1993 WL 559028
United States District Court, D. Minnesota, Third Division.

Nimali (DeSilva) SONDEL, Holly Novack, Karen Johnson, Kim Shaller, and Brenda Glapa, on behalf of themselves and all other persons similarly situated, Plaintiffs,
v.
NORTHWEST AIRLINES, INC. and Republic Airlines, Defendants.

No. CV 3–92–381.
|
Jan. 14, 1993.

Attorneys and Law Firms

Linda M. Dardarian, Barry Goldstein, David F. Offen–Brown, Saperstein, Mayeda, Larkin & Goldstein, Oakland, CA, and Susan M. Coler and Paul C. Sprenger, Sprnger & Lang, Minneapolis, MN and Washington, DC, for plaintiffs.

Thomas Tinkham, Jean F. Holloway and Margaret M. Zverinova, Dorsey & Whitney, Minneapolis, MN, for defendants.

MEMORANDUM OPINION AND ORDER

KYLE, District Judge.

Introduction

***1** This matter comes before the Court on defendant Northwest Airlines, Inc.'s ("Northwest") and Republic Airlines' ("Republic") motion for summary judgment against the claims of plaintiff Nimali Sondel ("Sondel") on the grounds that those claims are time-barred. Sondel has alleged violations of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–3—5 and the Civil Rights Act of 1866, 42 U.S.C. § 1981 for Republic's alleged failure to hire her because she is under 5'2" tall, Republic's minimum height for flight attendants. She claims that this minimum height standard for flight attendants discriminates against women, Asians and Hispanics.

Defendants' statute of limitation defense to the Title VII charge rests on Sondel's alleged failure to file a timely charge with the EEOC regarding Republic's rejection of her employment application. In order to proceed under Title VII, a plaintiff must file a charge within 240 days[1] of the most recent incident of claimed discrimination, and defendants contend that Sondel failed to do so. Defendants claim Sondel's section 1981 claim is barred by the applicable six year statute of limitations, as she commenced this action on July 16, 1992, more than eight and one-half years after Republic allegedly rejected her application for employment.

Background

Sondel made inquiry with Republic (and Northwest as Republic's corporate successor) regarding employment as a flight attendant in 1983. In her Complaint (and on the EEOC charge form), Sondel states that she was rejected by Republic in December, 1983. She claims that she requested an application form in October or November, 1983, submitted it, and then received a rejection notice from Republic in December, 1983. Second Amended Complaint, ¶ 9 ("Plaintiff Sondel applied to Republic Airlines in November, 1983, to be hired as a flight attendant. In November and December, 1983, and continuously thereafter, Republic, then Northwest, rejected her application...."). *See also* Zverinova Aff., Exh. A, Sondel Depo., pp. 29, lines 16–20 ("Q: Do you recall when it [the rejection card] was sent to you or when you received in? A: Between October to December, in between. Q: Between October and December of 1983? A: Yes, sir.").[2] The reason for her rejection was given as her height. After receiving the rejection from Republic, as well as several rejections from other airlines, all on the basis of her height, Sondel claims she wrote to Republic three or four times between the time of the rejection and November 14, 1984, requesting further explanation of why her height disqualified her from employment as a flight attendant. She received replies from Republic stating that the height restriction was a safety requirement. Zverinova Aff., Exh. A, Sondel Depo. at 35–36.

On November 14, 1984, Sondel wrote to the Miami

Office of the EEOC, charging that Eastern, Delta, Republic and British Air had all discriminated against her unfairly on the basis of her height and requesting "the EEOC to take steps to end this inequity." Zverinova Aff, Exh. B. On November 21, 1984, the EEOC wrote to Sondel, acknowledging her charge of employment discrimination against the airlines (Zverinova Aff., Exh. A, Sondel Depo., Exh. 8) and she signed an EEOC charge form against Republic on December 3, 1984, alleging beginning in December 1983 and continuing to the present time. *Id.* at Exh. 5. The charge was formally filed with the Miami Office of the EEOC on December 28, 1984.

***2** After Sondel filed her EEOC charge against Republic and the other airlines, the EEOC began its investigation. The investigation continued through March 26, 1991, when the EEOC issued its Determination that Republic's height policy violated Title VII. Sondel Dec., Exh. 5. In this Determination, the EEOC also found that "timeliness, and all other requirements for coverage have been met." *Id.* In response, Republic and Northwest requested reconsideration of the EEOC's finding of reasonable cause to believe that violations had occurred, but did not challenge the EEOC's statement that Sondel's charge was timely filed. Sondel Dec., Exh. 4.[3]

Discussion

I. *SUMMARY JUDGMENT STANDARD*

The moving party is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The role of the court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *Agristor Leasing v. Farrow*, 826 F.2d 732, 733 (8th Cir.1987). "In making this determination, the court is required to view the evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." *Id.* at 734.

When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), the non-moving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir.1987), *cert. denied*, 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In this case, the date or dates on which Sondel's application for employment was rejected by Republic will determine whether her claims under Title VII may proceed. The continuing nature, if any, of her claims under Section 1981 will determine the viability of those claims. Defendants, as the moving party in this motion for summary judgment, must establish that the facts surrounding these issues are undisputed and that they are entitled to judgment as a matter of law. That is, defendants must establish an absence of genuine issues of material fact regarding Sondel's failure to file her EEOC within the applicable limitation period and to commence this legal action within the applicable statute of limitations period.

II. *PLAINTIFF'S TITLE VII CLAIM*

***3** In order to maintain a Title VII action against an employer or potential employer, a plaintiff must file a charge with the EEOC within 240 days[4] of the last incident of alleged discrimination. 42 U.S.C. § 2000e–5(e)–(f). In a case of rejection from employment on allegedly discriminatory grounds, the EEOC charge must be made within 240 days from the date of the rejection. *See, e.g., Banas v. American Airlines, Inc.*, 969 F.2d 477, 481 (7th Cir.1992) ("When an employer acts in a discrete fashion, such as failing to hire or discharging a protected individual, this discrete act clearly triggers the running of the limitations period.").[5]

An "exception" or qualification to the requirement that a plaintiff file a charge with the EEOC within 240 days of the last incident of alleged discrimination arises when the plaintiff alleges a policy, pattern or practice in violation of the law which continues over a period of time. *See, e.g., Satz v. ITT Fin. Corp.*, 619 F.2d 738, 744 (8th Cir.1980) ("[T]he allegation of a presently maintained policy of discrimination may state a claim under Title VII even if the last specific act pursuant to that policy occurred more than 180 days [applicable charge period] prior to the

complaint." (citations omitted)); *Glass v. IDS Financial Services, Inc.*, 778 F.Supp. 1029, 1052–53 (D.Minn.1991) (adopting the continuing violation theory to toll both the charge-filing period and the statute of limitations period in ADEA cases for present or former employees who claim the employer engaged in a discriminatory demotion policy).

However, the continuing violation theory has only been applied to cases involving existing employees who allege continuing discriminatory policies of promotion, demotion, assignment or other employment actions. *See Hill v. AT & T Technologies,* 731 F.2d 175, 179 n. 8 (4th Cir.1984) ("A number of cases hold that the continuing violation theory is confined to promotion and assignment discrimination claims (i.e., confined to existing employees) and specifically does not apply to hiring or discharge claims.") (citations omitted); *Rodriguez,* 131 F.R.D. at 11 ("The continuing violation theory, inapplicable to rejected applicants...."). The Eighth Circuit has stated that "the initial job assignment, like a *hiring decision,* in no respect constitutes a continuing violation." *Heymann v. Tetra Plastics Corp.,* 640 F.2d 115, 120 (8th Cir.1981). *See also Rodriguez,* 131 F.R.D. at 10 ("In employer-employee cases, the limitations period starts, notwithstanding the continuing violation, upon termination of the employer-employee relationship."); *Smith v. Office of Economic Opportunity for Arkansas,* 538 F.2d 226, 229 (8th Cir.1976) ("The effects of the alleged discrimination were felt by the [plaintiff] when [she] was denied employment and they terminate on that date."). Thus, a plaintiff who challenges, from the position of an applicant, a refusal to hire based on an allegedly discriminatory policy must bring the claim within the limitations period beginning on the date of notification of the rejection. *See Yates v. Mobile County Personnel Board,* 658 F.2d 298, 299 (5th Cir.1981).[6]

***4** In this case, it is clear that Sondel challenges defendants' height policy from the position of a rejected applicant. The continuing violation theory will not extend, or toll the running of, the EEOC limitations period—she must establish that she suffered the impact of the policy through the rejection on or after May 2, 1984, 240 days prior to December 28, 1984, when her EEOC charge form was filed.[7] Thus, the critical question is: when was Sondel rejected by Republic?

During her deposition, Sondel stated that the rejection notice arrived on December 22, 1983:

> Q: Do you recall when it [the rejection card] was sent to you or when you received it?
>
> A: Between October to December, in between.
>
> Q: Between October and December of 1983?
>
> A: Yes, sir.
>
> Q: How do you know that?
>
> A: Because I have envelope I received.
>
> Q: The envelope you received in connection with this card or in connection with the original application?
>
> A: With the card.

> Q: And it looks to me as if it's got a canceled note dated December 22nd, 1983. Is that the way you read that?

> A: Yes.

Zverinova Aff., Exh. A, Sondel Depo., pp. 29, 31.

In addition to her deposition testimony, Sondel has stated in numerous documents that she was rejected in December, 1983 and that Republic discriminated against her in December, 1983. *See, e.g.* Second Amended Complaint, ¶ 9, dated November 16, 1992 (Sondel alleges that "In November and December, 1983, ... Republic ... rejected her application."); EEOC charge form, Zverinova Aff., Exh. A, Sondel Depo., Exh. 1; and correspondence from Sondel to Michael Walker, an EEOC investigator, dated March 27, 1987 and June 24, 1987 (Holloway Aff., Exhs. 2 and 3.).

In contrast, in her "Declaration" dated December 23, 1992, Sondel states that

> [she is] now not sure if the application, rejection, or something else came in that envelope [postmarked December 23, 1983], but I now believe that Republic sent me their application form in

the December 1983 envelope.

Sondel Dec., ¶ 3. She now believes that she received the rejection notice sometime in 1984. Sondel Dec., ¶ 4.[8] Sondel cannot state with certainty when she received the rejection notice, and Republic cannot state with certainty the date on which it mailed the rejection notice. What is certain, however, is the change in testimony on this critical issue occurred after the filing of the pending motion for summary judgment.

In a motion for summary judgment, the party who will bear the burden of proof at trial on a particular element of her claim must make a showing sufficient to establish the existence of that element. *Celotex*, 477 U.S. at 324. In this case, it is Sondel's burden to make a factual showing sufficient to establish that she was rejected by Republic on or after May 2, 1984, and to set forth specific facts which call into question defendants' assertion (based on Sondel's own testimony) that she was rejected in December 1983.

***5** Pursuant to Fed.R.Civ.P. 56(e),

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.

See Federal Deposit Insurance Corp. v. Oaklawn, 959 F.2d 170, 175 (10th Cir.1992) (affiant's unsupported "belief" insufficient to put contested facts at issue); *McLendon v. Georgia Kaolin Co.,* 782 F.Supp. 1548, 1557 (M.D.Ga.1992) (plaintiff's sworn assertion, lacking personal knowledge, insufficient to defeat summary judgment). The specific facts set forth by party opposing summary judgment must be just that—facts, not speculation. *See Sprague v. Vogt,* 150 F.2d 795, 800–01 (8th Cir.1945); *Martinez v. Junta de Planificacion,* 736 F.Supp. 413, 419 (D. P.R.1990) ("A genuine issue for trial precluding summary judgment is not created by mere allegations in the pleadings or by surmise and conjecture on the part of litigants; nor may summary judgment be defeated on gossamer threads of whimsy and speculation." (citations omitted)). Furthermore, a party may not create issues of credibility "by allowing one of its witnesses to contradict his own prior testimony." *Garnac Grain Co. v. Blackley,* 932 F.2d 1563, 1568 (8th Cir.1991); *Camfield Tire, Inv. v. Michelin Tire Corp.,* 719 F.2d 1361, 1365 (8th Cir.1983) (same).

The Court concludes that the recently written declarations of Sondel and Sawyer, and the corrections to Sondel's deposition filed by counsel, do not set forth specific facts which establish a genuine issue of fact regarding when Sondel was rejected by Republic. While neither party may be certain as to what day Sondel's application was rejected, it is Sondel's burden to establish that the day was on or after May 2, 1984. She has failed to make a factual showing sufficient to support such a conclusion.

III. *PLAINTIFF'S SECTION 1981 CLAIM*

Section 1981 of Title 42, United States Code, provides:

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

42 U.S.C. § 1981(a).

In this case, not only does Sondel maintain that she personally suffered discrimination under defendants' height policy, but also that the policy has a disparate impact on Asians and Hispanics as its effects are felt more often by individuals in those protected classes. Nevertheless, Sondel must be able to establish that *her* claims are timely in order to represent others similarly situated, even if the intervenor plaintiffs' (and purported class members') claims arose during the statutory period of limitations. *See, e.g., Allee v. Medrano,* 416 U.S. 802, 828–29 (1974) ("A named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicated standing on injury which he does not share. Standing cannot be acquired through the back door of a class action."); *Simmons v. Brown,* 611 F.2d F.2d 65 (4th Cir.1979) (in employment race

discrimination case, where original plaintiffs' claims had been dismissed after trial and they had failed to move for reconsideration, the failure to move for reconsideration amounted to conceding that they had not been victims of racial discrimination, and thus they could not represent the putative claim).[9]

***6** Section 1981 does not contain a specific statute of limitations, so federal courts apply the most appropriate or analogous state statute of limitations to those claims. *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 660 (1987). In states without a specific statute of limitations for personal injury claim, such as Minnesota, the general catch-all limitations period (six years in Minnesota, Minn.Stat. § 541.05, subd. 1(5)) applies to Section 1981 claims. *See Owens v. Okure,* 488 U.S. 235, 109 S.Ct. 573, 582 (1989).[10]

However, as with Title VII actions, the continuing theory of violations may be applicable in a section 1981 civil rights action. *See Delaware State College v. Ricks,* 449 U.S. 250, 256–57, 101 S.Ct. 498, 503–04 (1980); *Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir.1989) (in a case where plaintiff was denied a promotion, allegedly on the basis of his national origin, the court held that "[n]o part of a continuing violation which persists into the period within which suit is allowed is time-barred.... This is nothing special to section 1981; it is a general principle of our law."). Thus, if an action alleges a violation of Section 1981 in the form of a company policy, pattern or practice which continues into the limitations period, the action may not be barred by the applicable statute of limitations. *See Gonzalez v. Firestone Tire & Rubber Co.,* 610 F.2d 241, 249 (5th Cir.1980).

Again, however, the continuing violation theory in Section 1981 actions has only been applied to those cases in which the plaintiff is an existing or former employee who alleges that the company policy or practice resulted in discrimination against her. *See, e.g., Malhotra,* 885 F.2d 1305 (7th Cir.1989); *Harris v. Blue Cross and Blue Shield of Kansas et al.,* 1991 U.S.Dist. Lexis 12140 (D.Kan. September 30, 1991). The same rationale behind the imposition of specific EEOC charge period and the limitation of the continuing violation theory to existing employees applies in section 1981 cases. *See supra,* note 6.

In addition, the continuing violation theory has limited applicability when the plaintiff challenges a facially neutral, as opposed to facially discriminatory, policy.[11] When a plaintiff challenges a facially neutral policy or practice, she is essentially challenging the current impact, on herself and others similarly situated, of a policy previously adopted by the company. The basic complaint, then, is about the current *effects* of a past discriminatory act (the institution of the policy or practice) and, as a result, the continuing violation doctrine does not apply. *Lorance v. AT & T Technologies, Inc.,* 490 U.S. 900, 908, 109 S.Ct. 2261, 2266 (1989) (overruled by the 1991 Civil Rights Act on other grounds). When the plaintiffs "have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, [they] cannot complain of a continuing violation." *Id.* at 908, 109 S.Ct. at 2267. "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* at 908, 109 S.Ct. at 2266. *See also Roberts v. Panhandle Eastern Pipeline Co.,* 763 F.Supp. 1043, 1049 (W.D.Mo.1991) (continuing violation doctrine applies only to an existing employment relation; a continuing "violation" is actionable; a continuing "impact" from a complete act of discrimination is not). A plaintiff may benefit from the continuing violation theory only if she is subject to continuous injury on a day to day basis by the employer's existing policy. *See, e.g., Williams v. Owens–Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir.1982); *Elliot v. Sperry Rand Corporation,* 79 F.R.D. 580, 586 (D.Minn.1978).

***7** In this case, Sondel claims that Republic's violations of Section 1981 by its height policy continued into the limitations period, measured from six years prior to the date of filing the action against Republic and Northwest on July 16, 1992. She claims the refusal to hire individuals under the height of 5′ 2″ is part of a policy, pattern or practice of discrimination. Sondel offers EEOC charge forms filed by two women in 1992, in which they charge discrimination on the basis of Republic's application of the height restrictions in 1991 and 1992 as evidence that the challenged policy has continued into the limitations period. Defendants have not denied that they maintained the 5′ 2″ height requirement for flight attendants until early in 1992, well into the six year limitations period.

However, defendants have moved for summary judgment against the named plaintiff in this action, Sondel, and she must establish that defendants discriminated against *her* within the limitations period.[12] Sondel has not produced any evidence that she applied and was rejected by Republic on the basis of her height, let alone her gender or national origin, during the six year limitations period running from July 16, 1986 to July 16, 1992. The Court finds that Sondel is barred by the statute of limitations from asserting her section 1981 claims.

Order

Based upon the files, records, arguments of counsel and proceedings herein, IT IS ORDERED that

1. Defendants Republic's and Northwest's motion for summary judgment (Doc. No. 46) on plaintiff Sondel's Title VII and Section 1981 claims is GRANTED and plaintiff Sondel's claims are DISMISSED with prejudice; and

2. Defendants' request[13] for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Procedure (Doc. No. 47) is DENIED.

All Citations

Not Reported in F.Supp., 1993 WL 559028, 63 Fair Empl.Prac.Cas. (BNA) 408, 63 Empl. Prac. Dec. P 42,869

Footnotes

[1] *See* 42 U.S.C. § 2000e–5(e) (in deferral states such as Minnesota—those with state agencies responsible for enforcing discrimination laws—the filing period is, *at most* 300 days; in non-deferral states—those without such agencies—the period is, at most, 180 days). Minnesota and Florida are deferral states, and in Minnesota, a plaintiff must file an EEOC charge no more than 240 days after the last incident of discrimination, unless she can show that she filed a charge with the state enforcement agency, the Minnesota Department of Human Rights, within 300 days of the discriminatory act. *See EEOC v. Shamrock Optical Co.,* 788 F.2d 491, 492–93 (8th Cir.1986).

In their moving papers and at oral argument, defendants applied the maximum 300 day charge period in an effort to give plaintiff every benefit.

[2] Sondel has recently submitted a "Declaration," signed December 23, 1992, stating that she now believes she received the *application* on December 22, 1983, thus contradicting her deposition testimony and the allegations in the Second Amended Complaint. The declaration reads in part:

> I am now not sure if the application, rejection, or something else came in that envelope [stamped December 22, 1983], but I now believe that Republic sent me their application form in the December 1983 envelope. My best memory is that I first applied to Republic some time between November, 1983 and August, 1984.

> I best recall that I applied to Republic at about the same time that I applied to British Airways, Eastern, and Delta, which would date my Republic rejection as also in Summer or Fall 1984.

Sondel Declaration, ¶¶ 3 and 4.

[3] The Court is not bound by the EEOC's findings and conclusions. *See Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097, 1105 (8th Cir.1988).

[4] *See supra,* note 1.

[5] Sondel relies on *Roberts v. North American Rockwell Corp.,* 650 F.2d 823, 824–25 (6th Cir.1981) for the proposition

that when an applicant makes repeated inquiries into the status of her application and is continually told she would not be hired, that applicant has a continuous application, and the last contact with the employer is the date on which the EEOC charge period begins. Plaintiff's Memorandum in Opposition, p. 13. However, this Court finds *Rodriguez v. United States Department of Treasury,* 131 F.R.D. 1, 10–11 (D.D.C.1990), reaching the contrary result, persuasive. In *Rodriguez,* the District Court for the District of Columbia distinguished *Roberts* from a case in which the applicant had received a definite rejection, but continued some correspondence with the employer. The Court distinguished the cases on the grounds that a definite rejection, as opposed to inquiry during the pendency of the application, eliminates the possibility that the applicant can have a "continuous" application. *Rodriguez v. United States Department of Treasury,* 131 F.R.D. 1, 10–11 (D.D.C.1990) ("The question in this case, where *applicants* [as opposed to employees] are at issue, is as follows: does rejection of the application similarly sever the applicant-prospective employer relationship, so that the limitations period begins when the applicant is rejected? The Court believes the answer should be in the affirmative.") (emphasis added).

Furthermore, although Sondel claims that she sent three or four letters to Republic after her rejection, she does not have copies of those letter or the replies which she claims she received from Republic. Zverinova Aff., Exh. A, Sondel Depo. at 35–42.

Sondel also relies on an expansion on the "theory" of the "continuous applicant—that of the "deterred" applicant. If an individual faces a consistently enforced discriminatory policy excluding certain protected individuals, such an individual may be deterred from actually applying for the job, and therefore suffer the same discrimination that an actual applicant would have faced. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 365, 98 S.Ct. 1843 (1977). *See also Lams v. General Waterworks Corp.,* 766 F.2d 386, 393 (8th Cir.1985) (plaintiffs' failure to make known their interest in certain positions because of defendants' rebuffs and failure to follow on plaintiffs' inquiries constitutes a deterred application.). However, this argument fails on the facts of this case, as, unlike the plaintiffs in the case cited by Sondel, Sondel did actually apply, and cannot, therefore, maintain that she was deterred from applying based on the alleged discrimination.

[6] The Court also notes the ramifications of the application of the continuing violation theory to the claims of a rejected applicant, and finds that the application would be inconsistent with the general policy favoring prompt resolution of employment disputes. For instance, in this case, defendants' height restriction has been in effect for approximately 30 years; if every applicant whose claims have been rejected on the basis of height during those 30 years could bring a claim, defendants would be exposed to a class action of unlimited scope. Furthermore, defendants would have considerable difficulty defending against such a suit due to the unavailability of witnesses and documentation lost through the passage of time. (This is not to mention the plaintiffs' difficulty in establishing their own claim.)

Title VII was not designed to impose such open-ended liability on employers for rejecting applicants, given the 300 day maximum period of limitations in which to file a charge with the EEOC. *See also* 29 C.F.R. § 1602.14 ("Any personnel or employment record made or kept by an employer (including ... application forms submitted by applicants ...) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later."). "It has been cautioned, however, that to loosely construe continuing discrimination would undermine the theory underlying the statute of limitations embodies in 42 U.S.C. § 2000e–5(e)." *Smith v. Office of Economic Opportunity for the State of Arkansas,* 538 F.2d 226, 228 (8th Cir.1976).

[7] For the purposes of this discussion, the date on which the EEOC charge was filed is December 28, 1984. *See* 29 C.F.R. § 1601.13(a)(1) and (4)(ii)(A) (charges deemed filed "upon receipt" by the EEOC).

[8] Sondel has gone to great lengths to explain how and why she now believes she applied to, and was rejected by, Republic in 1984, despite all her previous statements that she was rejected in December 1983. She claims that all these statements were based on the assumption that she filed the EEOC charge on March 12, 1984, instead of December 3, 1984. Her confusion apparently stems from the date on the charge form—"3/12/84." While this notation generally indicates March 12, 1984, on the EEOC form, directly above the space where the date is to be filled in, there are instructions to the person notarizing the form to fill out the date as "day, month, and year." *See* Zverinova. Aff., Exh. A, Sondel Depo., Exh. 5.

In support of the reasonableness of her confusion, Sondel submits the December 23, 1992 declaration of Marie Sawyer, the notary who signed and notarized the EEOC charge form, in which she retracts the statements she made in a November 12, 1992 affidavit, submitted by defendants, stating that her "best recollection is that this date means December 3, 1984...." Sawyer Affidavit, November, 12, 1992.

[9] The parties acknowledge that if the Court dismisses Sondel's claims against the defendants, any class of applicants denied employments as flight attendants on the basis of their height would go back only until 1990, and that the Section 1981 claims could possibly be voluntarily dismissed.

[10] Republic and Northwest have not waived their argument that the two year statute of limitations applies to this action, but for the purposes of this motion for summary judgment, they apply the longest limitations period in favor of Sondel.

[11] A facially neutral policy is one which is based on criteria which, on its face, does not distinguish among applicants or employees on the basis of race, gender, age, etc. A facially discriminatory policy, on the other hand, is one which is based on factors which, on their face, apply only to one race, gender, etc. Criteria based on pregnancy would be considered a facially discriminatory policy, while height and weight are facially neutral criteria.

[12] As of the date of this Memorandum Opinion and Order, plaintiffs have not made a motion for class certification. Therefore, the Court rejects Sondel's apparent argument that defendants' repeated denial of job opportunities to other flight attendant applicants under the height of 5' 2" (members of plaintiff's purported class) constitutes a continuing violation for the purposes of expanding the limitations period for filing her Section 1981 claim. *See Montgomery v. Atlanta Family Restaurants, Inc.,* 1990 U.S.Dist. Lexis 16709 (December 4, 1990) (court adopted magistrate judge's Report and Recommendation rejecting plaintiff's argument that discrimination suffered by other members of the purported class could constitute a continuing violation when the magistrate judge had not yet ruled on plaintiff's motion for class certification).

[13] There is no motion before the Court regarding the entry of a final judgment pursuant to Rule 54(b). Rather, the proposed Order submitted by defendants contains a provision to that effect. Thus, the Court does not view the issue as properly before it, and the "denial" contained herein is without a consideration of the "merits" of the issue.