

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

MARION WATERS, et al.,	]	
	]	
Plaintiffs,	]	
	]	
vs.	]	2:07-CV-00394-LSC
	]	
COOK'S PEST CONTROL, INC.,	]	
	]	
Defendant.	]	

MEMORANDUM OF OPINION AND ORDER

I. Introduction.

The Court has for consideration Defendant's Motion to Dismiss Plaintiff's Original Complaint (Doc. 8) and Motion to Dismiss Plaintiff's Title VII Claims in First Amended Complaint (Doc. 10); both motions were filed on August 8, 2007. On September 10, 2007, Defendant refiled its Motion to Dismiss Plaintiff's Original Complaint as a procedural precaution. (Doc. 19.) Because the Court had not ruled on Defendant's first motion to dismiss the original complaint, Defendant's refiled motion is redundant and for the Court's purposes, will be considered MOOT. The initial motions to dismiss have been briefed by both parties and are ripe for decision. Upon full

consideration of the arguments submitted, Defendant's motions to dismiss are DENIED.

## II. Background.

Plaintiff Marion Waters ("Waters") initiated this action against the defendant, Cook's Pest Control, Inc., on February 28, 2007. His complaint ("Original Complaint") included class allegations under Title VII of the Civil Rights Act of 1964, 20 U.S.C. § 2000(e), *et seq.* ("Title VII"), and 42 U.S.C. § 1981 ("§ 1981"). (Doc. 1.) On July 11, 2007, this Court entered an Order requiring the plaintiff to show cause within eleven (11) days why his case should not be dismissed for failure to perfect service of process. (Doc. 2.) On July 17, 2007, an Amended Complaint nearly identical to the Original Complaint was filed with the Court, except the Amended Complaint added a new plaintiff: Christian Daniel Dotson. (Doc. 3.) The Amended Complaint was served on the defendant on July 19, 2007, or 141 days after the inception of this action. Plaintiffs filed a response to the Court's Show Cause Order on July 23, 2007. (Doc. 6.)

Defendant has not raised an objection *per se* to Plaintiffs' service of their Amended Complaint on July 19, 2007. Rather, on August 8, 2007,

Defendant filed a motion to dismiss the Original Complaint for lack of service, and a motion to dismiss the Title VII claims in Plaintiffs' Amended Complaint because the Amended Complaint was filed over ninety (90) days after Waters' receipt of his Notice of Right to Sue from the Equal Employment Opportunity Commission ("EEOC"). (Docs. 8, 10.) On August 21, 2007, Plaintiffs effected service of the Original Complaint.

### III. Analysis.

Defendant argues that this Court should dismiss Waters' Original Complaint for untimely service and strike Plaintiffs' Title VII claims in their Amended Complaint because they do not "relate back" to the filing of the Original Complaint.

Fed. R. Civ. P. 4(m) "grants discretion to the district court to extend the time for service of process even in the absence of a showing of good cause." *Horenkamp v. Van Winkle & Co., Inc.*, 402 F.3d 1129, 1132 (11th Cir. 2005). Plaintiffs' counsel's explanation to this Court regarding the tardiness of service of process consists of a series of mistakes and miscommunications by several good attorneys at respectable law firms; in short, Plaintiffs' counsel dropped the ball. Plaintiffs, however, filed their Amended

Complaint<sup>1</sup> shortly after the issuance of this Court's Show Cause Order, and assured the Court both that they will actively pursue their claims and confusion in case management is no longer an issue.

Moreover, in this Circuit it is established that the extension of time for service "may be justified . . . if the applicable statute of limitations would bar the refiled action." *Horenkamp*, 402 F.3d at 1132. Waters' Original Complaint was timely filed on the ninetieth day following the EEOC's issuance of a Notice of Right to Sue. If this Court dismisses the Original Complaint without prejudice, Waters' Title VII claims will be barred. Because a large portion of Plaintiffs' claims center around disparate impact allegations, dismissal of his Title VII claims could severely limit Waters' cause of action.

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<sup>1</sup>Plaintiffs believed that service of the Amended Complaint alone—without service of the Original Complaint—was sufficient to preserve their claims, but requested "ten days after the first responsive pleading would be due from Cook's" to "allow re-service if necessary to cure any defects." (Doc. 6 at 6.) Although Plaintiffs miscalculated that date in their submission as August 18, 2007 (a Saturday), "ten days" from August 8, 2007, properly counted under Fed. R. Civ. P. 6 as ten business days, is August 22, 2007. The Original Complaint was served on August 21, 2007.

The Court also notes that Defendant does not dispute that it had notice of this lawsuit, despite the untimely service, and was aware of the types of claims being asserted against it at least as early as April 2007.

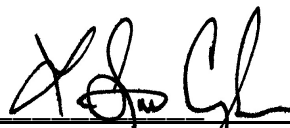
Defendant is correct that, given the reasons listed above, this Court is not *required* to extend the time for service of process in this action. However, the Court is convinced that it should indeed exercise its discretion under these particular circumstances and allow Plaintiffs' cause to proceed in full.

The Court also finds that Defendant's arguments and case citations regarding the "relation back" doctrine are inapplicable; Title VII claims were asserted in the Original Complaint, the late service of which is being allowed at the discretion of this Court.

IV. Conclusion.

Therefore, as outlined above, Defendant's motions to dismiss are DENIED.

Done this 28th day of January 2008.



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L. SCOTT COOGLER  
UNITED STATES DISTRICT JUDGE

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