

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, et al.,)
)
 Plaintiffs,)
)
 v.) Civil No. 00-953 (RWR/DAR)
)
)
 MICHAEL CHERTOFF, Secretary)
 U.S. Department of Homeland)
 Security,)
)
 Defendant.)
)
 _____)

**DEFENDANT'S MOTION FOR PARTIAL DISMISSAL
AND/OR FOR PARTIAL SUMMARY JUDGMENT OF AMENDED COMPLAINT**

Defendant Michael Chertoff, Secretary, United States Department of Homeland Security, respectfully moves, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss in part the Amended Complaint on the ground that this Court lacks jurisdiction over certain of plaintiffs' claims and certain allegations fail to state a claim.

In the alternative, this Court should enter partial summary judgment in favor of defendant, pursuant to Fed. R. Civ. P. 56, because there is no genuine issue as to any material fact and defendant is entitled to partial judgment as a matter of law. In support of this motion, the Court is respectfully referred to the accompanying statement of material facts not in dispute, memorandum of points and authorities, declarations and exhibits. A proposed order consistent with the relief sought is also

attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR PARTIAL DISMISSAL AND/OR FOR
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INTRODUCTION

_____ In this case against the United States Secret Service alleging discrimination based on race, concerning the promotions of Special Agents [SAs], plaintiffs have filed a First Amended and Supplemental Class Complaint ["Amended Complaint" or "Am. Compl."] seeking to convert the case into a class action. With the exception of individual and purported class allegations concerning specific 1999 non-promotion claims brought by Plaintiffs Moore and Turner, the remaining claims in the Amended Complaint should be dismissed or summary judgment granted to defendant. Certain individual and purported class claims have been dismissed previously by this Court. Other claims raised were never properly exhausted administratively, were withdrawn, and/or fail to state a claim on which relief can be granted.

What is more, despite extensive discovery, plaintiffs cannot demonstrate a prima facie case for a pattern and practice claim in regard to the alleged failure to promote. There is no statistically significant difference between African American SAs and non-African American SAs in regard to selection for promotion to the GS-14 level. Moreover, the number of African American SAs who bid for, and were selected for, promotion during the relevant time period is 47 out of 52 candidates. Many of the African American GS-14 selectees, including Plaintiffs Moore and Harris, have been promoted again to GS-15 positions. Additionally, a pattern and practice claim cannot be raised when plaintiffs failed to timely exhaust their claims for non-promotion, given the notice they had of these discrete act decisions. Accordingly, summary judgment for defendant is appropriate on plaintiffs' pattern and practice allegations.

FACTUAL BACKGROUND

Defendant incorporates herein the attached statement of material facts which are not in dispute.

ARGUMENT

I. Previously Dismissed Claims May not be Raised Again.

____ Many of the claims in the Amended Complaint [Docket No. 322], have already been dismissed by this Court or have been precluded by this Court's prior rulings in the case.

(A) Previously Dismissed Individual Claims

In the October 24, 2004 decision [2004 Mem.], this Court dismissed certain previously pled and unexhausted individual claims. Id. at 26. More recently, this Court noted that "plaintiffs confirmed at the February 22, 2006, hearing ... that they do not seek to revive those dismissed individual claims here." March 30, 2006 decision [2006 Mem.] at 8, n.1. Yet inexplicably, these dismissed individual claims reappear in the Amended Complaint. Compare the original complaint [Compl.] with the Amended Complaint as follows: Compl. ¶¶ 55 with Am. Compl. ¶ 101; Compl. ¶¶ 66-67 with Am. Compl. ¶¶ 67-68; Compl. ¶ 71 with Am. Compl. ¶ 69; Compl. ¶ 74 with Am. Compl. ¶ 70; Compl. ¶ 82 with Am. Compl. ¶ 98; Compl. ¶ 83 with Am. Compl. ¶ 91; Compl. ¶¶ 86-87 with Am. Compl. ¶¶ 93-94; Compl. ¶ 88 with Am. Compl. ¶ 92; Compl. ¶ 89 with Am. Compl. ¶ 99; Compl. ¶ 90 with Am. Compl. ¶ 95; Compl. ¶ 92 with Am. Compl. ¶ 100; Compl. ¶ 95 with Am. Compl. ¶ 85; Compl. ¶¶ 96-97 with Am. Compl. ¶¶ 86-87; and Compl. ¶ 104 with Am. Compl. ¶ 106. Plaintiffs should be held to their word that they do not seek to revive claims dismissed by this Court. Thus, the individual claims in the Amended Complaint identified above should again be stricken.

(B) Pre-1999 Individual and Class Claims

This Court has held that no pre-1999 claims are exhausted, and thus such claims may not be pled. 2006 Mem. at 15. Many

such pre-1999 claims, however, are present in the Amended Complaint. Id. at ¶ 60 (1992 suspension); ¶ 61 (1997 Inspection); ¶ 64 (1995 suspension); ¶ 65 (1991 suspension); ¶¶ 84-85 (1987 hiring claim); ¶ 86 (1989 hiring claim); ¶¶ 87-88 (1989 testing/hiring claim); ¶ 89 (1984 hiring claim); ¶ 90 (1983 hiring claim); ¶ 91 (1995 hiring claim); ¶ 96 (1986 undercover assignment claim); ¶ 97 (1984 undercover assignment claim); ¶ 98 (1984 comment regarding Moore and undercover work); ¶ 99 (1987-94 undercover assignment claims); ¶ 100 (1983 undercover assignment claim); and ¶ 105 (1984-1989 awards claim). As this Court has already ruled that pre-1999 claims are untimely and unexhausted, all such individual and purported class claims should be dismissed.

(C) Post May 3, 2000 Claims

The Amended Complaint also contains many untimely, unexhausted claims which post-date May 3, 2000, when suit was first filed. All such claims should be dismissed.

The Equal Employment Opportunity (EEO) Counseling contact concerning the claims of Plaintiffs Moore and Turner occurred in 1999 and January of 2000 (Exhs. 4, 11 and 12, block 4); the formal complaint was filed in February/March of 2000 (Exh. 7), and this case was filed on May 3, 2000. An EEO Counselor contact in 1999/2000, or the filing of an administrative complaint in 2000, could not possibly have put defendant on notice of

complaints that would occur years thereafter.

For example, in the Amended Complaint, Plaintiff Simms claims she was discriminated against in 2005 when she was "asked" to do undercover work, id. at ¶ 102, and in regard to her entry level grade in 2002, id. at ¶ 93. Plaintiff Robertson claims she was discriminated against when she was placed on administrative leave on or about 2002. Id. at ¶ 63. Neither plaintiff exhausted such claims administratively. Such unrelated and far later occurring incidents should be dismissed, given that the administrative process ended on May 3, 2000, the day this case was filed. To allow these claims now would circumvent the administrative exhaustion requirement entirely and deprive defendant of timely notice and/or an opportunity to resolve the claims administratively.¹ See Park v. Howard University, 71 F.3d 904, 907 (D.C. Cir. 1995) (The exhaustion requirement "serves the important purpose of giving the charged party notice of the claim"); see also Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) (exhaustion requirement "gives federal agencies an opportunity to handle matters internally wherever possible.").

Thus, any claims that post-date May 3, 2000 should be dismissed for failure to timely exhaust administrative remedies.

¹ As discussed below, the claims of Plaintiffs Simms and Robinson were in fact resolved years ago. See infra at 7-8 and 37-39; see also Exh. 1 ¶¶ 73 -76 & Attach. G; Exh. 16 ¶ 4 and Attach. A.

II. The Court Lacks Jurisdiction over Plaintiffs who did not Exhaust their Claims.

In the Amended Complaint, ten individuals seek to bring claims before this Court as individual, and/or class plaintiffs. Id. at ¶ 1. Yet this Court has already ruled that only those individuals who have timely exhausted an administrative complaint, or whose claims are vicariously exhausted through the claim of another, may pursue claims as a plaintiff. 2004 Mem. at 2. With respect to the current ten plaintiffs, the only administratively exhausted individual claims are those of Plaintiffs Turner, Moore and Harris, and the only administratively exhausted potential class claim is that of Plaintiffs Turner and Moore. Thus, the claims of the other seven plaintiffs must all be dismissed unless their claims are vicariously exhausted, or potentially subsumed into the class claim allegations of Plaintiffs Moore or Turner.

(A) Standard for Administrative Exhaustion

For jurisdiction to exist in a Title VII claim a plaintiff, whether individual or purported class agent, must have exhausted his/her administrative remedies. 2004 Mem. at 16, citing Love v. Pullman Co., 404 U.S. 522 (1972). First, there must be contact with an EEO Counselor within forty-five days of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1) (individual claims); 29 C.F.R. 1614.204(b) (class complaint). Second, a formal administrative complaint must be filed within fifteen days

after receipt of a notice of right to file. 29 C.F.R. § 1614.106(c) (individual claims); 29 C.F.R. § 1614.204(c) (2) (class claims). Third, at least 180 days must have passed since the filing of the formal administrative complaint. 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.407(b); 2004 Mem. at 16-17.

(B) Plaintiffs Rooks, Hendrix, Tyler, Simms and Ivery

Plaintiffs Rooks, Hendrix, Tyler, Simms and Ivery have never exhausted an administrative complaint of discrimination, whether an individual or class complaint, and plaintiffs do not appear to claim otherwise. Am. Compl., Section II, Jurisdiction, Exhaustion of Administrative Remedies, and tolling; 2004 Mem. at 9 and 10; Exh. 16, ¶¶ 3, 5 and 9. Thus, the individual claims of these plaintiffs, with the exception of Plaintiff Ivery's post 1999 non-selection for promotion claims,² must be dismissed as unexhausted, and no class claim may form around their claims.

(C) Plaintiff Robertson

Plaintiff Robertson contacted an EEO Counselor on or about January 21, 2003, alleging discrimination claims identical to those in the Amended Complaint. Compare Exh. 16 ¶ 4 & Attach. A with Am. Compl. ¶ 63. However, Plaintiff Robertson "withdrew" her EEO complaint on February 27, 2003. Exh. 16 ¶ 4 and Attach.

²This Court found that Plaintiff Ivery's failure to promote claims might be vicariously exhausted through Plaintiff Moore's claim, and that decision on that dismissal should await further development of the record. 2004 Mem. at 26, and n.6. See infra at 21-27.

A. Thus, Plaintiff Robertson's claim in paragraph 63 of the Amended Complaint must be dismissed as unexhausted and withdrawn.

(D) Plaintiff Summerour

This Court has already dismissed all of Plaintiff Summerour's claims, other than non-selection for promotion, as untimely and unexhausted. 2004 Mem. at 8, 26 and 28. These claims, however, have resurfaced in the Amended Complaint, along with new individual claims and a purported set of class claims. Am. Compl. ¶¶ 60, 70-73, 86 and 96. Plaintiffs allege that all these claims were administratively exhausted through the administrative Second Amended Class Action Complaint. Am. Compl. ¶ 6. On the contrary, Plaintiff Summerour never timely exhausted an administrative complaint of any kind.

Plaintiff Summerour first contacted an EEO Counselor on January 31, 2000. Exh. 15, block. The EEO Counseling Report indicates that Plaintiff Summerour complained that she had been discriminated against when she: (1) received a score of 49 out of 50 possible points in her First Level Evaluation on September 7, 1999; and (2) was not selected for a January 30, 2000 reassignment from a GS-13 position in the Presidential Protective Division (PPD), Office of Protective Operations, to a GS-13 position in the Office of the Assistant Director, Investigations. Exh. 15, tab 1, page 1 and tab G, page 7; see also Exh. 14 at 45, 110, 129 and 193 (no EEO contact concerning 1999 or 2000 MPP

score, suspension, or any matter relating to hiring).

As discussed above, contact with an EEO Counselor must be made within forty-five days of an alleged discriminatory event. See supra at 7. Thus, Plaintiff Summerour's January 31, 2000 contact with an EEO Counselor concerning her September 7, 1999 First Level Evaluation was untimely, and that claim should be dismissed. Exh. 8, p. 45.

The January 31, 2000 EEO Counselor contact, however, was timely as to Plaintiff Summerour's failure to reassign claim. Upon completion of EEO Counseling, Plaintiff Summerour was advised in writing of her right to file a discrimination complaint within fifteen days of the written notice. Exh. 7, tab E, p. 2. However, Plaintiff Summerour failed to do so. Rather, she simply joined Plaintiffs Turner and Moore in their Second Administrative Class Action Complaint. Exh. 8, ¶¶ 43-50.

Noticeably absent from the administrative Second Amended Class Action complaint is any allegation by Plaintiff Summerour in regard to the January 30, 2000 non-reassignment, notwithstanding the fact that exhaustion of an administrative complaint requires **both** timely contact with an EEO Counselor and the filing of a timely formal complaint. 2004 Mem. at 16; 29 C.F.R. §§ 1614.105(a)(1) and 1614.106(b).³ Thus, Plaintiff Summerour

³ Oddly, Plaintiff Summerour alleges in the administrative second Class Action Complaint the exact opposite of what she told
(continued...)

failed to pursue her only timely EEO Counselor contact claim and has failed to administratively exhaust any claim.

Plaintiff Summerour's claims, other than those of non-promotion (addressed infra, at 21-27) must be dismissed.

(D) Plaintiff Harris

(1) GS-14 Claims

Plaintiff Harris alleges discrimination in regard to non-selection to the GS-14 level from January 1999 through October 1999. Am. Compl. ¶ 51. Plaintiff Harris contacted an EEO Counselor around October 5, 1999, alleging discrimination in regard to a non-selection to the GS-14 level. Exh. 16 ¶ 6. He, however, withdrew this claim. Id. Plaintiff Harris was promoted in October of 1999. Exh. 1 ¶ 65; Am. Compl. ¶ 51. He thus never exhausted his non-selection to the GS-14 level promotion claim, and that matter should not be revived here.

(2) GS-15 claims

Plaintiff Harris exhausted an individual claim of discrimination concerning a number of non-promotions to the GS-15 level in 2004. Exhs. 16 ¶ 6, 7 & Attachs C and D. Yet here Plaintiff Harris seeks to raise additional GS-15 non-promotion

³(...continued)
the EEO Counselor. To the EEO Counselor, she complained about the non-receipt of a supposedly career enhancing lateral reassignment. In the administrative Second Amended Class Action Complaint, she alleged that she had been discriminated against with lateral assignments that had slowed her path to promotion. Compare Exh. 15 tab A with Exh. 8 ¶ 47.

claims which he did not exhaust. Am. Compl. ¶¶ 51-54.

Specifically, Plaintiff Harris seeks to raise non-promotions which occurred more than forty-five days prior to his EEO Counselor contact. Exh. 16, Attachs. C and D. These claims were untimely when EEO Counselor contact was made and thus could not be exhausted. Nothing has changed.

Through its decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Supreme Court held:

discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.

Id. at 113. Further, in defining a "discrete act," the Supreme Court identified "acts such as termination, failure to promote, denial of transfer, or refusal to hire." Id. at 114. Thus, since Morgan, each alleged discrete incident of discrimination constitutes its own "unlawful employment practice for which administrative remedies must be exhausted.'" Martinez v. Potter, 347 F.2d 1208, (10th Cir. 2003) citing Morgan at 110-113. Under Morgan, discrete acts of discrimination or retaliation that occur outside the statutory time period are not actionable if time barred, even when they are related to acts alleged in a timely filed suit. Id., 536 U.S. at 108.

The additional claims which Plaintiff Harris seeks to bring concerning GS-15 non-promotions, which pre-date by more than forty-five days his EEO Counselor contact, are claims of failure

to promote which were not exhausted. Under Morgan, they may not come before this Court.

Further, Plaintiff Harris did not raise a class claim in the administrative process. In fact, when specifically asked whether he was seeking to file a class claim, Plaintiff Harris advised that he was not. Exh. 16 ¶ 8 & Attach. E. Thus, Plaintiff Harris has failed to exhaust any administrative class claim, and such administrative class claim must be dismissed.

**III. The Unexhausted Claims of Plaintiffs
Moore and Turner should be Dismissed.**

Plaintiffs Moore and Turner each exhausted only an individual and potential class claim of non-promotion in regard to vacancies 99-089, 99-123, and 99-177. Nonetheless, Plaintiffs Moore and Turner raise other non-promotions (Am. Compl. ¶¶ 28 and 31), and matters completely unrelated to their exhausted non-promotion claim. The additional claims should be dismissed.

(A) Plaintiff Moore

(1) Unexhausted non-promotion claims

Plaintiff Moore exhausted a single non-promotion to the GS-14 level, vacancy number 99-089. Exh. 6. In fact, in the administrative process, Plaintiff Moore specifically withdrew all other promotion claims which he might have sought to bring. Exh. 5 ¶¶ 5-9 & attached notes to that declaration.

Upon receipt of his formal administrative complaint, the EEO

Specialist assigned to Plaintiff Moore's case asked him if he were seeking to contest other non-promotions beyond vacancy 99-089. Id. Plaintiff Moore said that he was not. Id. ¶ 7.

By letter dated November 18, 1999, Plaintiff Moore and his attorney were advised that the issue accepted for investigation was whether Plaintiff Moore was discriminated against when:

On July 16, 1999 the complainant was not selected for the position of Assistant to the Special Agent in Charge, GS-1811-14, announced under vacancy announcement #99-089.

The letter further stated:

If you disagree with the issue(s), please notify me in writing within five days of receipt of this letter. Please be clear and concise in your response. If no response is received, I will assume that you agree with the issue(s) and will proceed with the investigation of the complaint.

Id. ¶ 7 and 9; and Exh. 6. Plaintiff Moore did not disagree with the accepted issues.

Yet now, years later, Plaintiff Moore seeks to challenge his non-promotion to all positions for which he bid for promotion from 1999 through 2002, the date of his promotion to the GS-14 level. Am. Compl. ¶ 28. A clearer case of "gotcha" is hard to imagine. Having led defendant to believe that no other non-promotion claims were at issue, when Plaintiff Moore withdrew any such claims at the time of his administrative complaint, Exhs. 5 ¶ 7; Exh. 6, Plaintiff Moore now seeks to pursue those abandoned claims. This should not be permitted, and the unexhausted non-

promotion claims should be dismissed.⁴ See Morgan, 536 U.S. at 114 (failure to promote claims must be individually exhausted).

(2) Plaintiff Moore's reassignment claim

Plaintiff Moore now alleges that he was discriminated against when he was reassigned to Dallas in or about October 1999. Exh. 6; Am. Compl. ¶ 69. However, this claim was not raised in the original complaint in this case filed on May 3, 2000. Thus, such a claim should be considered abandoned.

More than six years have now passed since the filing of the complaint in this case, so even if the claim had been properly exhausted plaintiff Moore failed to timely raise it in the litigation. Moreover, a motion to dismiss has been filed and granted in part. Discovery has been ongoing and has been actively pursued since December of 2004. Defendant has submitted discovery and provided voluminous responses to several sets of interrogatory, admission and document requests. Defendant has provided plaintiffs with access to more than 10,000 pages of hard copy and electronic documents, and many Motions to Compel and Motions for Protective Orders have been filed and decided. None of this concerned Plaintiff Moore's transfer to Dallas.

It would be unfair and prejudicial to defendant to allow

⁴ Additionally, any claims concerning non-promotions which occurred more than forty-five days prior to Plaintiff Moore's first contact with an EEO Counselor on August 16, 1999, were untimely at the time of that contact, and remain untimely now.

plaintiffs at this late stage in the process to include this long forgotten and abandoned claim. There can be no excuse for the dilatory conduct of the plaintiffs in failing to bring this claim in the years past, and none has been offered. Accord Forman v. Davis, 371 U.S. 178 (1962) (leave to amend need not be granted where there has been undue delay, bad faith, dilatory tactics); Doe v. McMillan, 566 F.2d 713 (D.C. Cir. 1977) (thirty-eight months between original filing and first amended filing was too long a delay); Hayes v. New England Millwork Distributers, 602 F.2d 15 (1st Cir. 1979) ("where, as here, considerable period of time has passed between the filing of the complaint and the motion to amend, courts have placed the burden upon the movant to show some "valid reason for his neglect and delay."").

It is simply too late and prejudicial to now revive Plaintiff Moore's abandoned complaint of discriminatory transfer, and the claim should be dismissed.

(B) Plaintiff Turner's GS-14 non-promotion.

Plaintiff Turner made timely contact with an EEO Counselor in regard to failure to promote to the GS-14 level for vacancies number 99-123 and 99-177. Nonetheless, like Plaintiff Moore, Plaintiff Turner now raises claims about all his non-promotions from 1999 to October 2000, the date of his promotion to the GS-14 level, even though he never sought EEO counseling regarding these claims. Am. Compl. ¶ 31. As with Plaintiff Moore, these non-

promotion claims are discrete act claims which Plaintiff Turner may not now raise, as they are untimely and unexhausted. Further, any non-promotion claims which occurred prior to September 11, 1999, forty-five days before Plaintiff Turner contacted an EEO Counselor, cannot be said to be timely. Thus, all such additional non-promotion claims must be dismissed.

(C) Plaintiffs Moore's and Turner's other unexhausted claims

Plaintiffs Moore and Turner also seek to raise new, stale and unrelated claims. For Plaintiff Moore these include an allegation that during his first five years of employment with the Secret Service, in the early 1980's, he did not receive awards and bonuses, Am. Compl. ¶ 105, and that also in the 1980's while assigned to the Miami Field Office he was required to complete undercover work, *id.* at ¶ 98. For Plaintiff Turner an additional claim is that when he was hired as a Special Agent in the early 1980s, he was hired as a GS-5. *Id.* at ¶ 89. These all are previously dismissed and/or pre-1999 claims. 2006 Mem. at 15; 2004 Mem. at 7 and 25 (Turner's hiring claim). Thus, they should be dismissed.

Additionally, neither Plaintiffs Moore nor Turner ever contacted an EEO Counselor in regard to these matters. Their first contact with an EEO Counselor was in 1999, concerning non-promotions in 1999. Exhs. 4 and 11, block 4. Matters which happened decades ago and do not even relate to untimely claims

were not exhausted by those counselor contacts; they should be dismissed.

**IV Plaintiffs Turner and Moore Lack Standing to
Bring Claims that do not Involve Non-Promotion.**

Standing to invoke the jurisdiction of the federal courts requires a plaintiff to show that he "(1) has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)).

Similarly, in the case of a putative class complaint, the Supreme Court foreclosed the concept of an "across the board" class action in Title VII cases. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) and East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977). Both Falcon and Rodriguez clearly established that the "class representative [must] be part of the class and possess the same interest and suffer the same injury as the class members." Falcon, 457 U.S. at 156; Rodriguez, 431 U.S. at 403. Under Falcon and Rodriguez, it is well settled that an individual plaintiff who seeks to bring a class claim of discrimination **must**

make a factual showing that he was harmed by the practices complained of in the class claim portion of the complaint. See generally, *Holsey v. Armour and Co.*, 743 F.2d 199 (4th Cir. 1984) cert. denied, 470 U.S. 1028 (1985).

In the Amended Complaint plaintiffs raise claims of discrimination in regard to the Merit Promotion Plan (MPP) scoring process, and the "building blocks of promotion," including personnel matters such as discipline, assignments, awards and bonuses, hiring (entry level grade at time of hiring) and the TEA. Am. Compl. ¶¶ 16-20. Plaintiffs Moore and Turner, however, have suffered no harm in any of these areas.

In their administrative Second Amended Class Action Complaint, Plaintiffs Moore and Turner only complained of non-selection for promotion to the GS-14 level. According to Plaintiffs Moore and Turner, they each had extraordinarily high promotion (MPP) scores, each was promoted rapidly through the early years of their careers, and each received choice assignments and positions on which they bid and which they believed would further qualify them for promotion. Plaintiff Moore was selected for and served on the PPD. Plaintiff Turner served on the Vice Presidential Protective Division (VPPD). Plaintiff Moore was a Number 1 Whip on the PPD, an assignment he considered to be very prestigious and career enhancing. Plaintiff Turner was a Lead Training Instructor on VPPD and the

Resident Agent for the Vice President's Residence. Each received awards and bonuses for the work they accomplished. Each served as an acting supervisor. Neither had ever been the subject of a disciplinary action. Exh. 8 ¶¶ 28-33 and 36-39; Exh. 9 pp. 54-55; Exh. 13, p. 41.

Thus, these two plaintiffs have no standing to complain on behalf of others of harm in the "building blocks of promotion" the MPP scoring process, or in any other area. Changing any of these matters would not affect Plaintiff Moore's or Turner's non-selection for promotion claims. Thus, Plaintiffs Moore and Turner, the class agents who exhausted 1999 non-promotion claims, have no standing to plead a claim of discrimination in the MPP process, the building blocks of promotion, or any matter beyond the 1999 non-promotion to the GS-14 level. They may not act as class representatives for a class of individuals who are said to have been discriminated against in such matters.

Because there are no other plaintiffs who exhausted claims in these areas, the purported class claims concerning the MPP scoring process, the building blocks of promotion, and the other post-1999 allegations should be dismissed.

V. Claims which are not Vicariously Exhausted and/or like or Related.

Plaintiffs Moore and Turner raise three properly exhausted claims of failure to promote, which they seek to extend into a potential class. In this regard, plaintiffs have previously

suggested, and this Court has considered, two related mechanisms to bring additional claims under the exhaustion umbrella of Plaintiffs Moore and/or Turner.

First, this Court has previously found that some claims of non-selection for promotion could be vicariously exhausted through the non-promotion claims of Plaintiff Moore. This Court found that these non-promotion claims remained viable pending further development of the record. 2004 Mem. at 26, n.6.

Second, this Court found that "building block" claims could be said to be sufficiently "like" or "related to" the non-selection for promotion class claim of Plaintiff Turner to allow those claims to be pled under the theory of vicarious exhaustion. 2006 Mem. at 12-14.

Substantial discovery having now occurred, and the "building block" claims having now been pled, defendant submits that all claims in this case should be dismissed as unexhausted, with the exception of GS-14 non-selection for promotion claims concerning individuals who bid for promotion and were, like Plaintiffs Moore and Turner, eligible for consideration for possible promotion. All other claims are untimely, unexhausted and cannot be saved by the theory of vicarious exhaustion/"building block" claims.

(A) GS-15 and SES Claims

Plaintiffs seek to bring a class claim concerning promotion to the GS-15 and the SES level. Am. Compl. ¶¶ 16. The only

exhausted class complaint allegations are those of Plaintiffs Moore and Turner. Plaintiff Moore's and Turner's exhausted complaints concern non-promotion to the GS-14 level in 1999. Exhs. 8 ¶¶ 34 and 40. Plaintiffs Turner and Moore did not complain in the administrative process, and do not complain in the amended complaint, of non-promotion to the GS-15 level or the SES level. Id.; Am. Compl. ¶¶ 28-29 and 30. Indeed, Plaintiff Turner never bid for promotion to the GS-15 level, and never sought entrance into the SES program. Plaintiff Moore was promoted to the GS-15 level in 2004, without complaint to an EEO Counselor. Am. Compl. ¶ 31. Further, the selection process for the SES level is entirely different from that for promotion to the GS-14 or GS-15 level. Exh. 1 ¶ 6. The SES is not governed in any way by the MPP scoring process. Id. Thus, there is no exhausted potential class complaint concerning promotion to the GS-15 or SES level.

(B) MPP claims/failure to refer claims

Through the Amended Complaint plaintiffs seek to bring a claim of class wide discrimination in regard to defendant's MPP scoring process. They also seek to raise the claims of those who, due to the MPP scoring process, were not eligible for consideration for possible promotion to the GS-14 and GS-15 level. Am. Compl. ¶¶ 16-20, 35, 40, 44, 47, 49, and 52. MPP and/or failure to refer for promotion claims are plainly not

similar to those filed by Plaintiffs Turner and Moore for the purposes of vicarious exhaustion.

This Court preliminarily applied the theory of vicarious exhaustion to the unexhausted non-promotion claims of Plaintiffs Ivery, Tyler and Summerour.⁵ A determination of "whether there is a real possibility that one of the claims might be administratively settled while the other[s] can be resolved only by the courts," was to "await further development of the record" in this case. 2004 Mem. at 26, n.6.

The record now shows that plaintiffs cannot rely upon the "vicarious exhaustion" doctrine in regard to all non-promotion claims alleged by Plaintiff Tyler, and some such claims alleged by Plaintiffs Ivery and Summerour. Further, the Amended Complaint appears to add MPP scoring and failure to refer claims from other plaintiffs, which are equally subject to dismissal.

Under the vicarious exhaustion doctrine, a Title VII plaintiff who has failed to file an EEOC charge may, in certain limited circumstances, escape this requirement by joining with another plaintiff who has filed such a charge. Foster v. Gueory, 655 F.2d 1319, 1321-22 (D.C. Cir. 1981) (citations omitted).

"[E]xhaustion of administrative remedies by one member of the

⁵This Court has also ruled that the two non-selection for promotion claims of Plaintiff Turner were saved from dismissal under this same theory. 2004 Mem. at - 26. As it appears that Plaintiff Turner has now independently exhausted these same claims, these claims will not be addressed in this section.

class satisfies the requirement for all others with sufficiently similar grievances.” Hartman v. Duffey, 88 F.3d 1232, 1235 (D.C. Cir. 1996) (citing Foster, 655 F.2d at 1322-23). These limited circumstances only occur “[w]here the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges” Foster, 655 F.2d at 1322 (emphasis added). However, vicarious exhaustion does not apply “where the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts.” Id.

For example, in Mayfield v. Meese, 669 F. Supp. 1123, 1130-31 (D.D.C. 1987), the Court held that the two plaintiffs who had failed to exhaust could not rely on a theory of vicarious exhaustion because their claims were not sufficiently similar to plaintiff Mayfield’s exhausted claims:

Although the government gave Mayfield’s allegation of systemic discrimination short shrift, we cannot conclude from Mayfield’s case that no real possibility of administrative resolution of the claims of Moore and Sykes existed. Moore and Sykes for example, both applied for promotions, some of which were denied while others were granted. On the issue of causation alone, this placed them in a substantially different position than Mayfield, since Moore and Sykes would not have to prove that application for promotion was futile in order to recover under Title VII. This difference is significant enough to require Moore and Sykes to first seek administrative resolution of their claims independent from Mayfield’s administrative actions.

Id.

All non-promotion claims of Plaintiff Tyler, some of Plaintiffs Summerour and Ivery, and many other non-promotion claims which appear to be raised in the Amended Complaint involve a situation where a complainant bid but could not be considered for promotion because his/her MPP score was too low. This situation when compared to Plaintiff Moore's and Plaintiff Turner's exhausted claims is very similar to the one in Mayfield v. Meese as cited above. Plaintiff Moore's and Plaintiff Turner's claims involve non-selection for promotion to vacancies on which these plaintiffs bid and for which their high MPP scores placed their names on the Merit Promotion/Best Qualified Certificate (Certificate). Thus, in regard to their exhausted non-promotion claims, Plaintiffs Moore and Turner were among those who could be considered for selection for the position. Exh. 1 ¶¶ 26, 34, 47, 50 & Attachs. A, D and E. The issue in Plaintiff Moore's and Plaintiff Turner's cases is why they were not selected for positions for which they were eligible to be selected. The decision makers in these cases were the members of the Promotion Advisory Board. Exh. 1 ¶¶ 24, 25 and 26.

Conversely, when an individual's MPP score is too low to place his/her name on the Certificate for a promotion for which he/she applied, that individual may not be considered for promotion. Exh. 1 ¶¶ 23 and 26. The individual's name does not come before the Promotion Advisory Board. Id. Therefore, the

question is not why an individual was not selected for promotion, but why the individual received an MPP score that precluded the possibility of promotion. Such claims are not non-selection for promotion claims, but rather claims concerning the MPP scoring process, or claims of failure to refer for promotion. The nature of these claims involves an entirely different set of considerations, different decision makers and a different decision making process. Exh. 1 ¶ 10-16. Such claims are not sufficiently similar to that of Plaintiffs Moore and Turner as to have been exhausted for class or individual purposes through Plaintiffs Moore's and Turner's claims.

Significantly, defendant was not on notice through Plaintiff Moore's or Turner's EEO Counselor contacts that the MPP scoring process was to become at issue. See Foster, 655 F.2d at 1323 (emphasizing the importance that a defendant to be on notice of the charges against it). To the contrary, Plaintiff Moore was asked by the EEO Specialist whether he was seeking to raise a claim concerning the MPP scoring process, and he said "no." Exh. 5 ¶ 7, and attached notes to that document. Similarly when Plaintiffs Turner and Moore filed their individual and administrative class complaint, their claims did not relate to the MPP scoring process; rather, they cited to their high MPP scores. Exh. 8 ¶¶ 29 and 36. Indeed, in the administrative complaints, the original civil complaint and in the Amended

Complaint there is **no** allegation that Plaintiffs Moore or Turner were harmed or are even now complaining about their MPP scores. Id.; Compl. ¶¶ 50-54; Am. Compl. ¶¶ 29 and 32. Thus, defendant had no notice that it could be subject to a Title VII suit on a failure to refer for promotion claim or MPP scoring process claim, and had no opportunity to resolve such claims administratively prior to federal litigation. Sweeping in the dissimilar failure to refer/MPP scoring claims of Plaintiffs Tyler, Summerour, Ivery, and other plaintiffs would subvert the purpose of the vicarious exhaustion doctrine.

Furthermore, there is a real possibility that the failure to refer/MPP claims might have been administratively settled. See Foster, 655 F.2d at 1322 (emphasizing the importance of possible conciliation); Cook v. Boorstein, 763 F.2d 1462, at 1466 (D.C. Cir. 1985). In years past, plaintiffs in this case, including Plaintiffs Summerour and Turner, each filed internal agency grievances concerning their MPP scores, and had had those scores raised. Exh. 1 ¶¶ 40-46, 62-63, & Attachs. B and F. Thus, plaintiffs' failure to refer claims do not satisfy the Foster rationale that it would be wasteful, if not useless, for employees with the "same grievance" to have to process many "identical" complaints with the EEOC. Id., 655 F.2d at 1322.

The failure to refer claims of Plaintiffs Tyler, Summerour and Ivery, and of other unexhausted plaintiffs, are not the same

as the non-promotion claims of Plaintiffs Moore and Turner nor are they functionally identical. The failure to refer claims are far more similar to the dismissed claims in Mayfield v. Meese, where the facts to be proven were different and could have led to equally different resolutions. For these reasons, all claims submitted by a plaintiff which present a failure to refer/MPP scoring claim should be dismissed as unexhausted.

(C) Plaintiff Turner's Non-Selection Claim is not a Building Block Claim and Claims other than Non-Promotion Should be Dismissed.

This Court has ruled that plaintiffs, through the exhausted administrative class complaint of Plaintiff Turner, may raise post-1998 claims of purported class wide discrimination in regard to the building blocks of promotion. 2006 Mem. at 3. With these claims having now been pled, and with the benefit of the substantial discovery which has been conducted in this case, defendant submits that any remaining building block claims should be dismissed,⁶ as a review of the underlying non-selection for promotion claim of Plaintiff Turner demonstrates that his claim did not implicate the building blocks of promotion.

Plaintiff Turner's MPP score for the promotions for which he was not selected and about which he complained to an EEO

⁶ As noted above, plaintiffs' post-1999 building block claims concerning discipline, entry level grade at time of hiring, under cover work, and the TEA should be dismissed for failure to state a claim. See supra at 3-4.

Counselor was a 95.64 out of 100 possible points. Exh. 1 ¶¶ 46, 47, 50 & Attachs D and E; Exh. 40. Plaintiff Turner's MPP score was so high that it placed him well among the best qualified for the two vacancies in question, and he was eligible for possible selection. Id.

Plaintiff Turner's administrative class action complaint strongly points out that his non-promotion claims did not involve the events which had preceded his non-selection for promotion. In his administrative class complaint Plaintiff Turner pointed to his experiences with defendant as evidence that he should have been promoted. He notes that while in his first assignment in the Miami Field Office he was promoted from the GS-5 to the GS-13 level, five grade levels, in seven years. Exh. 8 ¶ 37. Plaintiff Turner bid and was competitively selected to the GS-13 level. Exh. 13 at 15. While in Miami, Plaintiff Turner received a variety of choice and career-enhancing assignments -- "numerous counterfeit, forgery and fraud investigations," "Acting Assistant Detail Leader and Shift Leader," and an opportunity to serve as the "Bahamas/Jamaica Island coordinator while in the counterfeit squad." Exh. 8 ¶ 37. As a GS-13 in the Miami Field Office, Plaintiff Turner was a senior agent who handled the most complex criminal investigations and protective advances. Exh. 13, at 15. Plaintiff Turner has stated that he was satisfied with his duties in the Miami Field Office. Id. at 19 and 20.

During the second phase of his career, Plaintiff Turner served on the VPPD, a position to which he had sought reassignment, and which he believed to be a desirable and a necessary step toward further promotion. Id. at 18 and 19. While on VPPD Plaintiff Turner was the lead training instructor for special agents assigned to the VPPD, and was the Resident Agent -- the agent responsible for the security arrangements for functions at the Vice President's residence. Exh. 8 at ¶ 38. Having completed the second phase of his career with the Secret Service, Plaintiff Turner was then reassigned at his request to the Washington Field Office, Exh. 13 at 21 and 22, where he was again given a number of career-enhancing assignments including acting supervisory assignments for two squads. Exh. 8 ¶ 39. Throughout his career Plaintiff Turner received a variety of cash awards, having received at least one cash award in each of the three years preceding his complaint, as well as the year of his complaint. Id. Plaintiff Turner was never the subject of a disciplinary action or investigation. Exh. 9 at 41.

Thus, Plaintiff Turner's two 1999 failure to promote complaints do not concern the building blocks of promotion. Rather, Plaintiff Turner's claims are that despite all the opportunities, assignments, and awards he had been given, despite his high promotion evaluation score and his placement on the Certificate for the two positions in question, he was not

selected for promotion.

In March 2006 this Court found that Plaintiff Turner's 1999 non-selection for promotion claim could vicariously exhaust other post-1998 claims, including discriminatory performance evaluations; discriminatory transfers, assignments, and other career-enhancing opportunities; discriminatory assignments to undercover work; discriminatory hiring practices; discriminatory testing; discriminatory disciplinary policies and practices; and discriminatory awards and bonuses. 2006 Mem. at 12-13. This Court found these other claims were sufficiently related to Plaintiff Turner's 1999 non-selection for promotion claim, because they concern the building blocks of promotion. Id.

In making this finding, this Court relied on Contreras v. Ridge, 305 Supp. 2d 126 (D.D.C. 2004), holding that "any EEOC investigation of the denial of promotion claim would necessarily involve investigation into the building blocks of promotion". Id. As defendant has previously pointed out to the Court, the facts underlying Mr. Contreras's EEO Counselor contact and formal administrative complaint are directly opposite to the facts underlying Plaintiff Turner's EEO Counseling contact and formal administrative complaint. See Exhs. 21 and 22.

Prior to the filing of his administrative class complaint, Mr. Contreras made several contacts with an EEO Counselor raising claims regarding performance ratings, denial of training, and

retaliation and discipline. Exh. 20 at ¶¶ 28 and 29. When Mr. Contreras made contact with an EEO Counselor in regard to his class complaint, he told the EEO Counselor that his complaint concerned "promotions, reassignments, details, job training and language skills, and that the discriminatory allocation of work assignment to Hispanic agents den[ies] them opportunities for promotions." Contreras, 305 F. Supp.2d at 132. Mr. Contreras also stated to the EEO Counselor that he had been the recent victim of such actions. Exh. 21. Finally, Mr. Contreras's promotion and reassignment situation as described to the EEO Counselor was as follows:

Mr. Contreras has submitted over thirty-eight (38) applications for promotion to GS-1811-13 and 14 Supervisory Criminal Investigator positions and/or lateral transfers at USCS and was rejected each time, ostensibly because his background and experience did not qualify him for inclusion on the BQL [Best Qualified List] from which the selection had been made.

Id.

This is directly contrary to the 1999 non-promotion claims presented by Plaintiff Turner to his EEO Counselor. Plaintiff Turner's complaint was that despite a high promotion evaluation score and although he had acted in at least one of the two positions in question, he was not selected for promotion. Exh. 8; Am. Compl. ¶ 31. There was not a single mention of any other complaint or event of alleged discrimination. Exh. 8 ¶ 35-40. Similarly, and again directly contrary to Plaintiff Turner's

complaints, in his formal administrative class complaint Mr. Contreras stated in his "description of individual allegations of discrimination of the [class] agent" that he had been repeatedly denied lateral transfers, career-enhancing opportunities and training. Mr. Contreras's formal class complaint sets forth factual allegations involving a disappointing career filled with lost opportunity. Exh. 22. As specifically noted by the Court in Contreras, Mr. Contreras's underlying formal administrative EEO complaint stated:

[the Customs Service's] repeated failure to promote Mr. Contreras to a supervisory position is the result of its discriminatory practices by which Hispanic agents receive a disproportionately large share of unfavorable work assignments including Spanish-English translation, wiretap monitoring, temporary duty, undercover work, geographical transfers and assignments to dangerous and otherwise undesirable posts. In addition, [the Customs Service] has failed and refused to assign Hispanics to positions and locations with promotional opportunities.

Id., 305 F. Supp. 2d at 133.

Because of the aforementioned practices, Mr. Contreras and similarly situated Hispanic special agents have been precluded from obtaining the training and diverse work experience which constitute the basis upon which applications for promotion are evaluated.

Id., 305 F. Supp. 2d at 133, ft. 3; see also Exh. 22. Having reviewed the above, the Contreras Court found that Mr. Contreras's non-selection for promotion claims implicated the building blocks of promotion, and accordingly such matters were "like or reasonably related to the timely exhausted promotion claim because they concern work opportunities that would

credential or position Hispanic agents for promotions.” Id., 308 F. Supp. 2d at 134.

The facts in the Contreras case do not exist in regard to Plaintiff Turner’s claims of non-selection for promotion. Plaintiff Turner’s claim is that despite having received choice assignments throughout his career, having received numerous awards, having served in acting supervisory positions, and having received a top promotion evaluation score, he was not selected for promotion. Exh. 8 at ¶¶ 36-40. Thus, it cannot be said that Plaintiff Turner’s claim is like Mr. Contreras’s and implicates the building blocks of promotion, or the denial of opportunities which would credential him for promotion.

If Plaintiff Turner’s non-selection for promotion claim implicates the building blocks of promotion then the same would have to be true of all non-selection claims, and this Court has already held in regard to Plaintiff Reginald Moore, such is not the case. See 2004 Mem. at 25-26; 2006 Mem. at 13.

This Court explained that based on Plaintiff Moore’s individual complaint, the other individual claims alleging other forms of discrimination -- discrimination in hiring, performance evaluations, and testing, hostile work environment, retaliation, and discriminatory assignment claims -- were “not the kinds of claims that the Secret Service could have reasonably anticipated while investigating Reginald Moore’s 1999 complaint.” See 2004

Mem. at 25. "The other claims raised by plaintiffs have only a generic thread of racial discrimination tying them together." 2004 Mem. at 25. "The facts of Reginald Moore's non-promotion claim did not implicate the building blocks of promotion because his claim asserted non-promotion in spite of a high performance evaluation. An investigation of this complaint would not have necessarily involved examining the building blocks of promotion." 2006 Mem. at 13.

If Plaintiff Moore's non-selection claim did not implicate the building blocks of promotion, the same must be true of Plaintiff Turner's complaint. These two claims are almost a direct overlay. Compare Exh. 8 ¶¶ 27-32 concerning Plaintiff Moore with Exh. 8 ¶¶ 36-40 concerning Plaintiff Turner. Both plaintiffs cite to their high promotion evaluation scores, their spotless work records, their history of achievement in both work assignments and awards and bonuses. Id. Both cite to the leadership roles which they have filled, and to the career opportunities they have been given, including acting supervisory positions. Id. In short, Plaintiff Turner's complaint is in direct and exact factual alignment with Plaintiff Moore, and in direct factual opposition to Mr. Contreras.

For these reasons, defendant respectfully requests that this Court now find that Plaintiff Turner's non-selection for promotion claim does not implicate the building blocks of

promotion. Defendant asks this Court to dismiss all claims other than non-selection for promotion as untimely and unexhausted.

**(D) Claims Concerning Awards and Bonuses
Should be Dismissed as They are not
Part of the Building Blocks of Promotion.**

Insofar as the Court might find that Plaintiff Turner's non-selection for promotion claim continues to implicate the building blocks of promotion, claims concerning awards and bonuses should still be dismissed as such matters are not part of the building blocks of promotion. Exh. 1 ¶ 31.

In Contreras, the Court ruled that claims concerning hostile work environment and foreign language proficiency awards were not properly asserted to the EEO Counselor or in the administrative charge or were not timely asserted, and, because of the failure to exhaust, were not properly before the Court. Id., 305 F. Supp. 2d at 134. Therefore, the Contreras Court distinguished between matters which could be said to be the building blocks of promotion and those that were not. In making this distinction, the Contreras Court specifically considered whether the claims were "work opportunities that would credential or position Hispanic agents for promotions." Id., 305 F. Supp. 2d at 133.

There has been substantial discovery in this case concerning the MPP process and those factors which flow into promotion considerations. Awards and bonuses are not considered in this process, and there is no evidence to the contrary. See

Plaintiffs Opposition to Defendant's Motion For Reconsideration
In Part and For Clarification [Docket No. 325] at 9. n.10.

There is no dispute that awards and bonuses have never been said to be part of the credentials for promotion at the Secret Service. Thus, they are not part of the building blocks of promotion. Such claims, therefore, should be dismissed as unexhausted and not "like" or "related to" the exhausted non-promotion building blocks claims.

**VI. Individual and Class Allegations Which Fail to
State a Claim for Which Relief May Be Granted
Should be Dismissed.**

In March 2006 this Court granted leave to plaintiffs to plead claims arising since 1999 which concerned the building blocks of promotion. As discussed above, these claims having now been pled, and based on the substantial discovery which has taken place to date, it is evident that the exhausted claims of Plaintiff Turner do not involve building block claims. For this reason, all claims other than the non-selection for promotion claims should be dismissed.

Beyond the more detailed argument as set forth above, however, and even were this Court to determine that Plaintiff Turner's claims as now pled include building block claims, portions of the Amended Complaint should be dismissed for failure to state a claim, under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs seek to claim class wide discrimination in regard

to discipline, hiring (entry level grade at time of hiring), and testing (the TEA), and assignment to undercover work. Am. Compl., Section B, ¶¶ 55-65, and Section D ¶¶ 82-94. However, plaintiffs have been unable to produce one individual who can present a viable claim of discrimination in regard to these four matters which is said to have occurred since 1999. Without at least a viable allegation of discrimination, which is said to have occurred since 1999, there is nothing to remedy and no relief to grant either individually or to a class. For this reason, plaintiffs' individual and purported class claim allegations in regard to discipline, hiring, the TEA, and assignment to undercover work should be dismissed as failing to state a claim.

(A) Claims concerning discriminatory discipline

Plaintiffs allege that since at least 1999 they have been subject to individual and class wide discrimination in regard to disciplinary action. However, plaintiffs do not present this Court with an allegation of discrimination in disciplinary action which occurred since 1999. See Am. Compl., Section B, ¶¶ 55-65.

Plaintiffs attempt to bring a claim of individual and class wide discrimination in regard to disciplinary action through an allegation presented by Plaintiff Lisa Robertson. Am. Compl. ¶ 63. However, a fair reading of this paragraph shows that Plaintiff Robertson was not the subject of a disciplinary action.

She was not removed, demoted, or suspended, and no letter of reprimand or counseling was issued to her. Plaintiff Robertson is complaining that she was placed on administrative leave and thought she would be proposed for removal, but she was not proposed for removal. Am. Compl. ¶ 63. No disciplinary action occurred.⁷

What is more, Plaintiff Robinson brought this same matter to the attention of an EEO Counselor in January of 2003, and then "withdrew" this claim in writing one month later in February 2003. Exh. 16 ¶ 4 & Attach. A. She cannot now reassert this "withdrawn" claim, and have a class form around such a claim.

Plaintiffs cannot state a claim of class-wide or individual discrimination in regard to discipline, based on an event that plaintiffs admit did not occur, and on a claim which was withdrawn in 2003. Plaintiffs have presented no post-1999 claim of discriminatory discipline, and thus the allegation concerning individual and class-wide discrimination in regard to disciplinary action should be dismissed.

(B) Claims concerning discrimination in testing

Plaintiffs allege individual and class-wide discrimination in regard to testing, specifically the TEA. Am. Compl. Section D, ¶¶ 82-103. However, plaintiffs present this Court with no

⁷ Placement on administrative leave is not considered disciplinary action. Exh. 23.

such claim from any individual which is purported to have occurred since 1999. Without a claim from a person there is nothing to remedy, no relief to grant. Thus, plaintiffs fail to state a claim of discrimination in regard to the TEA and this portion of the Amended Complaint should be dismissed.

(C) Entry level grade at time of hiring

Plaintiffs allege individual and class-wide discrimination in regard to entry level grade at the time of hiring. Plaintiffs claim that defendant hired African American Special Agents at a lower grade than Caucasians. Am. Compl., Section D, ¶¶ 82-103. However, the only claim concerning this allegation which is said to have occurred since 1999 is moot.

Plaintiff Camilla Simms alleges that in 2002 she was hired as a GS-5 when she should have been hired as a GS-9. However, Plaintiff Simms candidly admits that when she complained in regard to her hiring grade it was changed to a GS-9. Id. ¶ 93. Plaintiffs Simms' situation was resolved in 2003; therefore, this claim of discrimination is moot. Exh. 1 ¶¶ 75-79 & Attach. G. Thus, there is nothing to remedy here, no relief to grant. All relief was granted three years ago. For this reason, individual and class-wide claims of discrimination in hiring practices should be dismissed for failure to state a claim.

(D) Undercover Work

Plaintiffs allege individual and class-wide discrimination

in regard to assignment to undercover work. According to plaintiffs, African Americans are assigned to undercover work more frequently than non-African Americans and these undercover assignments slow the progress of African American Special Agents toward promotion to the supervisory ranks. Am. Compl. Section E, ¶¶ 95-102. However, plaintiffs have been unable to produce even one African American Special Agent who is complaining of being assigned to undercover work since 1999. Instead, plaintiffs again rely on Plaintiff Simms, who alleges that on one occasion in 2005 she was "asked" to work undercover even though she was seven months pregnant at the time. Am. Compl. ¶ 102. Noticeably absent from this complaint, however, is an allegation that Plaintiff Simms in fact worked this undercover assignment, or any other undercover assignment. *Id.*; Exh. 17. Thus, there is nothing to remedy here, no relief to grant. Plaintiffs should not be allowed to raise a claim of class-wide discrimination in undercover assignments around the fact that someone was merely asked to work an undercover assignment. For this reason, plaintiffs supposed class-wide claim of discrimination in undercover work should be dismissed for failure to state a claim.

VII. Defendant is Entitled to Summary Judgment on Plaintiffs' Pattern and Practice Claims.

Plaintiffs have repeatedly advised this Court that they seek to bring and will prove a pattern and practice of discrimination. According to plaintiffs, "[r]ace discrimination

has become the standard operating procedure of Defendant with respect to these employment decisions." Am. Compl. ¶ 121. Having completed substantial discovery, it does not appear that plaintiffs can in any way substantiate this allegation.

As the Court of Appeals for this Circuit has noted, "an important point of convergence" between disparate treatment and disparate impact claims exists in class actions such as this one. ... Because both disparate treatment and disparate impact claims 'are attacks on the systemic results of employment practices ... proof of each claim will involve a showing of disparity between the minority and majority groups in an employer's workforce.' ... Thus, under both theories of liability, the plaintiff must make a prima facie showing that racial disparity exists."

The centerpiece of such a showing is usually a statistical analysis demonstrating 'a disparity in the position of members of the plaintiff class and comparably qualified whites.'

Moore v. Summers, 113 F. Supp. 2d 5, 19 (D.D.C. 2000), citing Segar v. Smith, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984) and International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 & n.15 (1977).

The statistical and factual evidence developed in this case shows that plaintiffs cannot meet their burden of proof to show a pattern and practice of discrimination in regard to the selection of Special Agents for promotion to the GS-14 level. Expert examination of promotions made during the period of 1998

through 2002 reflects that African Americans are promoted to the GS-14 level at a slightly faster (but statistically insignificant) rate than their non-African American counterparts. Exh. 18, page 8, table 2.

Similarly, this analysis uncovered no statistically significant deviation in the rate of promotion of African American Special Agents versus the rate of promotion of non-African American Special Agents for the years 1998 through 2002, individually or in total. Exh. 19, p. 9, table 3; Exh. 9, p. 3, table 1; and Exh. 9, p. 5, table 2.

What is more, during the years 1998 through 2002, fifty-two African American GS-13 Special Agents bid for promotion to the GS-14 level. Exh. 1 ¶ 83. Of those fifty-two, forty-seven have since been promoted to the GS-14 level. Id. ¶¶ 81 and 83. Of the remaining five, three have resigned, leaving only two individuals at the GS-13 level. Id. ¶ 82. Additionally, of those forty-seven individuals who were promoted to the GS-14 level, fourteen are now at the GS-15 level, six are SES candidates, and one has been promoted into the SES. Id. ¶ 83. Finally, five of these individuals were promoted to the GS-14 level on the first occasion when they chose to bid (id. ¶ 84), while thirteen of these individuals, including Plaintiff Andrew Harris, were promoted to the GS-14 level during the first year in which they chose to bid. Id. ¶ 85. None of this reflects a

pattern or practice of discrimination in the defendant's promotion of African American special agents.

In the Amended Complaint, plaintiffs' only attempt to present any statistical evidence is that: "[a]s of July 31, 1999, African-Americans comprised 10.76% of the Special Agents at the GS-13 level in the Secret Service. However, at the GS-14 level, the African-Americans constituted only 4.18% of the total number of Special Agents." Am. Compl. ¶ 26. This is the exact same information which plaintiffs raised to assert discrimination in 2000, when they sought a preliminary injunction of the defendant's MPP. See Moore v. Summers, 113 F. Supp. 2d at 10. This Court already rejected this information, finding that "Plaintiffs' statistical analysis therefore does not demonstrate that a racial disparity exists in the promotion of GS-13 to GS-14's." Id. at 21. Now after extensive discovery in this case, with defendant having turned over its bid/promotion data base for all GS-13 to GS-14 promotions for the period of 1998 through 2002; with defendant having responded to over forty interrogatories, fifty admission requests, and seventy document requests; with over twenty depositions having been taken by the plaintiffs; and, with several expert reports having been completed by both sides, plaintiffs present this Court with only the same numbers which were previously rejected by this Court.

Plaintiffs can present no statistical or other evidence of a

pattern and practice of discrimination. The numbers in this case do not evidence that "discrimination is the standard operating procedure for defendant." The numbers evidence the opposite, a system which is racially neutral. For this reason, summary judgment should be granted on plaintiffs' pattern and practice claims concerning selections for promotion to the GS-14 level.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that their motion to dismiss or, in the alternative, for summary judgment be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 00-953 (RWR/DAR)
)	
)	
MICHAEL CHERTOFF, Secretary)	
U.S. Department of Homeland)	
Security,)	
)	
Defendant.)	
)	

ORDER

Upon consideration of defendants' partial motion to dismiss or, in the alternative, for partial summary judgment, plaintiffs' opposition, and the entire record, and it appearing to the Court that the grant of defendants' motion would be just and proper, it is hereby

ORDERED that defendants' partial motion to dismiss or, in the alternative, for partial summary judgment be, and it is, granted; and it is further

ORDERED all plaintiffs' claims in the Amended Complaint are dismissed with the exception of the individual and purported class allegations concerning specific 1999 non-promotion claims brought by Plaintiffs Moore and Turner.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, et al.,)	
)	
Plaintiffs,)	Civ. Action No. 00-95 (RWR/DAR)
)	
v.)	
)	
MICHAEL CHERTOFF, Secretary,)	
Department of Homeland Security,)	
)	
Defendant.)	

**DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 7.1(h), defendant hereby submits his statement of material facts as to which there is no genuine issue:

A) General information concerning the Secret Service's promotion selection process

1) The GS-14 level is the first level of management at the United States Secret Service (Secret Service). Exh. 1 (Declaration of Barbara Saliunas) ¶ 4.

2) Promotions to the GS-14 and GS-15 level are made through similar selection processes. Id. ¶ 5.

3) Promotions to the Senior Executive Service (SES) are made through a separate and unrelated process to that utilized for GS 14 and GS-15 promotions. Id. ¶ 6.

4) The Secret Service promotion process for GS-14 and GS-15 Special Agents is made through the GS-1811 Merit Promotion

Plan (MPP). Id. ¶ 5.

5) The Secret Service's MPP, as revised in 1997, is a multi-tiered process with two distinct phases: the scoring phase, and the bid/selection phase. Id. ¶ 7; see also Plaintiffs Reply in Support of Their Motion to Reconsider a Portion of the Court's March 30, 2006 Order on Plaintiffs Motion to Amend and Supplement Complaint [Docket No. 329] at 3.

6) The scoring phase is governed by the written MPP, a written credentialing plan which was developed prior to the 1997 revisions of the MPP, and a set of forms which are included within the MPP. Exh. 1 ¶ 8.

7) The scoring phase of the process begins in or about August of each year, when Special Agents seeking promotion to the GS-14 level will elect to enter into the scoring phases of the process. Id. ¶ 9.

8) Competing Special Agents will receive three sets of scores: the First Level Evaluation score, the Peer Panel score, and the Second Level Panel score. Id. ¶ 10.

9) The First Level Evaluation scores are completed on a set form by each competing Special Agent's Special Agent in Charge, Resident Agent in Charge, Chief Counsel, or higher level supervisor. Id. ¶ 11.

10) The Peer Panel Score is based on two elements, investigation and protection, and each competing Special Agent is

given a rating by three evaluators. Id. ¶ 12.

11) The Second Level Panel is based on two elements, leadership and decision making, and each competing Special Agent is rated by approximately seven evaluators. Id. ¶ 13.

12) Competing Special Agents are advised of the score for each element of the scoring process and provided a composite score. Id. ¶ 14.

13) Competing Special Agents are provided with the opportunity to grieve those scores through the Secret Service's internal administrative grievance process. Id. ¶ 15.

14) The post grievance scores are then combined for each Special Agent to form a composite score. Id. ¶ 16.

15) The composite/post grievance score may then be used to bid for promotion throughout the following calendar year. Id. ¶ 17.

16) The bid and selection phase of the promotion process begins in approximately January of each calendar year, after the composite scores have been awarded and grievances have been adjudicated. Id. ¶ 18.

17) Periodically during a year, GS-14 and GS-15 vacancies will be announced. Id. ¶ 19.

18) GS-13 Special Agents having a MPP score may bid on GS-14 positions. Id. ¶ 20.

19) Based upon the individuals who bid, the Secret Service

Personnel Division creates a Merit Promotion Certificate/Best Qualified List ("Certificate") for each vacancy. Id. ¶ 21.

20) The creation of the Certificate is governed by the MPP. Id. ¶ 22.

21) Under the terms of the MPP, the Certificate consists of the names of the top thirty (plus ties) MPP scoring Special Agents who bid for the position as a promotion, or the top 25% of those who bid, whichever is larger. However, if less than thirty individuals bid for a promotion, the names of all bidders are placed on the Certificate. Id. ¶ 23.

22) The Certificate is then provided to the promotion Advisory Board for consideration. Id. ¶ 24.

23) The promotion Advisory Board consists of Assistant Directors of the Secret Service. Id. ¶ 25.

24) Under the terms of the MPP, the promotion Advisory Board may only consider for possible promotion those whose names appear on the Certificate, or the top overall scoring GS-13/GS-14 Special Agents. Id. ¶ 26.

25) In practice, the promotion Advisory Board/Assistant Director who has oversight for the office where the position is located will have primary responsibility for making a recommendation to the promotion Advisory Board for the selection for that position. Id. ¶ 28.

26) The promotion Advisory Board/Assistant Director having

the position under his or her office will consider the candidates on the Certificate, seek recommendations for the candidates, and seek information concerning the potential selectees' background and work experience. Id. ¶ 29.

27) The promotion Advisory Board/Assistant Director having the position under their office, may consult with other promotion Advisory Board members, his/her Deputy Assistant Directors, and the Special Agent in Charge of the office where the position is located, and will finally make a recommendation for the position to the promotion Advisory Board. Id. ¶ 30.

28) The promotion Advisory Board will then discuss and vote on this recommendation. Id. ¶ 31.

29) When the promotion Advisory Board reaches a majority vote for a position, the recommendation is provided to the Director of the Secret Service for final selection. Id. ¶ 32.

30) Awards and bonuses are not part of the credentialing process for promotion. Id. ¶ 33.

B) Plaintiff Reginald Moore

31) Plaintiff Reginald Moore is employed by the Secret Service as a GS-15 level supervisory special agent, assigned as the Assistant to the Special Agent in Charge (ASAIC), Dignitary Protective Division. See First Amended and Supplemental Class Complaint [Docket No. 322] (Amended Compl.) ¶ 13(a).

32) In 1999 Plaintiff Moore's MPP score for use in bidding

for possible promotion was a 97.03 out of 100 possible points.
Exh. 1 attachment A.

33) In or about July 1999 Plaintiff Moore bid for promotion on vacancy number 99-089. Exh. 1 ¶ 34.

34) Plaintiff Moore was among the top thirty/top 25% MPP scoring Special Agents who bid for promotion on vacancy number 99-089 and his name appeared on the Certificate. Exh. 1 at ¶ 34, attachment A to that document.

35) As Plaintiff Moore's name appeared on the Certificate, he could have been considered by the promotion Advisory Board for possible selection for promotion for vacancy number 99-089, but he was not selected. Exh. 1 ¶ 34, attachment A to that document.

36) A white Special Agent with a lower MPP score was promoted to this position. Amended Compl. ¶ 28.

37) The announcement of the name of the individual selected for this position was issued on July 14, 1999. Exh. 1 ¶ 34.

38) On August 16, 1999, Plaintiff Moore first contacted an Equal Employment Opportunity (EEO) Counselor. Exh. 2, request/response # 2; Exh. 3, block 4.

39) Plaintiff Moore's contact with an EEO Counselor was within forty-five days of his learning of his non-selection for promotion in regard to vacancy number 99-089. Compare Exh. 1 ¶ 34 with Exh. 3, block 4.

40) On October 12, 1999, Plaintiff Moore filed a formal

complaint of discrimination. Exh. 4.

41) In November 1999 MaryAnn Hageline, an EEO Specialist, asked Plaintiff Moore and his attorney whether he was seeking to file an EEO complaint concerning his non-selection for a vacancy which had been announced on June 16, 1999, vacancy number 99-073. Exh. 5 (Declaration of Ms. Mary Ann Hageline) ¶¶ 3-8, and notes attached to that declaration.

42) Ms. Hageline also asked Plaintiff Moore and his attorney whether he was seeking to file a claim concerning other "non promotions to positions for which he had applied." Id.

43) Plaintiff Moore and his attorney advised Ms. Hageline that, in regard to non-selection for promotion, Plaintiff Moore was only seeking to complain in regard to vacancy number 99-089. Id.

44) By letter dated November 16, 1999, Plaintiff Moore and his attorney were advised of the accepted issues in the formal complaint. Id. ¶ 9; Exh. 6; Exh. 2, admission request/ response # 5.

45) The only non-promotion at issue as set forth in the November 16, 1999 letter was the non-selection for vacancy 99-089. Id.

46) Through the November 16, 1999, letter Plaintiff Moore and his attorney were advised that if they disagreed with the accepted issues they had the right to contest the issues within

five days of the receipt of that letter. Exh. 6; Exh. 2, admission request/response # 6.

47) Neither Plaintiff Moore nor his attorney contested the issues as set forth in the November 16, 1999, letter. Exh. 2, admission request/response # 7.

48) On or about February 23, 2000, Plaintiff Moore joined Plaintiff John Turner to file an administrative "Amended Class Action Complaint." Exh. 7.

49) In the administrative "Amended Class Action Complaint" Plaintiff Moore complained only of non-promotion to the GS-14 level in 1999. Id. ¶¶ 26-33.

50) On or about March 21, 2000, Plaintiff Moore along with Plaintiff Turner and Plaintiff C. Yvette Summerour filed an administrative "Second Amended Class Action Complaint." Exh. 8.

51) In the administrative "Second Amended Class Action Complaint", Plaintiff Moore complained solely of his non-promotion to the GS-14 level in 1999. Id. ¶¶ 27-34.

52) In the administrative "Second Amended Class Action Complaint", Plaintiff Moore described his high MPP score, his early history of promotions with the Secret Service, his early history of career enhancing assignments, that he had served on the Presidential Protection Division, and that he has received performance awards in 1996, 1997, 1998, and 1999. Id. ¶¶ 27-34.

53) Plaintiff Moore has never been the subject of an

employee disciplinary/adverse action. Exh. 9, pp. 54-55.

54) In August 2002, Plaintiff Moore was selected for promotion to a GS-14 supervisory position within the Secret Service. Exh. 1 ¶ 35.

55) Plaintiff Moore had bid for this position through the Secret Service's bid and selection process, the MPP. Id. ¶ 36.

56) In October 2004, Plaintiff Moore was selected for promotion to the GS-15 level. Id. ¶ 37.

C) Plaintiff John Turner

57) Plaintiff John Turner is a retired special agent of the Secret Service. Exh. 2, admission request/response # 24.

58) Plaintiff Turner retired from the Secret Service effective March 21, 2001, as a GS-14 supervisory special agent, last assigned as an Assistant to the Special Agent in Charge (ATSAIC) in the Secret Service's Washington (WFO) Field Office. Exh. 1 ¶ 39.

59) In 1998, Plaintiff Turner was a GS-13 special agent of the Secret Service. Id. ¶ 40.

60) In 1998, Plaintiff Turner was eligible to compete for promotion to the GS-14 level and entered into the MPP process to compete for promotion to the GS-14 level. Id. ¶ 41.

61) Plaintiff Turner was originally provided with his composite MPP score on October 20, 1998. Id. ¶ 42, and attachment B to that document.

62) This score was a 91.35. Id. ¶ 43, and attachment C to that document.

63) Plaintiff Turner filed an administrative grievance in regard to that score. Id. ¶ 44, and attachment B to that document.

64) On December 6, 1998, Plaintiff Turner's grievance was granted in part and his MPP score was raised to a 95.64. Id. ¶ 45.

65) Plaintiff Turner's MPP score for use in 1999 was then a 95.64 out of 100 possible points. Id. ¶ 46.

66) Plaintiff Turner believed that his 1999 post grievance score was fair. Exh. 10 ¶ 14.

67) Plaintiff Turner did not contact an EEO Counselor within forty-five days of his receipt of his 1999 MPP score or at any other time. Compare Exh. 1 ¶¶ 42 and 45 with Exh. 11, block 4.

68) On or about September 7, 1999, Plaintiff Turner bid for promotion to the GS-14 level on vacancy number 99-123. Exh. 1 ¶ 47; and Exh. 11, block 19.

69) Plaintiff Turner was not selected for promotion to vacancy 99-123. Exh. 1 ¶ 48.

70) A white special agent with a lower MPP score was selected for this position. Exh. 1 ¶ 49, and attachment D to that document.

71) The announcement of the name of the individual promoted to vacancy 99-123 was issued on September 26, 1999. Exh. 11, block 19.

72) On October 26, 1999, within forty-five days of his non-promotion for vacancy number 99-123, Plaintiff Turner contacted an EEO Counselor alleging race discrimination in regard to his non-selection for vacancy number 99-123. Exh. 11.

73) In approximately early November 1999, Plaintiff Turner received his MPP score for use in 2000. Exh. 1 ¶ 53.

74) Plaintiff Turner's MPP score for use in 2000 was a 98.10, out of 100 possible points. Exh. 1 ¶ 54; Amended Compl. ¶ 32.

75) Plaintiff Turner did not grieve his MPP score for use in 2000. Exh. 1 ¶ 55.

76) Plaintiff Turner did not complain to an EEO Counselor concerning his MPP score for use in 2000. Exh. 11 and Exh. 12.

77) In December of 1999, Plaintiff Turner bid for promotion on vacancy number 99-177, using his 1999 MPP score of 95.64. Exh. 1 ¶ 50, and attachment E to that document.

78) Plaintiff Turner was not selected for promotion to vacancy number 99-177. Exh. 1 ¶ 51; Exh. 12.

79) The individual selected for promotion to vacancy number 99-177 is white. Exh. 1 ¶ 52.

80) The name of the individual selected for promotion to

vacancy 99-177 was announced on or about December 23, 1999. Exh. 12, block 22.

81) On January 3, 2000, within forty-five days of his non-promotion to vacancy number 99-177, Plaintiff Turner contacted an EEO Counselor alleging discrimination in regard to his non-selection for vacancy number 99-177. Exh. 12.

82) In the administrative "Second Amended Class Action Complaint," Plaintiff Turner stated his complaint as non-selection for promotion to the GS-14 level. Exh. 8. ¶¶ 35-40.

83) In the administrative "Second Amended Class Action Complaint," Plaintiff Turner pointed to his high MPP score, a 98.10 out of 100 possible points, his early history of promotion, that he had enjoyed career enhancing assignments throughout his career, that he had been assigned to the Vice President's Detail, that he had served as a Lead training Instructor, that he had been the Residence Agent for the Vice President's Residence, that he had twice served as an acting supervisor while assigned to the WFO, and that he had received awards and/or bonuses in 1996, 1997, 1998 and 1998. Exh. 8 ¶¶ 36-39.

84) Plaintiff Turner has never been the subject of a disciplinary action or Office of Inspection investigation. Exh. 13, at 41.

85) In September 2000, Plaintiff Turner bid for promotion to an ATSAIC position in the WFO, vacancy number 00-137, using

his 2000 MPP score of 98.10, and was selected for that position. Exh. 1 ¶ 56.

D. Plaintiff C. Yvette Summerour

86) Plaintiff C. Yvette Summerour is currently employed by the Secret Service as a GS-14 supervisory special agent, ATSAIC Atlanta Field Office having been so assigned since December 2003. Exh. 1 ¶ 57.

87) Plaintiff Summerour received her MPP score for use in 1999 in approximately October 1998. Id. ¶ 58.

88) Plaintiff Summerour's MPP score for use in 1999 was a 86.89. Exh. 1 ¶ 59.

89) Plaintiff Summerour did not file an EEO complaint concerning her MPP score which was to be used in 1999. Exh. 14, p. 45.

90) Plaintiff Summerour received her MPP score for use in 2000 in approximately early November 1999. Exh. 1 ¶ 60.

91) Plaintiff Summerour's MPP score for use in 2000 was 93.31. Id. ¶ 61; Exh. 8 ¶ 49.

92) Plaintiff Summerour never contacted an EEO Counselor in regard to this score. Exh. 14, p. 129.

93) Plaintiff Summerour first contacted an EEO Counselor on January 31, 2000. Exh. 15, block 4.

94) The EEO Counseling Report indicates that Plaintiff Summerour complained that she had been discriminated against

when: (1) she had received a score of 49 points out of a possible 50 points in her First Level Evaluation given to her September 7, 1999; and (2) she was not selected for reassignment from a GS-13 position in the Presidential Protective Division (PPD), Office of Protective Operations, to a GS-13 position in the Office of the Assistant Director, Investigations. The effective date of Plaintiff Summerour's reassignment to the Office of the Assistant Director, Investigations was January 30, 2000. Exh. 15, Tab A.

95) Plaintiff Summerour's January 31, 2000, contact with an EEO Counselor concerning her September 7, 1999, First Level Evaluation was not within forty-five days of the receipt of that evaluation. Compare Exh. 15, block 4 with Exh. 15 tab G, p. 7; see also Exh. 14, p. 45 (where Plaintiff Summerour admits she never contacted an EEO Counselor concerning this matter).

96) Plaintiff Summerour's January 31, 2000, contact with an EEO Counselor was within forty-five days of her non selection for GS-13 reassignment to the Office of Investigations. Exh. 15.

97) Plaintiff Summerour was advised in writing of her right to file a formal administrative complaint of discrimination within fifteen days of the date of completion of EEO Counseling March 2, 2000. Exh. 15, Tab E.

98) Plaintiff Summerour did not file a formal complaint of discrimination in regard to her non-selection for reassignment at the GS-13 level from the PPD to the Office of Investigation.

Exh. 8 ¶¶ 41-50.

99) On or about March 23, 2000, Plaintiff Summerour joined Plaintiffs Turner and Moore in their administrative "Second Amended Class Action Complaint." Exh. 8.

100) Plaintiff Summerour's claim concerning her non-reassignment at the GS-13 level from the PPD to the Office of Investigation does not appear in administrative "Second Amended Class Action Complaint." Id. ¶¶ 41-50.

101) Plaintiff Summerour never contacted an EEO Counselor alleging discrimination in regard to non-selection for promotion to the GS-14 level. Exh. 15; Exh. 16 ¶ 9.

102) Plaintiff Summerour never contacted an EEO Counselor concerning her 1992 suspension. Exh. 14, p. 110.

103) In 2002, Plaintiff Summerour grieved her MPP score. Exh. 1 ¶ 62, and attachment F to that document.

104) Plaintiff Summerour's 2002 grievance in regard to her MPP score was granted and her MPP score was raised. Id. ¶ 63.

105) In 2001, Plaintiff Summerour bid for promotion to a GS-14 ATSAIC position in the Intelligence Division, and was selected for this position. Id. ¶ 64.

E) Plaintiff Andrew Harris

106) Plaintiff Harris first bid for promotion to the GS-14 level in 1999. Exh. 1 ¶ 65.

107) On or about October 5, 1999, Plaintiff Harris contacted

an EEO Counselor alleging discrimination in regard to non-selection for promotion to the GS-14 level. Exh. 16 ¶ 6.

108) Plaintiff Harris withdrew this complaint. Exh. 16, ¶ 6.

109) Plaintiff Harris was promoted to the GS-14 in 1999. Amended Compl. ¶ 51; Exh. 1 ¶ 66.

110) On or about March 26, 2004, Plaintiff Harris contacted an EEO Counselor alleging discrimination in regard to non-promotion to the GS-15 level. Exh. 16 ¶ 6, and attachment C to that declaration.

111) Plaintiff Harris's EEO Counselor contact was timely in regard to a number of GS-15 non promotions occurring forty-five days prior to March 26, 2004. Exh. 16, attachment C to that declaration.

112) Plaintiff Harris filed a formal complaint of discrimination in regard to his non-selection for promotion to the GS-15 level on or about September 30, 2004. Exh. 16 ¶ 8, and attachment E to that declaration.

113) During the formal administrative EEO process Plaintiff Harris was asked whether he was seeking to file an administrative class claim. Exh. 16 ¶ 8 and attachment E to that declaration.

114) Plaintiff Harris advised the defendant's EEO Office that he was not seeking to bring a class action complaint. Exh. 16 ¶ 8 and attachment E to that declaration.

115) Over 180 days have passed since the filing of Plaintiff Harris's formal individual administrative complaint and that complaint is now exhausted. Amended Compl. ¶ 7.

116) Plaintiff Harris was promoted to the GS-15 level effective January 23, 2005. Amended Compl. ¶ 54; Exh. 1 ¶ 67.

F) Plaintiff Cheryl Tyler

117) Plaintiff Cheryl Tyler is a former employee of the Secret Service having resigned in 1999, as a GS-13 special agent. Exh. 1 ¶ 68.

118) Plaintiff Tyler never exhausted an administrative EEO complaint concerning her MPP score or her non-selection for promotion to the GS-14 level. Exh. 2, request/response 20 and 21.

119) Plaintiff Tyler applied for promotion to the GS-14 level in 1999. Exh. 1 ¶ 69.

120) Plaintiff Tyler's MPP score for use in 1999 was too low to place her name on the Certificate for any of the GS-14 positions for which she applied in 1999. Exh. 1 ¶ 70.

121) As Plaintiff Tyler's MPP score was too low to place her name on the Certificate for any of the GS-14 positions for which she applied in 1999, she could not have been considered by the promotion Advisory Board for possible promotion. Exh. 1 ¶ 71.

G) Plaintiff Luther Ivery

122) Plaintiff Luther Ivery is a former employee of the

Secret Service having retired in 2004. Amended Compl. ¶ 13(f).

123) Plaintiff Ivery has never contacted an EEO Counselor in regard to any matter. October 24, 2004 Memorandum Opinion and Order (2004 Mem.) at 10.

124) At the time of his retirement Plaintiff Ivery was a GS-14 supervisory special agent. Amended Compl. ¶ 13(f).

125) In 1999 through the date of his promotion in 2002, Plaintiff Ivery chose to compete for promotion and bid for promotion on a number of positions at the GS-14 level. Id. ¶ 43.

126) In regard to some positions on which Plaintiff Ivery bid his MPP score was too low to place his name on the Certificate. Id. ¶ 44.

127) In regard to positions for which Plaintiff Ivery bid, but where his name was not placed on the Certificate, he could not have been considered for promotion by the promotion Advisory Board. Exh. 1 ¶ 26.

H) Plaintiff Leroy Hendrix

128) Plaintiff Leroy Hendrix is a GS-14, Supervisory Special Agent employed by the Secret Service. Amended Compl. ¶ 50.

129) Plaintiff Hendrix contacted an EEO Counselor on or about July 20, 2005, but did not pursue this matter. Exh. 16 ¶ 5 and attachment B to that declaration.

130) Plaintiff Hendrix has never exhausted an administrative EEO complaint. Exh. 16 ¶ 5 and attachment B to that declaration;

2004 Mem. at 8.

I. Plaintiff Lisa Robertson

131) Plaintiff Robertson was hired by the Secret Service as a Special Agent in 2002. Amend Compl. ¶ 13(j).

132) Plaintiff Robertson is currently a GS-13 Special Agent. Id.

133) Plaintiff Robertson has never bid for promotion to the GS-14 level. Exh. 1 ¶ 72.

134) Plaintiff Robertson contacted an EEO Counselor on or about January 21, 2003, alleging discrimination in regard to the same matter which is presented in the Amended Complaint at paragraph 63. Exh. 16 ¶ 4; Compare Exh. 16 attachment A with Amended Compl. ¶ 63.

135) Plaintiff Robertson withdrew her EEO complaint concerning the matter presented in the Amended Complaint at paragraph 63 on or about February 27, 2003. Exh. 16 ¶ 4 and attachment A to that document.

136) Plaintiff Robertson has never exhausted an administrative EEO complaint. Id.

J) Plaintiff Camilla Simms

137) Plaintiff Camilla Simms was hired by the Secret Service as a Special Agent in 2002. Amended Compl. ¶ 13(I).

138) When Plaintiff Simms was hired her name was Camilla Shepard. Exh. 1 ¶ 73.

_____139) Plaintiff Simms is currently a GS-13 Special Agent assigned to the Secret Service's Chicago Field Office. Amended Compl. ¶ 13(I).

140) Plaintiff Simms has never bid for promotion to the GS-14 level. Exh. 1 ¶ 74.

141) On or about March 8, 2003, Plaintiff Simms filed an administrative grievance complaining that her entry level grade was too low and should have been a GS-9. Exh. 1 ¶ 76 and attachment G to that document; Amended Compl. ¶ 93.

142) Plaintiff Simms's grievance was granted and her grade was raised to a GS-9. Exh. 1 ¶ 77.

143) After receiving her GS-9 grade revision, Plaintiff Simms complained that she did not receive her GS-11 in a timely manner. Exh. 1 ¶ 78; Amended Compl. ¶ 93.

144) Plaintiff Simms's complaint concerning her non receipt of her GS-11 in a timely manner was considered and the matter was corrected with Plaintiff Simms receiving her GS-9 retroactive to September 22, 2002, and her GS-11 effective September 21, 2003. Exh. 1 ¶ 79; Amended Compl. ¶ 94.

145) In 2005, while pregnant, Plaintiff Simms was asked if she would be willing to perform undercover work. Amended Compl. ¶ 102.

146) Plaintiff Simms did not perform the requested undercover. Exh. 17.

147) Plaintiff Simms has never contacted an EEO Counselor in regard to any matter. Exh. 16 ¶ 3.

G) Plaintiff Kenneth Rooks

149) Plaintiff Rooks has never contacted an EEO Counselor in regard to any allegation of discrimination. Id.

H) Rate of Promotion Information

150) The unrebutted statistical evidence in this case indicates that during the years 1998 through 2002 African American Special Agents of the Secret Service were being promoted from the GS-13 to the GS-14 level within a slightly shorter (but not statistically significant) period of time than non-African American Special Agents. Exh. 18 (Sept. 30, 2005, report of Dr. Paul White) at p. 8, table 2.

151) Statistical evidence in this case indicates that in 1998 there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Exh. 19 (March 23, 2006, report of Dr. Paul White) at 5.

152) Statistical evidence indicates that in 1999 there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Id.

153) Statistical evidence indicates that in 2000 there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Id.

154) Statistical evidence indicates that in 2001 there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Id.

155) Statistical evidence indicates that in 2002 there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Id.

156) Statistical evidence indicates that in years 1998 through 2002 combined there was no statistical disparity between the rate of promotion to the GS-14 level of African American Special Agents and the rate of promotion to the GS-14 level of non-African American Special Agents who bid for promotion to the GS-14 level. Id.

157) From 1998 through 2002 fifty-two African American Special Agents bid for promotion. Exh. 1 ¶ 80.

158) Of the fifty-two African American Special Agents who

bid for promotion from 1998 through 2002, forty-seven have since been promoted to the GS-14 level. Id. ¶ 81.

159) Of the remaining five African American Special Agents who bid for promotion from 1998 through 2002, but were not promoted, three have resigned, leaving only two individuals at the GS-13 level. Id. ¶ 82.

_____160)_Of those forty-seven African American Special Agents who bid from 1998 through 2002 and were promoted to the GS-14 level, fourteen are now at the GS-15 level. Id. ¶ 83.

161) Of those forty-seven African American Special Agents who bid from 1998 through 2002 and were promoted to the GS-14 level, six are now SES candidates, and one has been promoted into the SES. Id.

162) Of those forty-seven African American Special Agents who bid from 1998 through 2002 and were promoted to the GS-14 level, five were promoted to the GS-14 level on the first occasion when they chose to bid. Id. ¶ 84.

164) Of those forty-seven African American Special Agents who bid from 1998 through 2002 and were promoted to the GS-14 level, thirteen, including Plaintiff Andrew Harris, were promoted to the GS-14 level during the first year in which they chose to

bid. Id. ¶ 85.

Respectfully submitted,

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