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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	}	
Plaintiff,	}	CIVIL ACTION NO.
v.	}	00-AR-2762-S
PEMCO AEROPLEX, INC.,	}	
Defendant.	}	

MEMORANDUM OPINION AND CASE MANAGEMENT ORDER

The original complaint in this hoary case was filed on September 28, 2000. In it, the Equal Employment Opportunity Commission ("the EEOC") charged that defendant, Pemco Aeroplex, Inc. ("Pemco"), "discriminated against a class of Black individuals by subjecting them to a hostile work environment". The complaint, which has never been amended, alleged the jurisdictional prerequisite of EEOC administrative exhaustion by 36 black employees who were individual plaintiffs in a separate case entitled *Burnes, et al. v. Pemco Aeroplex, et al.*, CV-99-AR-3280-S ("*Burnes*").

After Pemco answered the complaint, the parties on March 8, 2001, filed a report of their planning meeting. Before entering a scheduling order, the court on March 19, 2001, held a status and scheduling conference, and on March 20, 2001, entered an order declining to issue a definitive scheduling order because the court had contemporaneously consolidated *Burnes* with this case for

discovery purposes only. It was this court's understanding that the EEOC would fully participate in the discovery conducted in *Burnes* as well as in this case, and that the anticipated joint discovery would suffice in this case. Discovery did, in fact, proceed in *Burnes*, as well as in this case, and the EEOC participated in discovery efforts to the extent it cared to. No order was ever entered precluding or limiting discovery in this case as distinguished from that in *Burnes*. Such an order would have been inconsistent with joint discovery.

On February 15, 2002, the EEOC filed a motion to consolidate this case with *Burnes* for trial as well as for discovery, alleging, *inter alia*, that the same witnesses would be called in both cases. That motion was denied. On May 31, 2002, the court learned that discovery was being undertaken in this case separate from that in *Burnes*. It was on that date that Pemco filed a motion to compel against the EEOC. The court referred the said motion to Magistrate Judge Armstrong on June 4, 2002. On June 26, 2002, the EEOC filed a motion for an extension of time within which to respond to Pemco's motion to compel. Magistrate Judge Armstrong granted that motion on July 2, 2002. The basis for the EEOC's motion for an extension was its alleged need to incorporate the formal assertion of the EEOC's "deliberative process" privilege, which could only be claimed by the EEOC chairwoman, Ms. Domingues. On July 1, 2002, the EEOC filed a paper reciting that Ms. Domingues's declaration

was attached, but the paper does not contain any such attachment.

On July 9, 2002, as a result of a status and scheduling conference held on that date, the EEOC was ordered to furnish Pemco a list of all of the EEOC's witnesses by July 20, 2002, and Pemco was ordered to do likewise within a week after it received the EEOC's list. In the order of July 9, 2002, the discovery schedule was amended to allow discovery until December 27, 2002, but only by deposition. It was obvious that the court thought that there had been sufficient discovery so as to expect it to be completed by December 27, 2002.

On July 19, 2002, the EEOC filed a list of 126 witnesses plus generic references to members of the aggrieved class and to all witnesses in *Burnes*. On July 29, 2002, Pemco filed a list of 175 witnesses. On August 1, 2002, Pemco filed a motion to strike the EEOC's witnesses other than those listed by name. The said motion was granted on August 16, 2002, and no request for reconsideration has been filed.

On August 21, 2002, Pemco moved for an extension of discovery until December 31, 2002. On August 26, 2002, the EEOC moved for an extension of discovery until the court ruled on Pemco's Rule 56 assertion of "issue preclusion" as an absolute defense by virtue of the outcome in *Burnes* that had been favorable to Pemco. In its said motion for an extension of discovery, the EEOC suggested that a motion to compel would be forthcoming from it. Also on August

26, 2002, the EEOC moved to quash 30 deposition notices.

On August 26, 2002, Pemco responded to the EEOC's motion for an extension and moved for a protective order, alleging, *inter alia*, that its responses to the EEOC's requests for production had been delivered to the EEOC over a year previously and that there had been no timely or valid objection to Pemco's responses.

On September 5, 2002, the EEOC moved for an extension of the time within which to respond to a motion to quash allegedly filed by Pemco (copy of which does not appear in the court file). On the same date the EEOC filed the motion to compel anticipated in earlier filings by both parties.

After a hearing conducted on September 6, 2002, the court on September 10, 2002, granted Pemco's motion of August 21, 2002, for an extension of discovery until December 31, 2002, and recognized that the said extension rendered moot the EEOC's motion of August 26, 2002, for an extension. Again, it was obvious that the court expected discovery to end on December 31, 2002. The pending discovery motions were expressly deferred pending a ruling on Pemco's pending Rule 56 motion based on "issue preclusion".

The court then granted summary judgment in favor of Pemco, whereupon the EEOC appealed and obtained a reversal of that ruling. Understandably, discovery activity halted pending the appeal. After Pemco's petition to the Supreme Court for *writ of certiorari* was denied, the case came back to this court.

After the return of the case to this court, the court set it for pretrial conference on November 1, 2005, only to learn that both parties insist that they need more discovery and need the aid of the court in obtaining full responses to outstanding discovery requests. The court, expressing some surprise, required the parties to state in writing their positions on their discovery needs and on other unresolved pretrial issues by simultaneous submissions to chambers on November 18, 2005. The parties complied. By order entered on November 29, 2005, the parties' submissions were made part of the record.

Based on the court's review of the entire 5-year record, including the submissions of November 18, 2005, it is ORDERED as follows:

1. Although there is no indication in the record that the reference to Magistrate Judge Armstrong has been withdrawn, it has obviously been ignored. It is therefore DEEMED WITHDRAWN.

2. **By 4:30 p.m., December 16, 2005,** the EEOC shall file a copy of Ms. Domingues's declaration and submit to the court for *in camera* review all material requested by Pemco and claimed by the EEOC to be privileged, after which the court will promptly rule upon Pemco's motion to compel.

3. The EEOC's motion to compel is DENIED[1], except to the

[1]The EEOC's discovery requests were overly broad, unduly burdensome, duplicative of evidence readily available from other sources, or seeking items not calculated to produce or lead to evidence relevant to the limited issue to be tried. This renders moot the unexplained year that elapsed between Pemco's

extent the said motion seeks the names of black employees (and their dates of employment) who worked for Pemco between January 1, 1995, and the present. This limitation is not meant as an indication that all such persons are within the class represented by the EEOC. Pemco shall furnish this information to the EEOC **by 4:30 p.m., December 30, 2005.** Consistent with this ruling, Pemco's motion for protective order is PARTIALLY GRANTED AND PARTIALLY DENIED.

4. No witness shall be offered at trial who has not either been a witness at the trial of *Burnes* or who has been subject to being deposed by the party against whom the witness is offered. The list of witnesses filed by the EEOC on July 19, 2002, and the list of witnesses filed by Pemco on July 29, 2002, shall constitute **all** witnesses, unless by motion filed **by 4:30 p.m., March 31, 2006,** and granted for good cause, additional witnesses are allowed. Further depositions of thus far undeposed witnesses shall not exceed one hour each during the deposing party's interrogation of the witness. All depositions shall be completed **by March 31, 2006,** unless additional witnesses are allowed. No further written discovery shall be allowed unless upon motion granted for good cause, or in response to Pemco's outstanding motion to compel, that is, to the extent it may hereinafter be granted.

5. Evidence of events that occurred prior to January 1,

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responses and the EEOC's motion to compel.

1995, shall not be admitted into evidence, even as background material. Any doubt or equivocation by a witness as to whether or not a particular event occurred before of after January 1, 1995, shall be resolved against admissibility.

6. Testimony given by any witness in the *Burnes* trial shall be just as admissible as if it had been in a deposition taken in this case.

7. The group of persons on whose behalf the EEOC can seek monetary damages shall not include black persons who after January 1, 1995, had a pending action against Pemco in which the plaintiff invoked Title VII and/or 42 U.S.C. § 1981, made a claim of race discrimination and whose case has been concluded, no matter what the outcome of the case or the reason assigned for that outcome (except a dismissal without prejudice). Furthermore, the class represented by the EEOC shall not include any person who was not employed by Pemco at some time after August 28, 1997 (the date that is 180 days before the first EEOC complaint was filed by a charging party on January 28, 1998).[2]

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[2]The Eleventh Circuit has squarely held that stale claims of a former employee cannot be revived by reference to a continuing violation against another employee. *Hipp v. Liberty National Life Ins. Co.*, 252 F. 3d 1208, 1221-22 (11th Cir. 2001) (holding that plaintiff who retired more than a year before another filed the representative charge "may not rely on continuing violation doctrine to revive his stale claim" and finding "no authority, however, for allowing one plaintiff to revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others.")

Other courts have rejected attempts by the EEOC to resurrect time-barred claims of former employees:

> Lower courts "are compelled by the text of the statute" and should

> not alter the timely filing requirements of Title VII. 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.

EEOC v. Custom Companies, Inc., 93 FEP Cases 1450 (N.D. Ill. 2004) (citations omitted) (distinguishing the cases relied upon by the EEOC for its position).

> [C]ontinuing violations based on a system of discrimination do not permit challenges to presently maintained employment practices by employees who left a defendant's employ prior to commencement of the charge filing period. Moreover, the continuing violations theory is properly applicable only to include earlier claims for individuals, **not to add new parties**.

EEOC v. United Ins. Co. of America, 666 F. Supp. 915, (S.D. Miss. 1986) (citations omitted; emphasis added).

> It seems obvious that if the continuing violation doctrine is applied, those members of the class must have suffered an adverse employment action within the given time period or else the limitation would be meaningless.

EEOC v. Optical Cable Corp., 169 F. Supp. 2d 539, 549-50 (W.D. Va. 2001).

> That the EEOC may properly bring a claim based upon discrimination against a class of individuals where such a claim arises out of the investigation of an individual charge, does not permit the EEOC to resurrect untimely claims . . . . Such a result would improperly expand the substantive rights of the individuals which the EEOC represents and would render the [180-day] filing period effectively meaningless.

EEOC v. Harvey L. Walner & Assoc., 1995 WL 470233 *4 (N.D. Ill. 1995) (citations omitted), *aff'd on other grounds* 91 F. 3d 963, 969 (7th Cir. 1996) (expressing "no wonder" that the EEOC abandoned the argument on appeal).

In surveying this consistent body of law, another court found not only that the continuing violation doctrine could not revive stale claims, but that the claims of anyone whose employment ended more than 180 days prior to the representative charge are necessarily time-barred:

> While the continuing violation doctrine has been applied in the class action context, courts that have considered the issue have concluded not only that all class members must have suffered an adverse employment action within the given time-period, but have held, more pertinently, that irrespective of a continuing pattern or practice of discrimination by an employer, **those individuals who terminated their employment with the defendant prior to the [180-day] cutoff under title VII may not join the class challenging such discrimination**."

8. Inasmuch as this court in *Burnes* overruled Pemco's motion filed at trial pursuant to Rule 50 for judgment as a matter of law, Pemco should not be sanguine over any expectation it may have that the court will grant its promised Rule 56 motion based loosely on the rationale employed by Judge Smith of this court in *Evans v. Pemco*, CV-96-S-2801-S, 1998 WL 1040470 (N.D. Ala.). Nevertheless, the dispositive motion deadline is **4:30 p.m., April 14, 2006.** Assuming, *arguendo*, that any Rule 56 motion will be overruled, the case is SET for final pretrial conference **at 9:30 a.m., April 28, 2006.**

9. All motions *in limine*, including *Daubert* motions, shall

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Lumpkin v. Coca-Cola Bottling Co. United, Inc., 216 F.R.D. 380, 385 (S.D. Miss. 2003) (citations omitted; emphasis added). *See, e.g., Hipp*, 252 F. 3d at 1221-22; *Domingo v. New England Fish Co.*, 727 F. 2d 1429, 1444 (9th Cir. 1984) ("as a prerequisite to obtaining relief, each class member must demonstrate, by fact of employment or otherwise, that he or she had been discriminated against during the limitation period or was a member of a group exposed to discrimination during that time."); *Laffey v. Northwest Airlines, Inc.*, 567 F. 2d 429, 472 (D.C. Cir. 1976) ("the timely filing of an EEOC Charge by one member of a class could not revive claims which were no longer viable at the time of filing").

Although the Supreme Court in *National RR Passenger Corp. V. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002), allows a hostile race environment plaintiff to recover damages for some portion of a hostile environment that preceded the 180 days prior to the necessary EEOC complaint during which some discrete incident manifesting the hostile environment occurred, it nevertheless recognizes that the holding "does not leave employers defenseless against employees who bring hostile work environment claims that extended over long periods of time". 122 S. Ct. 2076. This defense is provided by ordinary principles of equity jurisprudence. It would neither be fair nor equitable in the instant case to allow monetary damages to be recovered for a hostile environment that Pemco inherited when it was formed in 1987. Exercising its discretion, this court will allow recovery of damages by an individual member of the class represented by the EEOC only if it was sustained on or after January 1, 1995.

be filed **before 4:30 p.m., April 28, 2006.**

10. The trial of the case will be bifurcated so that the jury will first be called upon to determine whether a hostile racial environment existed at Pemco at any time after August 28, 1997, and if so, the date on or after January 1, 1995, when it began. The jury will be instructed that if a hostile environment pre-dated January 1, 1995, the starting date would be January 1, 1995. Only if the jury answers so as to establish liability will the same jury hear evidence bearing on the amount of damages for mental anguish, if any, suffered by individual members of the represented group, who are precluded from recovering monetary damages.

11. **To the extent this order is inconsistent with prior orders of the order, this order supersedes those orders and controls future proceedings.**

12. The parties are admonished to GET BUSY.

DONE this 2nd day of December, 2005.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE