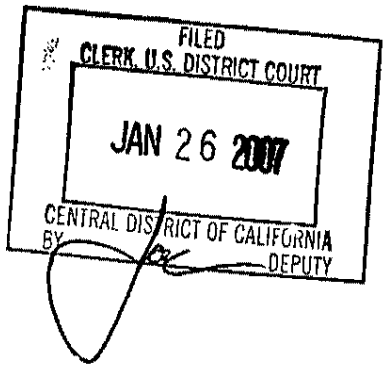

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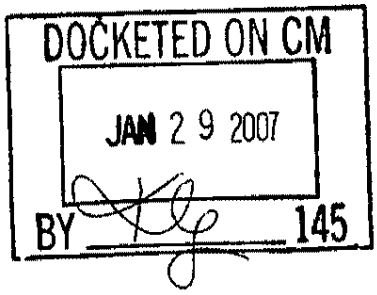
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. LAWRY'S RESTAURANTS, INC.; d/b/a LAWRY'S THE PRIME RIB, FIVE CROWNS, AND TAM O'SHANTER , Defendants.	Case No. CV 06-01963 DDP (PLAx) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [Motion filed on November 28, 2006]

This matter is before the Court on the defendant's motion for partial summary judgment on the grounds that the timely filing provision of Title VII bars recovery for any alleged injuries occurring before May 6, 2002. Both parties are engaged in settlement negotiations and agreed to submit this pure question of law to the Court to determine the scope of the action. After reviewing the parties' submissions, the Court is inclined to grant the motion in part and adopt the following order.



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I. BACKGROUND

The plaintiff Equal Employment Opportunity Commission (the "EEOC") brings suit under Section 706(f)(1) and 707 of Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. §§ 2000e-5(f)(1) & -6, against the defendant, Lawry's Restaurants d/b/a Lawry's The Prime Rib, Five Crowns, and Tam O'Shanter Inn ("Lawry's"), for unlawful employment discrimination on the basis of gender. See 42 U.S.C. § 2000e-2(a)(1).

Lawry's operates a chain of restaurants that originated in Beverly Hills, California in 1922. (Defendant's Statement of Uncontroverted Facts ("DUF") ¶¶ 5-7) Lawry's provides a distinctive tableside service maintained by three types of employees: "carvers," who slice meat at the table; "servers," who make salads at the table and provide other waitstaff services; and "helpers," who act primarily as bussers. (DUF ¶¶ 14-19, Mot. at 3.) Since Lawry's founding, it has maintained a policy of only hiring women to be servers. (DUF ¶ 10.) As justification, Lawry's cites the unique and historic "Harvey Girls" uniform worn by all servers. (DUF ¶¶ 11 & 12.)

Brandon Little was employed by Lawry's in Las Vegas, Nevada as a helper. (Lindsay Decl. Ex. 1 at 1 (Little's EEOC charge).) When he applied to be a server, Little's application was denied on the grounds he was not qualified, since he could not wear the "Harvey Girls" uniform skirt. (Lindsay Decl. Ex. 2 at 6 (Defendant's Position Statement to EEOC).) On March 2, 2003, Little filed a complaint with the Nevada Equal Rights Commission and the EEOC on behalf of himself and all similarly situated males denied or

discouraged from employment as servers in all Lawry's restaurants. (Lindsay Decl. Ex. 1.)

The EEOC, after investigation and conciliation efforts, brought this suit on behalf of Brandon Little and a class of male employees, alleging that since at least 1964, Lawry's impermissibly refused to hire males for the position of server. (Compl. ¶¶ 8 & 9.) After this Court rejected defendant's motion to dismiss, the parties reentered settlement negotiations, where a dispute arose as to the scope of actionable claims for back pay by the EEOC. (Notice of Mot.) Lawry's claims it cannot be held liable for any claims of back pay by anyone not hired and able to bring a claim within 300 days of Little's March 2, 2003 charge. (Mot. at 2.) The EEOC counters that it should be able to bring claims for back pay for any employee whose rights were violated from the passage of Title VII in 1964 to the present. (Opp. at 3.)

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Both parties have agreed to the pertinent material

facts in their pleadings, thus summary judgment should be granted to Lawry's if, as a matter of law, its position is correct and it is entitled to judgment .

B. EEOC's Power under Title VII

Title VII as amended gives the EEOC broad enforcement power to litigate in the public interest against private parties engaging in employment discrimination. See 42 U.S.C. § 2000e-5 & -6[1]; EEOC v. Waffle House, 534 U.S. 279, 286 (2002) (quoting Gen. Tel. Co. v. EEOC, 466 U.S. 318, 326. (1980)). After the EEOC is informed of potential discrimination by the filing of a charge, it must conduct an investigation to determine if reasonable cause exists and "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." EEOC v. Shell Oil Co., 466 U.S. 54, 88 (1984). If conciliation fails, the EEOC may bring suit in federal court seeking appropriate legal and equitable relief ranging from compensatory and punitive damages to injunctive, declaratory, and affirmative relief. §§ 1981a(a)(1), 2000e-5(g).

When Title VII was passed in 1964, individuals were granted the right to sue for individual actions under section 706 (now § 2000e-5) after exhausting an administrative remedy. The government, in the person of the Attorney General, was given in section 707 (now § 2000e-6) the power to sue parties engaged in a "pattern or practice of resistence to the full enjoyment of any of the rights" secured in Title VII by filing suit. When Congress

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[1] In the remainder of the Court's opinion, all statutory citations are to Title 42, United States Code.

amended the statute in 1972, the Attorney General's power was transferred to the EEOC. See Pub. L. No. 92-261 codified as amended § 2000e-6(c). Since 1972, the EEOC has been charged with protecting the public interest against employment discrimination by private parties.[2]

The Supreme Court has noted that when the EEOC brings suit, it "does not function simply as a vehicle for conducting litigation on behalf of private parties." Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977). Rather, the EEOC is charged to "vindicate the public interest in preventing employment discrimination." Gen. Tel., 446 U.S. at 326. That charge has led the Supreme Court to exempt the EEOC from individual statutes of limitation, Occidental Life, 432 U.S. at 368, and from the strictures of Federal Rule of Civil Procedure 23 for class certification, Gen. Tel., 446 U.S. at 324. More recently, the Supreme Court held that a private charging party's agreement to submit to arbitration could not devolve the EEOC of its ability to bring suit. Waffle House, 534 U.S. at 288.

While the EEOC's power is broad, it is not indefinite. Title VII's primary purpose is prophylactic; "it aims, chiefly, not to provide redress but to avoid harm." Kolstad v. Am. Dental Ass'n., 527 U.S. 526, 545 (1999) (internal quotations omitted). To that end, Congress has limited the scope of available monetary relief under Title VII. Under the Civil Rights Amendments of 1991, Pub. L. No. 102-166 codified as amended at § 1981a, damages are limited to $200,000 per injured party for employers with more than 200 but

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[2] By Executive Order No. 12068, (June 30, 1978) President Carter, using the power of the Reorganization Act, transferred the power to sue state and local governments for employment discrimination back to the Attorney General.

fewer than 500 employees. § 1981a(1)[3]. For back pay awards, Title VII limits the available scope for any party to "two years prior to the filing of the charge with the Commission." § 2000e-5(g)(1).

C. Back Pay Relief

Back pay relief involves complex inquiry and computation by the court consistent with the Supreme Court's seminal ruling in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The awarding of back pay supports Title VII's prophylactic objectives by deterring employers from engaging in unlawful practices and providing victims an incentive to bring charges. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). That objective is further supported by the two-year limitation contained in the statute, which courts have held applies to private litigants and the EEOC alike. See United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 933-34 (10th Cir. 1979); EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 540 (9th Cir. 1976) aff'd on other grounds 432 U.S. 355 (1977). Thus, at a very minimum, the plain language of section 2000e-5(g)(1) would limit the potential EEOC recovery to back pay for the prospective class to March 2, 2001, or two years before Little filed his charge.[4]

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[3] At argument, counsel for the EEOC noted that there is not a time restriction for the computation of compensatory and punitive damages. This appears to be correct; the two year limitation of § 2000e-5(g) by its own terms applies only to back pay.

[4] This language forecloses the EEOC's argument that it should be able to recover from the passage of Title VII in 1964.

D. Scope of Relief

Lawry's asks this Court to limit its potential back pay liability to 300 days prior to the filing of the Little charge. Lawry's cites to National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) for the proposition that a discrete act, such as a decision not to hire or not to promote, cannot be part of a "continuing violation," as claimed by the EEOC. Lawry's further cites to Ninth Circuit cases post-Morgan declining to impose back pay liability for actions occurring prior to the "effective limitation period." See Cherosky v. Henderson, 330 F.3d 1243, 1247-48 (9th Cir. 2003) ("[I]f the mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of unlawful employment policy could be untimely."); Lyons v. England, 307 F.3d 1092, 1107 (9th Cir. 2002) (noting if a plaintiff chose to bring discrete act suits individually, it would not establish a pattern granting liability outside the limitation period); Domingo v. New England Fish Co., 727 F.2d 1429, 1443 (9th Cir. 1984) ("It follows that, 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.").

Each of the cases cited by Lawry's is easily distinguishable with one simple fact: not one involves a suit by the EEOC in the public interest. As the Supreme Court recognized in Waffle House, the EEOC's claim is not "merely derivative" of the original charge. Waffle House, 534 U.S. at 297. Lawry's is, in essence, making the same argument that was unsuccessful in Waffle House: that the EEOC

should be prohibited from seeking victim-specific relief because of policies applied to the individual who made the initial EEOC charge.

Where the Court differs with Lawry's is on what constitutes an "injury" when the EEOC brings a pattern-or-practice claim. As the Supreme Court noted in Morgan itself, there is an important distinction between a private litigant and the EEOC when defining a "practice" for the purposes of individual suits. When defining what an unlawful employment "practice" was for an individual bringing suit in Morgan, the justices looked to Section 707's grant to the Attorney General of power to bring "pattern or practice" suits to note that practice was singular. Morgan, 536 U.S. at 111. This observation indicates that the Attorney General's authorization in section 707 is to bring suits for *patterns* of illegal behavior. Compare § 2000e-5(b) with § 2000e-6(a). The Attorney General's power to bring *pattern* suits is now vested in the EEOC. § 2000e-6(c). That is precisely what the EEOC is doing in this instance.

This formulation of the case is entirely consistent with the Supreme Court's ruling in Bazemore v. Friday, 487 U.S. 386 (1986). In Bazemore, the Supreme Court invalidated a discriminatory salary structure that paid black employees less than white employees. The Court noted that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." Id. at 395. This definition of the injury was made in response to the defendant's argument that the policy was not illegal since it was enacted prior to Title VII. Id. at 394. The Court rejected that argument, instead noting the wrong accrued

each time the policy was implemented. In this case, the wrong by Lawry's accrues each time and every day a male is given different responsibilities simply because of his gender.

While Lawry's does cite to favorable opinions involving EEOC suits from other district courts, namely EEOC v. Optical Cable Corp., 169 F. Supp. 2d 539 (W.D. Va. 2001) and the unpublished decision in EEOC v. Custom Companies, Inc., No. 02 C 3768, 2004 WL 765891 (Apr. 7, 2001 N.D. Ill.), those opinions are not binding and the Court respectfully disagrees with those opinions. Rather, the Court agrees with the disposition in EEOC v. Autozone, Inc., 258 F. Supp. 2d 822, 832 (W.D. Tenn. 2003), which held that the EEOC was empowered to collect back pay to the two-year limit of § 2000e-5(g)

Thus, the only clear limitation on the scope of back pay relief available to the EEOC is the unambiguous limitation found in the statute itself. No party may collect back pay more than two years prior to the initial charge. § 2000e-5(g)(1). This Court is obliged to give full effect to all words used by Congress where possible. E.g., Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1175 (9th Cir. 2006). Were the EEOC limited to collecting back pay awards only for actions occurring within the 300 days (or 180 days in non-deferral states), that two-year limitation would be rendered a nullity.

D. Class Membership

Thus, the question remaining is whether the class of individuals for which the EEOC may collect backpay awards must be limited, as Lawry's argues, to those injured within the 300 days

preceding Little's charge, that is those men injured after May 6, 2002.[5] The Court here agrees with Lawry's. The rule established by the Ninth Circuit is clear that, in order to be a member of the class, a putative member must demonstrate some injury within the 300 day filing period.

It is uncontested that Lawry's had an openly discriminatory policy of refusing to hire males to server positions in effect at least since 1964. This pattern of illegal behavior serves as a consistent and ongoing injury against the male employees of Lawry's every day it remains in effect. Each day Brandon Little walked into work, he knew he was unable to move up from the helper to the server position. His application for the job would have been futile. Though interested, he was deterred from applying every day he entered the restaurant and was reminded of Lawry's discriminatory policies.

This situation is completely opposite what the Supreme Court handled in Morgan. There, the defendant complained of sporadic discrimination by his supervisors that prevented his being promoted and provided for a hostile work environment. This situation also different from Cherosky: the Court there admitted no policy existed. Thus to the extent the case speaks to policies, that language is dicta.

This situation is much like the one in Teamsters, where the Supreme Court held that the company's assertion that a person had not actually applied for the job in the face of a discriminatory

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[5] Though Lawry's papers indicate the date should be May 5, 2002, the Court agrees with the EEOC that the 300th day before March 2, 2003 is May 6, 2002.

policy was not a bar to recovery. Teamsters, 431 U.S. at 365. Such an application would be a "futile gesture" or "vain gesture in light of employer discrimination." Id. at 366. To remedy, the Court allowed recovery for an employee or applicant who can establish a prima facie case by showing both that he had a real and present interest in the job and that he refrained from applying based on a justifiable belief that such an application was futile.

The case most on point with the present is EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002). In Joe's, the Eleventh Circuit post-Morgan dealt with an implicit policy at a famous Miami restaurant that only hired men to be servers. The court faced a similar situation faced by this Court today: how to limit the appropriate scope of back pay and class membership. The court in Joe's held that the "futile gesture" doctrine both survived Morgan and would satisfy the "injury" requirement within the filing period. 296 F.3d at 1274. A similar rule makes sense here. Lawry's actively discouraged applications with its discriminatory policies. Lawry's should not be rewarded for having an overt policy by being granted some degree of amnesty against those who did not file an actual application within the 300-day filing period. Thus, where the EEOC can show a male employee or applicant had both a real and present interest in the position of server and that he was deterred from applying by Lawry's discriminatory policies after May 6, 2001, that man's claim is timely. Cf. Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1136 (9th Cir. 2002) (applying the "futile gesture" doctrine from Title VII jurisprudence to the Americans with Disabilities Act);

The Eleventh Circuit in Joe's limited back pay recovery to the time of a "roll call," or annual hiring time at which Joe's Stone Crabs hired all of its servers, that fell in the 300 day period. Lawry's has not presented evidence of any such a system. Accordingly, the maximum limitation on back pay the EEOC could recover, as noted above, is two years before the filing of the charge, or March 2, 2001.

III. Conclusion

Accordingly, the Court is inclined to grant defendant's motion for partial summary judgment to the extent that the following restrictions are made:

1) The class represented by the EEOC is limited to those individuals the EEOC can show 1) had a real and present interest in being a server and 2) either were denied that job or refrained from applying due to futility during the 300-day statutory filing period.

2) From that class, the EEOC may collect back pay for the two years preceding the filing of the initial charge.

3) From that class, the EEOC may collect compensatory and punitive damages to the extent they are consistent with applicable law.

IT IS SO ORDERED.

Dated: 1-26-07

DEAN D. PREGERSON
United States District Judge