable under a continuing violation theory, although they may be used as evidence of a hostile environment claim. *See id.*

***4** Thus, *Morgan* stands solely for the proposition that under an individual hostile work environment theory, an employer may be liable for acts of harassment *against the same individual plaintiff* that occurred before the filing period, provided that such acts are part of the same continuing pattern of harassment. *Morgan* is silent on whether a class can include class members who did not experience any acts of harassment during the filing period. (Further, *Morgan* did not alter the "single filing" doctrine, which, under this Court's reasoning in the October 27, 2003 ruling, would bar the inclusion of class members whose employment ended outside of the filing period.)

Having dispensed with the sole Supreme Court authority cited by the parties, the Court now addresses the parties' Seventh Circuit authority. Unfortunately, as shown below, there is competing

Seventh Circuit authority on this issue, which provides ammunition for both parties. Custom initially points to *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1248, 1256 (7th Cir.1980) (hereinafter *"Movement"*), which this Court relied upon in its prior ruling. In *Movement,* the Seventh Circuit held that the determination of class action claims depended on "which individual charges apply to which class claims in order to determine the earliest charge filed relative to each class." *See id.* at 1248. The *Movement* court noted that "it is not necessary that each class member have filed a charge with the EEOC for support; however, only those who could have filed a charge at or after the time a charge was filed by the class representative can be included in the charge." *See id* (citations omitted). Thus, *Movement* provides controlling authority for the proposition that class membership must be tethered to the earliest underlying EEOC charge. Here, the only charge in the sexual harassment class action is Copello's January 14, 1999 charge, and therefore, under *Movement,* class membership should be limited to only those employees who could have filed a charge in the preceding 300 days. (As discussed below, the EEOC seeks to distinguish *Movement* on the basis that the lawsuit there sought to vindicate solely private, rather than public, rights.)

Custom also relies on *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir.1978) (hereinafter *"Airlines"); rev'd in part on other grounds, sub nom by Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In *Airlines,* a female flight cabin attendant brought a class action alleging Title VII sex discrimination because of an airline policy to ground all pregnant female employees. Siding with a defendant airline, the Seventh Circuit declined to extend the continuing violation theory and excluded from the class all employees who were terminated more than 90 days prior to the date that the EEOC charge was filed (90 days was the governing filing period at the time of this case). *See id.* at 1147. The court noted: "it is the continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases." *Id.* at 1149.

***5** EEOC seeks to distinguish *Airlines* on the basis that (1) the Supreme Court purportedly overturned the Seventh Circuit's ruling, and (2) *Airlines* did not address hostile environment claims brought by the EEOC, but rather involved solely private litigants. The EEOC's claim that the Supreme Court overturned the Seventh Circuit's ruling pertaining to the application of the continuing violation doctrine is incorrect. In *Zipes,* the Supreme Court overturned only the Seventh Circuit's determination that the timely filing requirement was jurisdictional, and hence not subject to a waiver analysis. *See Zipes,* 455 U.S. at 392-99. The Supreme Court did not review the Seventh Circuit's reasoning pertaining to the continuing violation doctrine, and, as a result, it remains viable Seventh Circuit law. (The Court will address below the EEOC's argument relating to the fact that *Airlines* involved only private litigants.)

Custom also relies on several district court cases from this circuit (and other circuits) to support its argument that class membership is limited to only those employees who could have filed an EEOC charge during the filing period. *See, e.g., EEOC v. Harvey L. Wainer & Assoc.*, 1995 WL 470233 (N.D.Ill.1995) (hereinafter *"Walner I"), aff'd on other grounds, EEOC v. Harvey L. Walner,* 91 F.3d 963 (7th Cir.1996) (hereinafter *"Walner I"); Daniels v. Federal Reserve Bank of Chicago,* 194 F.R.D. 609 (N.D.Ill.2000). *Walner I* is perhaps Custom's strongest case because of the similarities to the present case. In *Walner I,* the EEOC filed a complaint alleging that "a class of female employees" had been subjected to a hostile environment based on sexual harassment by an employer law firm. *See Walner,* 1995 WL 470233 at * 1; *Walner,* 91 F.3d at 965. The EEOC also included allegations of a continuing violation. *See* Walner, 91 F.3d at 969-70. Defendants sought to exclude certain former employees from the class because they failed to file discrimination charges with the EEOC within the requisite 300 days, and were terminated well before the filing period. *See id.* at *1. The court agreed, holding that the while the EEOC has the authority to bring class claims arising out of an investigation of an individual EEOC

charge, it cannot "resurrect untimely claims" because such "a result would improperly expand the substantive rights of the individuals which the EEOC represents and would render the 300- day filing period effectively meaningless." *See id.* at *4. The court noted the "anomaly" that would result if the procedural device of class actions could expand substantive rights by reviving otherwise time-barred claims:

> Courts which have considered the question directly have uniformly held that only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class.

Id., quoting Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (C.A.D.C.1976). The *Walner I* court also noted that "the rule permitting a Title VII class action based on only a single EEOC filing to proceed is inapplicable to the claims of former employees" because the primary justification for such a rule--that the employer has sufficient notice from a single charge--does not apply in the case of long-deserted employees. *See id.*

***6** Finally, the *Walner I* court held that the continuing violation theory did not permit time-barred claims from former employees:

> The EEOC is attempting to bootstrap [the former employees'] state claims onto [plaintiff's] timely charge by alleging these individuals' claims are merely part of a continuous and ongoing course of discriminatory conduct which extends, through [plaintiff's] allegations, well into the applicable 300-day limitations period.

Id. at *6. The court's refusal to entertain the continuing violation doctrine was based on its conclusion that the EEOC's pattern and practice allegations were merely "a conglomeration" of "recognizable and independently actionable occurrences" and "not the type of continuing violation which would permit this Court to consider the stale claims of parties who elect not to file charges with the EEOC within the requisite 300-day period." *Id.; see also id.* at *8, n. 2. Thus, *Walner I* confusingly appears to leave the door open, albeit in *dicta*, for the argument that some types of continuing violations may resurrect stale claims. (The EEOC does not rely on this language, and, in any event, its persuasive value is extremely limited, given the discussion below.)

To limit *Walner I*, the EEOC argues that "the Seventh Circuit explicitly rejected" the district court's approach in *Walner I*. *See Walner*, 91. F.3d at 970. This is not accurate. The Seventh Circuit affirmed the district court's decision, but did so on the grounds that the EEOC lacked standing to bring the complaint because there was *no* viable charge to base its claims upon. *See id.* The EEOC focuses on the following *dicta* to support its contention:

> The district court examined the viability of the claims presented by these five women as potential bases for the EEOC's complaint. As we have noted above, this was not required under a continuing violation theory of discrimination under Title VII had the EEOC satisfied the administrative prerequisites with respect to [plaintiff's] charge.

Id. In essence, the EEOC argues that this statement shows that the Seventh Circuit held that as long one timely charge exists, the viability of other time-barred claims is irrelevant under a continuing violation theory. The EEOC has this *dicta* passage perform too much work. All that the Seventh Circuit "noted above" was the general rule that a single viable charge is all that is normally required to support a class complaint containing continuing violations allegations. It is true that the fact pattern in *Walner* included time-barred claims, but the Seventh Circuit was focused here on solely whether there was *any* basis to support the EEOC's standing. It did not engage in any substantive review of whether the continuing violation doctrine could revive the time-barred claims of other potential plaintiffs - nor could it, as the EEOC had abandoned its continuing violation argument on appeal. *See id.* at 969. As a result, stretching this *dicta* language into a holding that a class action containing a continuing violation theory can revive time-barred claims is untenable.

***7** Custom also relies on *Daniels*, where plaintiffs sought to bring a class action employment discrimination case that would include all affected employees since 1964. The defendant argued that

only those employees who could have filed a timely suit should be included in the class. *See Daniels,* 194 F.R.D. at 617. Plaintiffs, in turn, contended that the continuing violation doctrine applied, such that "all claims from 1964 to the present" were properly before the court. *See id.* Relying on *Movement* and *Walner I,* the court held that continuing violation doctrine permits only the inclusion of additional, but otherwise time-barred *claims*--not the inclusion of otherwise time-barred *parties. See id.* at 617-18.

The EEOC, in turn, points out that there are several district court cases within this circuit that hold that class membership can include employees employed outside the 300-day filing period. *See, e.g., EEOC v. Chicago Miniature Lamp Works,* 640 F.Supp. 1291 (N.D.Ill.1988) (hereinafter *"Lamp Works"*); *EEOC v. Mitsubishi Motor Manf. of America, Inc.,* 990 F.Supp. 1059 (C.D.Ill.1998) (hereinafter *Mitsubishi*); *EEOC v. Dial Corp.,* 156 F.Supp. 926 (N.D.Ill.2001). In *Lamp Works,* an employee and the EEOC raised class allegations of employment discrimination covering an eleven-year period. The defendant argued that only those employees who were discriminated against, during the filing period could become members of the class. *See id.* at 1293- 94. The EEOC argued in response that the defendant had engaged in a "continuing violation" and therefore every victim throughout the eleven-year period could be a class member. *See id.* The court noted that "[c]ourts applying the 'continuing violation' notion to the longstanding-discriminatory-practice situation may effectively treat the EEOC filing as relating back to the onset of that period, bringing earlier acts of discrimination within the limitations period." *Id.* at 1294. Relying on a Second Circuit decision, the court held that "[b]ecause [defendant] engaged in a continuing course of discrimination against black persons, even persons who suffered discrimination during the earlier part of that continuous period (and not just within the 300 days) can become class members entitled to relief." *Id.* at 1296.

The EEOC also points to *Mitsubishi* and *Dial* for support. These cases provide the EEOC with an alternate theory to include otherwise time-barred claims. Specifically, the EEOC argues that *Mitsubishi* and *Dial* establish that the 300-day filing period in Section 706 cases does not apply to Section 707 "pattern or practice" cases. In *Mitsubishi,* a Commissioner's charge initiated a Section 707 "pattern or practice" discrimination action. The defendant argued, among other things, that employees who left the company more than 300 days before the Commissioner filed his charge should be time-barred. *See Mitsubishi,* 990 F.Supp. at 1083. The court held that the 300-day limitations period did not apply to pattern or practice cases, and thus claims before the 300-day filing period were not time-barred. *See id.* at 1085. The *Mitsubishi* court placed great emphasis on the fact that the case before it was initiated by a Commissioner's charge, rather than an individual charge:

> ***8** By its nature, the Commissioner's charge alleging a pattern or practice of sexual harassment is not filed within 300 days of any particular incident of sexual harassment, because it is not based on an individual charge, but rather on the evidence gathered over a course of time showing a pattern of harassment against many individuals.... Without any single incident of discrimination, from which to start the 300-day clock running, a court cannot determine when a Commissioner's charge is timely filed."

Id. at 1085. Thus, according to the court, a Section 707 pattern or practice case is "not amenable to a timeliness determination." *Id.*

In *Dial,* the defendant claimed that the 300-day limitations period barred class members from obtaining individual relief for discrimination occurring before the period, despite the EEOC's allegations of a continuing violation. *See Dial,* 156 F.Supp.2d at 966. Relying exclusively on the *Mitsubishi* court's reasoning (even though the case before it was based on an individual charge and not a Commissioner's charge), the *Dial* court held that "in pattern-or-practice litigation, the 300-day requirement is arbitrary as to these individual claims since 'the purpose of the limitations period is to prevent the filing of stale claims.' " *See id.* at 968, *quoting Mitsubishi,* 990 F.Supp. at 1085. Under the *Dial* court's reasoning, because of the continuous nature of the discriminatory policy, "an employer

that maintains a continuing violation neither deserves nor obtains repose." *See id., quoting EEOC v. City of Chicago,* No. 85 C 7281, 1989 WL 134788 at * 9 (N.D.Ill.1989).

Custom devotes a significant portion of its opening brief attempting to show that *Mitsubishi,* and its progeny, *Dial,* are inapposite and, in any event, wrongly decided. Custom relies primarily on a Virginia district court case that disagreed with the analysis in *Mitsubishi. See EEOC v. Optical Cable Corp.,* 169 F.Supp.2d 539 (W.D.Va.2001). In *Optical Cable,* the EEOC brought a pattern or practice case under Section 707 against an employer. The employer argued that the EEOC complaint was untimely with respect to those individuals who did not suffer an adverse employment action within the governing 180-day filing period, even in the face of a continuing violation allegation. *See id.* at 544-45. The court first considered whether the 180-day period governing Section 706 claims applied to Section 707 pattern or practice claims. *See id.* at 546-47. Relying on the plain language of the statute, the court held that the same limitations period governs both Section 706 and Section 707 claims. *See id.* The court also suggested, without reaching a final decision, that a continuing violation could not revive stale claims and to hold otherwise would allow "the court-made continuing violation doctrine" to nullify the statutory period of limitations. *See id.* at 549.

This Court is persuaded by the reasoning in *Optical Cable.* The plain language of the Title VII statute dictates that Section 706's 300-day filing period applies to Section 707 actions: "[a]ll such [Section 707] actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [Section 706] of this title." 42 U.S.C. § 2000e-6(e); *see Optical Cable,* 169 F.Supp.2d at 547. *Mitsubishi* can be distinguished by, among other reasons, its dependency on a Commissioner's charge. *See Mitsubishi,* 990 F.Supp. at 1083. This predicate fact caused great concern to the *Mitsubishi* court that any consideration of timeliness would be arbitrary. *See id.* In contrast, Copello's individual charge here clearly establishes the parameters of the 300-day filing period. *Dial* is unpersuasive because it wholesale adopts *Mitsubishi's* reasoning without considering that the *Mitsubishi* court relied heavily on the presence of a Commissioner's charge--a fact that did not exist in *Dial,* which was based on an individual charge. *See Dial,* 156 F.Supp.2d at 966.

***9** Thus, the Court is presented with somewhat contradictory district court opinions. Neither party convincingly distinguishes these cases on sound analytic grounds. (And the Court fares no better.) For instance, the EEOC seeks to distinguish Custom's authority on the basis that none of Custom's cases addresses the situation "where a Court has Limited the class when there is a continuing violation, or a pattern or practice, of hostile environment sexual harassment." Defs. Surreply Br. at 6. (*Walner I* did, in fact, address such a situation, but the EEOC contends, incorrectly, that *Walner II* overruled the pertinent reasoning.) Setting aside the EEOC's erroneous view regarding *Walner I,* this distinction has little significance. The EEOC certainly provides no authority for the proposition that hostile environment sexual harassment allegations *per se* are afforded a unique application of the continuing violation doctrine, as opposed to other types of hostile environment or other discriminatory conduct. That is, the crucial issue here is the ability of the continuing violation doctrine to revive stale claims involving *any sort* of continuing discriminatory conduct.

Custom's attempt to distinguish the EEOC's case law is similarly unavailing. For instance, Custom argues that the EEOC's cases address only "discrete acts," which no longer constitute a continuing violation following the recent *Morgan* decision. This argument, however, misses the key analytic issue presented in these cases: whether the continuing violation doctrine itself can somehow revive stale claims of *any sort.* That *Morgan* limited the category of acts that can be subjected to a continuing violation analysis does not *ipso facto* undermine the reasoning contained in these opinions, as applied to non-discrete acts.

At the end of the road, the Court finds that

Custom's authority is stronger and more-consistent with the policy underlying Title VII's procedural requirements. Custom at least cites some controlling authority from the Seventh Circuit that supports its argument. *See Movement,* 622 F.2d 1235; *In re Airlines,* 582 F.2d 1142. The EEOC does not cite any controlling authority for its position. In addition, the district court cases cited by Custom are analytically more-sound and in greater harmony with the policies underlying Title VII, as shown below.

b. Policy considerations favor Custom's position

Custom's argument is also more-consistent with Title VII policy (as well as this Court's prior ruling). The relatively short filing period in Title VII is not by accident: Congress intended a short limitations period to encourage prompt processing and resolution of employment discrimination claims. *See Morgan,* 536 U.S. at 108, *citing Mohasco Corp. v. Silver,* 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). Lower courts "are compelled by the text of statute" and should not alter the timely filing requirements of Title VII. *Id.* When taken to its logical conclusion, the EEOC's argument would eviscerate *any* limitations period in Title VII cases, so long as the plaintiff alleges a continuing violation. Any employer accused of a continuing violation or pattern or practice hostile environment allegations faces exposure to unlimited claims from long-departed employees. This Court cannot nullify the statutory provisions of 42 U.S.C. § 2000e-5(e)(1) in this manner.

***10** The Court acknowledges that the very nature of hostile environment claims encompass acts that are sufficiently subtle to go undetected for long periods of time. *See Morgan,* 436 U.S. at 115-16. As the *Morgan* court noted:

> The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts.

Id. at 115. As a result, there may be employees who experience *some* of the effects of a hostile work environment, but yet have no legal recourse because the conduct has not reached sufficient "cumulative effect" to be actionable until after the employee departs. *Id.* Ultimately, however, this reflects nothing more than a variation on the inherent tension behind any statute of limitations:

> Statutes of limitations ... represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.... [T]hey protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), *quoting Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349, 64 S.Ct. 582, 88 L.Ed. 788 (1944) (internal citation omitted). Accordingly, the Court must uphold the limitations provisions outlined in Title VII.

The EEOC raises one final argument, essentially couched in policy terms, in which it argues that cases where "the EEOC is seeking enforcement of Title VII on behalf of the public good" are "different because the plaintiff is not merely a private litigant." Pls. Resp. Brief at 10. For instance, the EEOC points out that EEOC enforcement actions containing class allegations are not subject to Rule 23 of the Federal Rules of Civil Procedure. *See General Telephone Co. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980); *In re Bemis Co., Inc.,* 279 F.3d 419, 421 (7th Cir.2002). Relying primarily on *General Telephone,* the EEOC claims that its ability to vindicate public rights entitle it to avoid procedural limitations that may otherwise encumber private litigants. To a certain degree, this is true, but the EEOC does not provide any controlling authority permitting it to expand substantive rights, such as reviving stale claims. *See Walner I,* 1995 WL 470233 at *4; *cf. EEOC v. Newspapers, Inc.,* 1985 WL 5252 (E.D.Wis.1985). And the Court finds no

controlling authority for the proposition that the EEOC's laudable public mandate allows it to alter substantive individual rights. On the contrary, the EEOC's public enforcement actions have only a minimal focus on such individual rights:

> *11 The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation.

In re Bemis Co., 279 F.3d at 421. Thus, barring the claims of those employees who were employed outside of the filing period here would do little to frustrate the primary public purpose of the EEOC's enforcement action because it would not impede the EEOC's ability to end Custom's purported hostile environment through injunctive remedies. *See EEOC v. North Gibson School Corp.*, 266 F.3d 607, 616 (7th Cir.2001) (contrasting the "high level of public interest served when the EEOC seeks an injunction with the minimal public interest served by an individual monetary award").

2. Forward time limits on the class

Custom also seeks to limit class membership in the forward-looking direction. According to Custom, the appropriate cut-off date here is the date the representative charge was filed. (Custom calculates this to be June 26, 2000.) Custom argues that the "piggyback" doctrine only allows the joinder of other claims if they arise out of similar discriminatory treatment in the same time frame. *See Hipp,* 252 F.3d at 1217. To hold otherwise would purportedly frustrate the requirements of notice to the employer (and the EEOC). *See id.* at 1225. The EEOC, in turn, argues that there is no Seventh Circuit authority supporting Custom's position. Indeed, the EEOC notes that Seventh Circuit authority shows that it is not limited to the allegations in the filed charge, but rather may bring an action based on any claims that arise in the course of a reasonable investigation. *See, e.g., EEOC v. Temple Steel Co.*, 723 F.Supp. 1250, 1252 (N.D.Ill.1989); *Walner II,* 91 F.3d at 968. By analogy, the EEOC argues that it may therefore include any additional claims of sex harassment from additional parties that it uncovers during its investigation. *See id.*

Ironically, the strongest support for the EEOC's position can be traced back to the principal opinion that Custom relies upon, *Hipp,* rather than the case law cited by the EEOC. In *Hipp,* the Eleventh Circuit limited the forward scope of an opt-in class to the date the representative charge was filed. *See Hipp,* 252 F.3d at 1225. The court noted that the primary purpose of the charge-filing requirement was to put the employer (and the EEOC) on notice of claims. *See id.* In holding that the representative charge at issue did not put the employer on notice of subsequent claims, the *Hipp* court specifically noted that the charge "did not explicitly allege that the violation was continuing." *See id.* at 1225, n. 20. Thus, *Hipp* can be distinguished on the basis that the governing charge did not encompass continuing violation allegations. *See id.* More significantly, the *Hipp* plaintiffs argued that the after-the-charge claims they sought to include in the class "related to or grew out of the allegations" in the governing charge--an argument very similar to the one offered by the EEOC here. *See id.* at 1225-26. The *Hipp* court acknowledged that there was authority supporting this position--and specifically cited Seventh Circuit case law for this proposition--but declined to follow such authority. *See id.* at 1226, *citing McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir.1979); *Levine v. Bryant,* 700 F.Supp. 949, 957 (N.D.Ill.1988).

*12 Curiously, neither party cites to this Seventh Circuit authority, but it nonetheless guides the decision here. In *McDonald,* plaintiffs brought a class action challenging an airline's no-marriage rule for flight attendants. In determining the period of recovery for the class, the Seventh Circuit held that the temporal limits of the class extended beyond the date of the filed charges and up to the date that the no-marriage policy ended. *See McDonald,* 587 F.2d at 361. The court reasoned that the "ruling is not unfair to United, for it was put on notice by [earlier plaintiffs'] filings that aggrieved stewardesses were challenging its no-marriage rule policy." *See id.* Similarly, in *Levine,* the district court allowed a plaintiff to opt-in the class after the governing charge was filed because the initial plaintiff's "EEOC charge put [defendant] on notice that someone was challenging

its alleged age discrimination." *See Levine,* 700 F.Supp. at 957.

Custom cites no Seventh Circuit authority for its forward limit argument, and this Court sees no reason to contravene the authority provided in this circuit. Adopting *McDonald* and *Levine'* s reasoning is consistent with the policy underlying charge-filing requirements, which provide an employer and the EEOC with notice about claims and conciliation opportunities. *See Horton v. Jackson County Bd. of Com'rs,* 343 F.3d 897, 899 (7th Cir.2003). Especially in class actions, one charge typically suffices to alert the employer that other charges might follow. *See id.* Here, Custom cannot seriously argue that it lacks notice of potential subsequent claims arising from the EEOC's investigation. Nor can Custom argue that it is deprived of conciliation opportunities, given the two prior failed conciliation efforts. Moreover, the concerns about prejudice to the defendants that arise from stale claims, such as loss of evidence, memory, and witnesses, are not present here because of the relatively recent (and short) forward-looking time frame. Accordingly, the requirement that any additional claims go through the charge-filing procedure would not serve the purpose of this requirement and would merely lead to an increased burden for both the EEOC and the employer. *See id.*

B. Limits on the Class in the Retaliation Action

Custom also seeks rearward and forward limits on the class in the retaliation action. This requires little extended discussion as the *Morgan* decision effectively nullifies the EEOC's position here (and the above discussion limiting the continuing violation doctrine also applies to defeat the EEOC's argument). Specifically, *Morgan* forbids the application of the continuing violation doctrine to discrete acts of retaliation. *See Morgan,* 536 U.S. at 114-16. The EEOC "concedes that if the Court were to find its retaliation allegations constitute 'discrete acts' under *Morgan* there could be no continuing violation." EEOC Resp. Br. at 5, n.3. However, the EEOC contends that the Court cannot impose any limitations until after discovery. *See id.* Specifically, the EEOC "expects that discovery in the instant case will reveal a *policy* of retaliation constituting a continuing violation." *See id.* (emphasis in original).

***13** Assuming *arguendo* that such a "policy" could render otherwise discrete acts subject to a continuing violation analysis after *Morgan,* the retaliation complaint does not contain any allegations of a particular retaliatory policy. The EEOC had opportunity to investigate these claims prior to filing the complaint and did not include such allegations. Instead, the complaint unmistakably alleges solely discrete retaliatory practices such as alteration of job duties, reduction in compensation, discipline, and discharge. *See* Compl. ¶ 8. These are precisely the sort of discrete acts that fall squarely under *Morgan's* purview. *See Morgan,* 536 U.S. at 113. As a result, the EEOC cannot rely on the continuing violation doctrine to extend the limitations period in the retaliation action. (And, as indicated above, the continuing violation theory does not revive stale claims in any event.) Accordingly, the rearward limits proposed by Custom are appropriate here.

For the reasons noted above, however, the forward limit proposed by Custom is not applicable in the retaliation action.

III. *CONCLUSION*

For the foregoing reasons, Custom's Motions to limit the Class in Cases Nos. 02-C-3768 and 03-C-2293 are GRANTED with regard to rearward time limits but DENIED with regard to forward time limits.

IT IS SO ORDERED.

2004 WL 765891 (N.D.Ill.), 93 Fair Empl.Prac.Cas. (BNA) 1450

Motions, Pleadings and Filings (Back to top)

• 2004 WL 1685805 (Trial Motion, Memorandum and Affidavit) Defendants' Response to Plaintiff EEOC's Motion for Entry of a Protective Order and Motion to Compel Defendant Custom Companies to Produce a Witness Pursuant to 30(B)(6) Notice

(Jun. 24, 2004)

- 2004 WL 1608626 (Trial Motion, Memorandum and Affidavit) Defendant the Custom Companies, Inc.'s Memorandum of Law in Support of Its Motion for Partial Summary Judgment (May. 21, 2004)

- 2004 WL 1685894 (Trial Pleading) Defendant Custom Distribution Network, Inc.'s Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

- 2004 WL 1685895 (Trial Pleading) Defendant Custom Executive Group Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

- 2004 WL 1685896 (Trial Pleading) Defendant the Custom Companies, Inc. Answer to First Amended Complaint of Equal Employment Opportunity Commission (Mar. 23, 2004)

- 2004 WL 1685892 (Trial Pleading) First Amended Complaint (Mar. 10, 2004)

- 2004 WL 1685803 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Surreply in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Feb. 18, 2004)

- 2004 WL 1608624 (Trial Motion, Memorandum and Affidavit) Custom's Corrected Reply Memorandum of Law in Support of Its Motion to Limit the Class in Case No. 03 C 2293 (Feb. 04, 2004)

- 2004 WL 1685801 (Trial Motion, Memorandum and Affidavit) Custom's Corrected Reply Memorandum of Law in Support of Its Rule 12(C) Motion for Partial Judgment on the Pleadings (Feb. 04, 2004)

- 2004 WL 1608622 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Motion to Limited the Class in Case No. 03 C 2293 (Feb. 03, 2004)

- 2004 WL 1608623 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Rule 12(c) Motion for Partial Judgment on the Pleadings (Feb. 03, 2004)

- 2004 WL 1685800 (Trial Motion, Memorandum and Affidavit) Custom's Reply Memorandum of Law in Support of Its Motion to Limit the Class in Case No. 02 C 3768 (Feb. 03, 2004)

- 2004 WL 1685798 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Response in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Jan. 20, 2004)

- 2004 WL 1685799 (Trial Motion, Memorandum and Affidavit) Plaintiff-Intervenor Allison Kennedy's Response in Opposition to Defendants' Motion for Partial Judgment on the Pleadings (Jan. 20, 2004)

- 2004 WL 856445 (Trial Motion, Memorandum and Affidavit) Plaintiff EEOC's Response in Opposition to Defendant Custom Companies' and Custom Distribution Network's Motions to Limit the Class in Case 02 C 3768 and 03 C 2293 (Jan. 20, 2004)

- 2003 WL 23415988 (Trial Motion, Memorandum and Affidavit) Notice of Motion (Dec. 02, 2003)

- 2003 WL 23683298 (Trial Motion, Memorandum and Affidavit) Defendants' Rule 12(C) Motion for Partial Judgment on the Pleadings (Dec. 02, 2003)

- 2003 WL 23683303 (Trial Motion, Memorandum and Affidavit) Defendants' Motion to Limit the Class in Case No. 02 C 3768 (Dec. 02, 2003)

- 2003 WL 23683291 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Law In Support of Their Motion to Bar Evidence of Treatment, Symptoms, or Conditions of Emotional Distress (Oct. 06, 2003)

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United States District Court, N.D. Illinois, Eastern Division.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
DIAL CORPORATION, Defendant.
No. 99 C 3356.

Dec. 27, 2001.

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR CERTIFICATION OF ISSUES FOR APPEAL

URBOM, Senior J.

***1** This case is now before me on the Defendant's Motion for Certification of Issues for Appeal, filing 209. In its complaint, filed on May 20, 1999, the plaintiff EEOC alleges that the defendant Dial has engaged in a pattern or practice of tolerating sexual harassment and "sex-based" harassment at its Aurora, Illinois, manufacturing plant since at least July of 1988. Filing 1 ¶ 7. On March 13, 2000, Dial filed a motion for summary judgment with respect to the pattern-or-practice and individual claims. *See* filing 70. In an order dated August 9, 2001, Dial's motion was granted in part and denied in part. *See* filing 204. Dial then filed the present motion, requesting that I certify for interlocutory appeal the following three issues raised in its summary judgment motion:

1. Whether the time limitations which apply to privately prosecuted class-based Title VII claims apply to an EEOC[-]prosecuted pattern and practice Title VII claim.
2. Whether considerations of judicial economy, efficiency, and manageability preclude a two-phase trial of a pattern and practice claim, which is based upon individual claimants' testimony of alleged sexual harassment.
3. Whether Dial was given sufficient notice of EEOC's pattern and practice claim at the administrative stage where the underlying charge contains no allegations of a class-wide Title VII violation and the bulk of the evidence relied upon by EEOC was revealed after it filed suit.

Filing 209 at 1-2 (sequence reversed). After reviewing the submissions of both parties, I find that only issue 1, as outlined above, satisfies the statutory requirements of 28 U.S.C. § 1292(b).

A. Standard of Review

Section 1292(b) of Title 28 governs discretionary appeals of interlocutory orders. Pursuant to this provision, a litigant may not file a petition for permission to appeal with the circuit court until the district court judge has certified that, in his or her opinion, the order at issue satisfies the following four statutory criteria: "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Board of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir.2000) (emphasis in original); *see* 28 U.S.C. § 1292(b). The Seventh Circuit has instructed district courts not to certify interlocutory orders under § 1292(b) "[u]nless *all* these criteria are satisfied...." *Ahrenholz*, 219 F.3d at 676 (emphasis in original). Because interlocutory appeals "tend to cause unnecessary delays in the lower court's proceedings and tend to waste overburdened judicial resources," " 'permission to take [such] an ... appeal should be granted sparingly and with discrimination." ' *Lakeside Feeders, Ltd. v. Chicago Meat Processors, Inc.*, 35 F.Supp.2d 638, 643 (N.D.Ill.1999) (citing *Herdrich v. Pegram*, 154 F.3d 362, 368 (7th Cir.1998)); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473- 74 (1978); quoting *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 738 (N.D.Ill.1977)); *see also Freeman v. Kohl & Vick Mach. Works, Inc.*, 673 F.2d 196, 201 (7th

Cir.1982) (noting that "federal law expresses strong policy against piecemeal appeals" (citation omitted)); *In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F.Supp. 1078, 1081 (N.D.Ill.1995) ("Certification is the exception and not the rule." (citation omitted)).

***2** Although § 1292(b) technically requires only that the district court issue a written order reciting that the statutory elements outlined above have been met, the Seventh Circuit has explained that "[i]t would be a great help to [them] if the district court, whenever it certifies a case for an immediate appeal ..., explained *why* it thinks the case satisfies the statutory criteria." *In re Hamilton*, 122 F.3d 13, 14 (7th Cir.1997) (emphasis in original) (citations omitted); *see Buckley v. Fitzsimmons*, 919 F .2d 1230, 1239 (7th Cir.1991), *vacated on other grounds*, 502 U.S. 801 (1991) ("[W]e expect the court to *explain* why, rather than assert that, immediate appeal will materially advance the disposition." (emphasis in original)). Finally, while § 1292(b) indicates that the district court should certify its order for immediate appeal in the order itself, the Seventh Circuit has authorized an alternative procedure by which certification may be made by a separate order. *See* 28 U.S.C. § 1292(b) ("When a district judge ... shall be of the opinion that such order involves a controlling question of law [etc.] ..., he shall so state in writing *in such order.*" (emphasis supplied)); *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir.1990) (explaining that "it is commonplace for the district judge to be asked to certify an order for an immediate appeal under section 1292(b) after-and not necessarily immediately after-he has issued the order"); *Hamilton*, 122 F.3d at 14 (noting that "[w]e have ... authorized this procedure" (citing *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 245-48 (7th Cir.1981); *Weir*, 915 F.2d at 286; *Marisol by Forbes v. Giuliani*, 104 F.3d 524, 527-29 (2d Cir.1996); *In re Benny*, 812 F.2d 1133, 1136-37 (9th Cir.1987)); *see also* Fed. R.App. P. 5(a)(3) ("If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement .").

B. Analysis

As noted above, Dial has identified three issues that it seeks to have certified. Each of these issues will be discussed below.

1. *Time Limitations of § 2000e-5(e)*

In its motion for summary judgment, Dial argued that the 300-day limitations period defined in 42 U.S.C. § 2000e-5(e) barred class members from obtaining individual relief for events that occurred before April 5, 1995. [FN1] Dial also sought to prevent the EEOC from relying on any evidence relating to pre-April 5, 1995, incidents in proving its pattern-or-practice claim. I essentially ruled against Dial as to both matters. *See* filing 204 at 23 (concluding that I would " 'let the evidence of a pattern or practice determine the relevant "limits" for the lawsuit." ' (citation omitted)); *id.* at 42-45 (concluding that "the timeliness of the class members' individual claims cannot be determined at this stage of the litigation ..."). Dial now argues that the issue of the 300-day limitations period satisfies the statutory criteria outlined above.

> FN1. This 300-day period is calculated from February 5, 1996, the day Beverly Allen filed her discrimination charge with the EEOC. *See* filing 204 at 1, 23.

***3** With respect to the first and second criteria, Dial asserts that the issue involves "a controlling question[ ] of law [that relates] to the overriding issue of the scope of EEOC's authority to 'act on a charge of a pattern or practice of discrimination' under Title VII Section 707." Filing 209 at 2 (citing 42 U.S.C. § 2000e-6(e)). I agree with Dial. The Seventh Circuit has recognized that " " 'controlling" means serious to the conduct of the litigation, either practically or legally." ' *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir.1991) (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974); citing *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir.1982)); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1998 WL 808992 at *4 (N.D.Ill. Nov. 17, 1998) (same). The Seventh Circuit has

also acknowledged that " 'a growing number of decisions have accepted the rule that a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.' " *Johnson,* 930 F.2d at 1206 (quoting 16 WRIGHT, MILLER, COOPER & GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3930 (1977)); *see also Ahrenholz,* 219 F.3d at 677 (suggesting that a "controlling issue" is one that may "head off protracted, costly litigation"). In this case, I am persuaded that the issue of the 300-day limitations period is "serious" in that if it is decided in favor of Dial, those individual claims based solely on pre-April 5, 1995, conduct must be dismissed as time-barred, and much of the evidence on which the EEOC relies in support of its pattern-or-practice claim may be excluded. [FN2] It therefore seems to me that a reversal would save time and expense for both the litigants and the court. It also seems to me that the issue of whether the 300-day limitations period applies in pattern-or-practice litigation clearly involves a "question of law." *See Ahrenholz,* 219 F.3d at 676-77 (explaining that a "pure" question of law is "something the court of appeals could decide quickly and cleanly without having to study the record ..."). Finally, I note that the EEOC does not raise any arguments regarding these first two criteria. Thus, for reasons outlined above, I find that the issue of the 300-day limitations period involves a "controlling question of law" as required by § 1292(b).

> FN2. In arguing that a reversal on this issue would not "materially advance the ultimate termination of the litigation," the EEOC contends that "[e]ven if certain victims of harassment were barred from recovering damages, evidence of their harassment would still be admissible" as background evidence with respect to the pattern-or-practice claim. 28 U.S.C. § 1292(b); filing 213 at 7 (citations omitted). For the reasons discussed below, I do not find the EEOC's argument persuasive.

With respect to whether the issue is "contestable," Dial directs my attention to § 2000e-6(e), which provides that pattern-or-practice actions "shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title." 42 U.S.C. § 2000e-6(e). Noting that § 2000e-5(e) includes the 300-day limitation, Dial contends that both my summary judgment ruling and the *Mitsubishi* decision are directly contrary to § 2000e-6(e). Thus, Dial concludes this provision establishes a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). I agree. As noted in the summary judgment ruling, some courts have concluded that the limitations period of § 2000e-5(e) does not apply to § 2000e-6(e) pattern-or-practice suits. *See* filing 204 at 43 n. 34; *see also United States v. Fresno Unified Sch. Dist.,* 592 F.2d 1088, 1096 & n. 5 (9th Cir.1979), *cert. denied,* 444 U.S. 832 (1979) ("Not all procedures listed in [§] 706 [§ 2000e-5], however, are necessarily relevant in pattern or practice litigation.... Some of the [§] 706 procedural requirements seem to apply only to unlawful employment practices and not to pattern or practice suits."). The Seventh Circuit, however, has apparently not yet had the opportunity to address this issue. Thus, in light of the express language of § 2000e-6(e), I am persuaded that the issue of the 300-day limitations period is contestable.

*4 As for the fourth criterion, Dial contends that if the Seventh Circuit were to reverse, "then Phase I and Phase II proceedings will ... be significantly smaller in scope." Filing 209 at 13-14. In response, the EEOC contends that a reversal by the Seventh Circuit would not in fact accelerate the ultimate termination of this litigation because (1) only the *form* of relief sought may be narrowed on appeal, and (2) even if certain individual claims for relief were time-barred, evidence relating to such claims would still be admissible in the pattern-or-practice phase as background evidence. *See In re Brand Name Prescription Drugs,* 878 F.Supp. at 1083 (noting that "[o]nly the form of the relief sought would be altered" in concluding that a reversal would not materially advance the litigation); *United Airlines, Inc., v. Evans,* 431 U.S. 553, 558 (1977) (providing that time-barred events may be "relevant background evidence in a proceeding in which the status of a current practice is at issue"); *Hennessy v.*

Penril Datacomm Networks, 69 F.3d 1344, 1349 (7th Cir.1995) (concluding that evidence relating to conduct that occurred prior to November 21, 1991, the effective date of the 1991 Civil Rights Act, was admissible to provide context and background for the plaintiff's post-Act claim). I disagree. First, I note that if Dial obtains a favorable ruling on appeal, more than just "the form of the relief sought" may be altered. While the EEOC is correct in noting that evidence relating to time-barred allegations *can be* relevant for background purposes with respect to the pattern-or-practice claim, I agree with Dial that such evidence may still be excluded under Federal Rule of Evidence (hereinafter Rule) 403 if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Fed.R.Evid. 403; *see also McCarty v. Pheasant Run, Inc.,* 826 F.2d 1554, 1559 (7th Cir.1987) (recognizing that "[a] trial judge has broad discretion in administering Rule 403 of the Federal Rules of Evidence...."). It seems to me that the more remote in time the alleged acts of harassment are from the actionable time period, the more likely it is that evidence relating to such acts will be excluded on Rule 403 grounds. Thus, should the circuit find for Dial on the issue of the 300-day limitations period, much of the evidence on which the EEOC relies to support its pattern-or-practice claim may be excluded, thereby reducing the length of Phase I. *See, e.g., Panache Broad. v. Richardson Elecs., Ltd.,* No. 90 C 6400, 1999 WL 1024560, at *5 (N.D.Ill. Oct. 29, 1999), *appeal denied,* 202 F.3d 957 (7th Cir.2000) [FN3] (determining that an appeal would materially advance the termination of litigation where a ruling in the defendant's favor "would make the trial in this case approximately one week rather than four months and would reduce this case from one involving hundreds of products to one involving only a few"). While the case may continue, it would therefore be significantly limited in scope. [FN4] *See, e.g., In re Brand Name Prescription Drugs,* 878 F.Supp. at 1083 (denying certification where, *inter alia,* "even if [the circuit] reversed, this *massive* case would continue" (emphasis supplied)); *In re Brand Name Prescription Drugs,* 1998 WL 808992, at *6-7 (explaining that " 'section 1292(b) ... does not require that an issue be outcome determinative in order for an interlocutory appeal to be proper," ' and concluding that an appeal would speed up the litigation where, *inter alia,* such an appeal would result " 'in a substantial savings of both judicial and party resources" ' (citations omitted)). [FN5] Finally, according to the chart attached to Dial's Memorandum of Law in Support of its Motion for Summary Judgment, over thirty of the remaining class members base their individual claims solely on pre-April 5, 1995, conduct. *See* filing 94 at 31-35. A reversal by the circuit court would also presumably eliminate these individual claims and substantially reduce the length of Phase II as well.

FN3. The Seventh Circuit denied the appeal on timeliness grounds. *See Richardson Elecs., Ltd. v. Panache Broad.,* 202 F.3d 957, 959 (7th Cir.2000) ("[I]t seems to us that when a class-certification order is an arguable candidate for a Rule 23(f) appeal, the appellants may not use section 1292(b) to circumvent the 10-day limitation in Rule 23(f).").

FN4. In addition, it seems to me that if the Seventh Circuit reverses my conclusions with respect to the limitations issue, the likelihood of settlement will substantially increase, thus "materially advanc[ing] the ultimate termination of [this] litigation...." 28 U.S.C. § 1292(b).

FN5. This decision suggests that the inquiries under the "controlling" criterion and the "materially advance" criterion are similar. *See In re Brand Name Prescription Drugs,* 1998 WL 808992, at 4-5, 6-7.

***5** In support of its claim that the issue of the 300-day limitations period will not speed up this litigation, the EEOC also notes that in the *Mitsubishi* case, the Seventh Circuit refused to accept an interlocutory appeal as to, *inter alia,* the question of whether "there is [an] applicable statue of limitations in a § 707 case to bar the individuals identified by the EEOC as potential victims of the

alleged pattern or practice of sexual harassment...." *EEOC v. Mitsubishi Motor Mfg. Inc.*, 990 F.Supp. 1059, 1093 (C.D.Ill.1998); *see* filing 213 at Ex. 1. In its summary denial, the circuit court stated as follows: "We are persuaded at this time that acceptance of this appeal would not serve to 'materially advance the ultimate termination of the litigation." ' Filing 213 at Ex. 1 (citing 28 U.S.C. § 1292(b)). The EEOC therefore concludes that to certify essentially the same issue that has already been rejected for interlocutory appeal by the Seventh Circuit would be a "waste of time." *See* filing 213 at 7. I disagree. For the reasons outlined above, I am persuaded that under the circumstances of this particular case, the four statutory criteria have been met with respect to this issue. [FN6] It is therefore my "duty ... to allow an immediate appeal to be taken ..." under § 1292(b). *Ahrenholz*, 219 F.3d at 677. Accordingly, I find that the determination of this issue relating to the 300-day limitations period does "involve[ ] ... a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [summary judgment] order may materially advance the ultimate termination of [this] litigation ..." 28 U.S.C. § 1292(b).

> FN6. The arguments made by *Mitsubishi* in its Petition for Permission to Appeal Under 28 U.S.C. § 1292(b) are not before me, and I therefore have no basis for concluding that the Seventh Circuit will reject those arguments now raised by Dial with respect to the "materially advance" criterion.

2. *Viability of Pattern-or-Practice Theory in Sexual Harassment Litigation* [FN7]

> FN7. If the Seventh Circuit accepts Dial's interlocutory appeal, it "may address any issue fairly included within the [summary judgment] order because 'it is the *order* that is appealable, and not the controlling question identified by the district court." ' *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE ¶ 110.25[1] (2d ed.1995) (additional citations omitted); *see also Edwardsville Nat'l Bank & Trust Co. v. Marion Lab., Inc.*, 808 F.2d 648, 650 (7th Cir.1987) ("[Section 1292(b)] refers to certifying an 'order' for interlocutory appeal. It is not a method of certifying questions. The question is the *reason* for the interlocutory appeal, but the thing under review is the order." (emphasis in original) (citations omitted)). Thus, it seems that in light of my conclusion regarding the question of the limitations period, I need not analyze the other issues raised by Dial in its motion. However, given the Seventh Circuit's preference for reasoned certifications, as opposed to certifications that merely "satisfy[ ] the procedural formalities of § 1292(b)," I shall address Dial's remaining two issues below. *In re Hamilton*, 122 F.3d at 14; *see supra* Part 1.

In its motion for summary judgment, Dial also argued that the pattern-or-practice theory of Title VII liability is not viable in sexual harassment cases. More specifically, Dial contended that considerations of judicial economy, efficiency, and manageability precluded a bifurcated, *Teamsters* -style trial in this particular case. I rejected the argument, and Dial now claims that this issue satisfies the criteria set forth in § 1292(b). I disagree.

It seems to me that the issue raised by Dial is neither contestable nor a "pure" question of law. *See Ahrenholz*, 219 F .3d at 675, 676-77. With respect to the former, Dial asserts in its brief that "[t]he pattern and practice device should be preserved for cases where (1) the plaintiff is challenging an employer's broad-based policy, and (2) resolution of one representative individual's claim establishes that the policy or practice adversely affected a class of employees." Filing 209 at 8. Dial, however, does not cite *any* authority to

support this assertion. *See id.* In addition, while recognizing that Federal Rule of Civil Procedure (hereinafter Rule) 23 does not govern the EEOC's pattern-or-practice claim, Dial nevertheless directs me to the decisions of three district courts that have denied Rule 23 class certification in cases involving hostile work environment allegations. *See id.;* filing 215 at 7 (citing *Cox v. Indian Head Indus., Inc.,* 187 F.R.D. 531 (W.D.N.C.1999); *Faulk v. Home Oil Co.,* 184 F.R.D. 645 (M.D.Ala.1999); *Zapata v. IBP, Inc.,* 167 F.R.D. 147 (D.Kan.1996)). Analogizing these cases to pattern-or-practice actions by the EEOC, Dial seems to argue that such cases demonstrate a "substantial ground for difference of opinion" as to whether a sexual harassment suit may proceed under a pattern-or-practice theory. 28 U.S.C. § 1292(b). Given the Supreme Court's indication that Rule 23 does not apply to a § 2000e-6(c) pattern-or-practice claim, combined with Title VII itself, which authorizes a pattern-or-practice action for sexual harassment, I do not find Dial's analogy particularly persuasive. *See General Tel. Co., Inc. v. EEOC,* 446 U.S. 318, 324 (1980) ("[T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit."); *id.* at 327 & n. 9 (indicating that § 707 suits need not comply with the requirements of Rule 23); *see also* 42 U.S.C. § 2000e-6(e) (authorizing a "pattern or practice of discrimination" claim); *id.* § 2000e-2(a)(1) (prohibiting discrimination on basis of sex); *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64-66 (1986) (recognizing that "sex discrimination" includes hostile-work-environment sexual harassment). Thus, Dial has failed to convince me that a "substantial ground for difference of opinion" exists with respect to its "judicial economy, efficiency, and manageability" argument. 28 U.S.C. § 1292(b); *see In re Brand Name Prescription Drugs,* 878 F.Supp. at 1081 ("Where a controlling court of appeals has not decided an issue, it must still be demonstrated that a 'substantial likelihood' exists that the district court ruling will be reversed on appeal." (citation omitted)).

***6** Nor has Dial convinced me that this argument relates to a "pure" question of law. The Seventh Circuit has explained that such a question involves "something the court of appeals could decide quickly and cleanly without having to study the record...." *Ahrenholz,* 219 F.3d at 677. Thus, interlocutory appeals should not be granted where the appellate court would be required to go "hunting through the record compiled in the summary judgment proceeding" in order to decide the issue. *See id.* It seems to me, however, that the considerations cited by Dial inherently require fact-specific inquiries into the extensive summary judgment record in this case. Furthermore, I agree with the EEOC that district courts, rather than appellate courts, are better suited to decide whether the interests of "judicial economy, efficiency, and manageability" preclude a *Teamster'* s-style bifurcation. [FN8] *See* filing 213 at 6 ("Moreover, the district court is ideally situated to determine how to manage its litigation and what would constitute 'thwarting' of judicial economy."); *see also, e.g., Krocka v. City of Chicago,* 203 F.3d 507, 516 (7th Cir.2000) (recognizing that district court judges "[have] considerable discretion to order the bifurcation of a trial"). Accordingly, for the reasons outlined above, I find that the determination of the issue relating to these interests does not satisfy the statutory criteria of § 1292(b).

> FN8. Despite Dial's assertions to the contrary, I did not conclude that "the principles of judicial economy and manageability underlying Rule 23 do not apply to this case." Filing 209 at 3; *see id.* at 7 ("[The Court] simply held that Rule 23-type arguments regarding judicial economy are not relevant because this is an EEOC pattern and practice case." (citing filing 204 at 19)). In fact, I expressly stated that "this action is not, by any means, unmanageable." Filing 204 at 21 (citation omitted).

3. Notice Requirements

First, Dial seeks to certify the issue of whether the EEOC can proceed with its pattern-or-practice claim when the underlying charge did not include

any class-based allegations and "the bulk of the evidence relied on by [the] EEOC was revealed after it filed suit." Filing 209 at 1-2. The EEOC does not appear to challenge Dial's assertion that this issue involves a controlling question of law, the resolution of which would speed up this litigation. *See Ahrenholz,* 219 F.3d at 675; 28 U.S.C. § 1292(b). The EEOC does, however, dispute Dial's ability to demonstrate the existence of a "substantial ground for difference of opinion" with respect to the notice issue.

In arguing that the issue is, indeed, contestable, Dial states that "[its] case authority for the proposition that a class claim improperly exceeds the scope of an individual charge is rooted in the statutory requirements of 42 U.S.C. § 2000e-5." Filing 209 at 5; *see also id.* at 4 (citing to 42 U.S.C. § 2000e-6(e), which provides that "[a]ll [pattern-or-practice] actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title"). This provision, Dial notes, "requires that before any lawsuit can be initiated, there must be an administrative charge notifying the employer of the alleged Title VII violation." *Id.* at 4. Relying also on § 2000e-6(e), which authorizes the EEOC "to investigate and act on a charge of a pattern or practice of discrimination," Dial contends that an individual charge with no class allegations cannot form the basis for an EEOC pattern-or-practice action, as such a charge does not afford employers the notice required by § 2000e-5. 42 U.S.C. § 2000e-6(e); *see id.* § 2000e-5(b), (e). Finally, Dial directs me to several cases where private plaintiffs were barred from expanding an individual charge into a class lawsuit based on the "scope-of-the charge" doctrine. *See* filing 209 at 4; filing 215 at 4-5. Thus, Dial concludes, "[g]iven the statutory scheme and the law applicable to private litigants," the Seventh Circuit could reasonably determine that Beverly Allen's individual charge does not support the EEOC's pattern-or-practice claim. Filing 209 at 5.

*7 According the EEOC, however, "the law is *well-settled* that 'EEOC may allege in a complaint whatever unlawful conduct it has uncovered during the course of its investigation, provided that there is a reasonable nexus between the initial charge and the subsequent allegations in the complaint." ' Filing 213 at 4 (emphasis in original) (quoting *EEOC v. Harvey L. Walner & Assocs.,* 91 F.3d 963, 968 (7th Cir.1996)); *see* filing 204 at 7-8. Under this Seventh Circuit authority, the EEOC concludes, Allen's individual charge supports its pattern-or-practice claim. I agree with the EEOC. Despite Dial's repeated assertions to the contrary, the Seventh Circuit does, indeed, appear to treat private plaintiffs and the EEOC differently with respect to the ability to expand a charge of discrimination beyond its original scope. In an apparent attempt to distinguish the above authority, Dial contends that much of the evidence on which the EEOC now relies to support its pattern-or-practice claim was uncovered, not during its investigation of Allen's charge, but during discovery. Accordingly, Dial concludes, "it is reasonably likely that the Seventh Circuit would hold that EEOC's investigation did not put Dial on notice of the pattern and practice claim it created through discovery." Filing 209 at 5-6. I am not persuaded. As stated in my summary judgment ruling, I have no reason to doubt that during its investigation of Allen's complaint, the EEOC discovered evidence leading it to find "reasonable cause" to believe that Dial had engaged in class-wide discrimination by subjecting women to sexual harassment. *See* filing 204 at 10-12. Thus, the fact that the EEOC uncovered additional alleged incidents of harassment during the discovery process does not render the above authority inapposite. I therefore find that for these reasons, the determination of the issue relating to notice does not satisfy the difference-of-opinion requirement of § 1292(b).

IT IS ORDERED that the Defendant's Motion for Certification of Issues for Appeal, filing 209, is granted, because the issue "Whether the time limitations which apply to privately prosecuted class-based Title VII claims apply to an EEOC prosecuted pattern and practice Title VII claim" meets the requirements of 28 U.S.C. § 1292 and this court's order of August 9, 2001, filing 204, is therefore certified to the Seventh Circuit Court of Appeals for interlocutory review.

2001 WL 1945088 (N.D.Ill.)

(Cite as: 2001 WL 1945088 (N.D.Ill.))

2001 WL 1945088 (N.D.Ill.)

END OF DOCUMENT

EXHIBIT D

1996 WL 267752 (N.D.Ill.)

(Cite as: 1996 WL 267752 (N.D.Ill.))

United States District Court, N.D. Illinois, Eastern Division.
In re BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION.
This Document Relates to: ALL CASES.
No. 94 C 897.

May 17, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

***1** On April 4, 1996, this court issued two Memorandum Opinions in this massive multi-district litigation. In the first opinion, the court denied all summary judgment motions by the Manufacturer Defendants (regarding both the conspiracy allegations and the indirect purchaser claims) and granted summary judgment in favor of the Wholesalers Defendants. In the second opinion, the court rejected proposed partial settlements between the Class Plaintiffs and several of the manufacturers (the "Settling Defendants"). Recognizing the impact which such decisions carried as to the future course of the litigation, the court, at a status hearing which followed the issuance of the two opinions, expressed to the parties a willingness to entertain questions which might merit certification for immediate interlocutory appeal. Presently before the court are the products of the court's inquiry.

For the reasons set forth below, the Manufacturer Defendants' motion for certification of interlocutory appeal with regards to the indirect purchaser claims is granted pursuant to 28 U.S.C. 1292(b). The Wholesaler Defendants' motion for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure is similarly granted. The defendants' request to certify or reconsider our April 4, 1996 decision rejecting the proposed partial settlements is denied.

A. Manufacturer Defendants' Motion for Certification of Interlocutory Appeal from Order Denying Motions for Summary Judgment as to Indirect Purchaser Claims

In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the Supreme Court barred an "indirect purchaser" from seeking damages for illegal overcharges passed on to it by intermediates who purchase directly from the manufacturers. *Illinois Brick*, 431 U.S. at 746. On April 4, 1996, following an examination of the immense record before it, this court revisited the issue of *Illinois Brick* and held that the control which the manufacturers exercised over the wholesalers and any of its "indirect purchaser" transactions effectively transformed those transactions into one sale. Finding that the policies and rationales behind the so-called "indirect purchaser rule" of *Illinois Brick* were not implicated in the present case, the court denied the Manufacturer Defendants' motions for summary judgment on the indirect purchaser issue, holding that the bar imposed by *Illinois Brick* had no application to the plaintiffs' Sherman Act claims.

A significant feature of the instant cases involves denial of certain discounts by manufacturers to members of the plaintiff class while the manufacturers directly negotiate these same discounts with other customers of the wholesalers. Because of the non-involvement of the wholesalers in the negotiations and decisions to discount or not discount to customers of the wholesalers, the phrase "indirect purchaser" is somewhat misleading. When a manufacturer makes a decision which materially affects the price a customer will pay to the wholesaler supplier and deals directly with that customer, either by way of granting the discount or denying it, the manufacturer intrudes itself in the

sales transaction. Consequently, one of the significant components of the sales transaction between wholesaler and customer is decreed by the manufacturer, and there is nothing indirect about this aspect of the sales/purchase transaction.

*2 Pursuant to 28 U.S.C. § 1292(b), the Manufacturer Defendants now seek to certify the *Illinois Brick* matter for interlocutory appeal. Specifically, the Manufacturer Defendants seek certification of the following question:

> In a private action under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, whether the *Illinois Brick* doctrine bars price-fixing damage claims of indirect purchaser-retailers against manufacturers on the indirect purchaser-retailers' purchases from wholesalers, which are separate companies neither owned by any manufacturer nor co-conspirators of any manufacturer?

For the reasons set forth below, we grant the defendants' motion and certify the posited question for interlocutory appeal.

A district court possesses the authority to certify an order for interlocutory appeal where that order involves (1) a controlling question of law as to which (2) there is a substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The Manufacturer Defendants maintain that the proper application of *Illinois Brick* concerns each of these factors. We agree.

Regarding the issue of whether a matter involves a controlling question of law, the Seventh Circuit has acknowledged that "a growing number of decisions have accepted the rule that a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants." *Johnson*, 930 F.2d at 1206 (quoting 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice and Procedure* § 3930, at pp. 159-60 (footnote omitted)). In light of this observation, the Seventh Circuit has endorsed a flexible standard, stating that " 'controlling' means serious to the conduct of the litigation, either practically or legally." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir.1991) (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974), *cert. denied*, 419 U.S. 885 (1974)).

Although the plaintiffs maintain that *Illinois Brick* is "just a damage issue" such that it could be separated and would not meaningfully affect the determination of liability at trial, the plaintiffs oversimplify the significance of *Illinois Brick*. As discussed more fully below, the applicability of *Illinois Brick* has a profound impact upon the scope of the plaintiffs' Sherman Act claims. For purposes of § 1292(b), a question is not *un* controlling merely because it does not dispose of a case. In cases of this magnitude, "the proper measure of damages is always a controlling question of law." *In re Uranium Antitrust Litigation*, 556 F.Supp. 806, 808 (N.D.Ill.1983). The proper applicability of *Illinois Brick* in this action is no different.

We further believe that the indirect purchaser issue posed by *Illinois Brick* is an issue as to which there is a substantial ground for difference of opinion. In our April 4, 1996 opinion, we stated that the degree of control exercised by the manufacturers effectively transformed the transaction, i.e., from defendant to middleman to indirect purchaser, into one sale. As such, the policy concerns of *Illinois Brick* were not implicated, and the rule barring indirect purchasers did not apply.

*3 In *Illinois Brick*, the Supreme Court expressly recognized a "control" exception to the indirect purchaser rule. *See Illinois Brick*, 431 U.S. at 736 n. 16. The true scope of the exception's application, however, has never been crystallized. Where the direct purchaser is a subsidiary or is otherwise owned by the alleged violator, the application of the control exception is clear; and it is in this ownership scenario where the control exception has been most often utilized. *See, e.g., In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir.1978). In articulating the control exception to *Illinois Brick*, however, the Supreme Court indicated that the exception applied to situations

where a direct purchaser is not only owned, but "owned *or controlled* " by the alleged wrongdoer. *Illinois Brick,* 431 U.S. at 736 n. 16 (emphasis added). The Supreme Court reasoned that where such ownership *or* control is exercised, the policies behind *Illinois Brick* are not implicated and have no application.

We believe that the circumstances of the present case fully embrace the spirit of the control exception articulated by the Supreme Court. We are mindful, however, that this case is unlike any other in which the courts have applied the control exception and that the true scope of the control exception has yet to be fully explored. For purposes of 28 U.S.C. 1292(b), it is clear that a substantial ground for difference of opinion exists concerning the applicability of *Illinois Brick* in the present litigation. The first two requirements for certification under section 1292(b) are thus easily satisfied.

The third requirement of section 1292(b), i.e., that immediate appeal may materially advance the ultimate termination of the litigation, is perhaps the most hotly contested, for an interlocutory appeal of the indirect purchaser issue would not result in the dismissal of any parties to the action, nor would it fully dispose of any claims. The plaintiffs attest that between ten and twenty percent of their purchases were made *directly* from manufacturers. The viability of these direct damages claims thus would not hinge upon the ultimate applicability of *Illinois Brick.* Likewise, no manufacturer would be released from the action by virtue of a reversal on the indirect purchaser issue. An antitrust defendant remains jointly and severally liable for the acts of its co-conspirators. *See In re Uranium Antitrust Litigation,* 552 F.Supp. 518, 522 (N.D.Ill.1982). Given the potential for liability as co-conspirators, even as to those select manufacturers who conducted transactions exclusively through the use of wholesalers, Sherman Act claims would remain. A trial as to all of the defendants would also be required on the plaintiffs' asserted claims for injunctive relief. *See In re Beef Industry Antitrust Litigation,* 600 F.2d 1148, 1167 (5th Cir.1979) (concluding that *Illinois Brick* does not bar suits for injunctive relief by indirect purchasers). An interlocutory appeal as to the indirect purchaser issue thus would not obviate the necessity of a Sherman Act trial.

*4 Section 1292(b), however, does not require that an issue be outcome determinative in order for an interlocutory appeal to be proper. Rather, section 1292(b) requires only that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Notwithstanding the plaintiffs' arguments to the contrary, a reversal by the Seventh Circuit of the *Illinois Brick* issue would result in a substantial savings of both judicial and party resources. The magnitude of the plaintiffs' damages claims would be vastly diminished--estimates vary, but between eighty to ninety percent of the plaintiff's damages claims are directly affected by the applicability of *Illinois Brick.* In addition, the relevance and propriety of certain (often sensitive) information, e.g., prescription drug sales by defendants not selling directly to retailers, would be greatly influenced by the final applicability of *Illinois Brick.*

Were appellate review of the indirect purchaser issue to be deferred to the end of the litigation and the *Illinois Brick* issue to be subsequently reversed, a strong possibility of retrial on the Sherman Act claims would be needlessly created. The Seventh Circuit has expressly recognized the desirability of avoiding a trial that "could prove to be a useless exercise." *In re Uranium Antitrust Litig.,* 617 F.2d 1248, 1262 (7th Cir.1980). Given the enormity of the present litigation and the time, energy, and expense which a full trial will entail, the elimination of the need for retrial is extremely agreeable. An interlocutory determination as to the indirect purchaser issue, *along with a determination regarding the proper role of the wholesalers in any conspiracy* (*see infra* at Section B), would obviate the necessity for relitigating any portion of the Sherman Act claims. As such, we find that the third requirement of section 1292(b) has been satisfied. The ultimate termination of the litigation may certainly be advanced by an immediate appeal on the indirect purchaser question. [FN1]

> FN1. In its earlier § 1292(b) ruling, *see In re Brand Name Prescription Drugs Antitrust Litigation,* 878 F.Supp. 1078 (N.D.Ill.1995), the court reasoned that, even in the event of reversal, immediate appeal would not materially advance the ultimate termination of the litigation on the ground that the Robinson-Patman Act damage claims would have to be determined in the same proceeding, thus reducing the efficiencies that could have been achieved by dismissal of the Sherman Act damage claims on the plaintiffs' purchases from wholesalers. However, this is no longer the situation. Under Pretrial Order No. 5 and the court's scheduling orders, the Robinson-Patman Act claims have been deferred pending resolution of the Sherman Act claims. As a result, simplification of the Sherman Act claims would not only vastly reduce the complexity of trial of those claims, but also, by doing so, hasten the adjudication of the now separately tracked Robinson-Patman Act claims.

Although the circumstances surrounding the certification vary, it is significant that other courts, including the Seventh Circuit, have recognized that questions concerning the application of *Illinois Brick* are particularly suitable for review on interlocutory appeal. *See Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.,* 852 F.2d 891, 892 (7th Cir.1988) (*en banc*) ("*Panhandle I* "), *cert. denied,* 488 U.S. 986 (1988), *overruled on other grounds, Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.,* 935 F.2d 1469 (7th Cir.1991) (" *Panhandle II* "), *cert. denied,* 502 U.S. 1094 (1992) ; *see also In re Wyoming Tight Sands Antitrust Cases,* 866 F.2d 1286 (10th Cir.1989), *aff'd sub nom, Kansas v. Utilicorp United, Inc.,* 497 U.S. 199 (1990); *Link v. Mercedes-Benz of North America, Inc.,* 788 F.2d 918 (3d Cir.1986). Because we believe that the indirect purchaser question in the present case involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, the Manufacturer Defendants' motion for interlocutory review pursuant to 28 U.S.C. § 1292(b) is granted.

B. Wholesaler Defendants Motion for Entry of Final Judgment

***5** On April 4, 1996, this court granted the Wholesaler Defendants' motions for summary judgment. The Wholesaler Defendants now move for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. [FN2] Although, customarily, a final judgment will not be entered by a trial court on an adjudicated claim until the court has resolved all of the issues between all of the parties, the Federal Rules provide for considerable discretion as to such matters. As recognized by the Supreme Court:

> FN2. The Wholesaler Defendants include: AmeriSource Corporation, Bergen Brunswig Corporation, Bindley Western Industries, Inc., Cardinal Health, Inc., FoxMeyer Drug Company, McKesson Corporation, and Whitmire Distribution Corporation.

> The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had. In recognition of this difficulty, ... Rule 54(b) ... was promulgated.

Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d 944, 947 (7th Cir.1980) (quoting *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 511-12 (1950)).

Rule 54(b) of the Federal Rules of Civil Procedure provides that, where certain requirements are satisfied, a district court possesses the power to render a final judgment as to a portion of a lawsuit. The requirements of the rule are easily stated:

> First, there must be an action involving multiple claims for relief or multiple parties. Second,

there must be a final decision by the district court as to at least one claim or the rights and liabilities of at least one of the parties. Third, the district court must make "an express determination that there is no just reason for delay." Finally, the court must expressly direct the entry of judgment (citations omitted).

Bank of Lincolnwood, 622 F.2d at 947; *See* Fed.R.Civ.P. 54(b).

In granting summary judgment in favor of the wholesalers, the court noted that "[t]here is no evidence, direct or circumstantial, in the entirety of [the] massive record that the wholesalers had any involvement in the decisions not to afford discounts to the plaintiffs." Memorandum Opinion at 47-48. Having so found, the wholesalers were dismissed from the case, and the legal posture of the litigation was profoundly altered.

Without entry of final judgment at the present time, the specter of a second trial would loom should the decision on the wholesalers' summary judgment motion be reversed. More significant, however, is the interplay between the ultimate fate of the wholesalers and the court's ruling on the manufacturers' *Illinois Brick* indirect purchaser motion for summary judgment (the indirect purchaser issue has been postured for interlocutory certification pursuant to 28 U.S.C. § 1292(b)). As explained above, final determination of the *Illinois Brick* issue has potentially dramatic implications as to the final contours of this action. Furthermore, any consideration of the *Illinois Brick* issue by the Seventh Circuit would necessarily merit consideration of the wholesalers' role in the sale and distribution of brand name prescription drugs. Because the status of the wholesalers is central to the *Illinois Brick* argument, principles of judicial economy and consistency favor the consideration of the matters at the same time.

***6** We are mindful of the plaintiffs' concerns as to the delay which might be caused by an appeal. However, given the enormous ramifications of the *Illinois Brick* issue upon the course of the trial and the role which the fate of the wholesalers ultimately assumes in the determination of the *Illinois Brick* issue, entry of final judgment for the Wholesaler Defendants at the present time appears appropriate. Because we find no just reason for delay, the Wholesaler Defendants' motion for entry of final judgment is granted.

C. Defendants' Motion for Certification, or in the Alternative, Reconsideration of the Court's April 4, 1996 Order Denying Approval of the Settlements

The defendants' motion for certification or reconsideration of the April 4, 1996 order denying approval of the proposed partial settlements with the Class Plaintiffs was denied in court on May 8, 1996. At that time, the court preliminarily approved an amendment to the earlier settlement agreements which purported to rectify the inequities which were cited in the April 4, 1996 order. Given the existence of the new settlement agreements and our continued belief that the rejection of the initial settlements was not immediately appealable, we denied the defendants' motion for certification or reconsideration in court. We adhere to that previous judgment.

CONCLUSION

For the reasons set forth above, the Manufacturer Defendants' motion for certification of interlocutory appeal with regards to the indirect purchaser claims is granted. The Wholesaler Defendants' motion for entry of final judgment is also granted. All other motions are denied.

1996 WL 267752 (N.D.Ill.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, John E. Bucheit, an attorney, hereby certify that on June 14, 2005, I caused a true and correct copy of the foregoing **MOTION FOR LIMITED RECONSIDERATION OR, IN THE ALTERNATIVE, CERTIFICATION FOR INTERLOCUTORY REVIEW** to be served upon the following via PDF electronic delivery:

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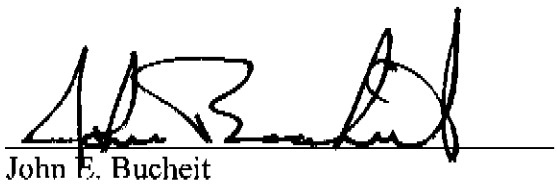

John E. Bucheit