

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Christine Mills, et al.,

\*

Plaintiffs,

\*

v.

Case No.: 04-2205 (HHK)

James Billington,  
Librarian of Congress

\*

\*

Defendant

\* \* o0o \* \*

Plaintiffs' Memorandum of Law in Support of  
Response in Opposition to Defendant's Motion To Dismiss

Plaintiffs, by way of their undersigned counsel, hereby respond in opposition to the Motion To Dismiss under Fed. R. Civ. Proc. 12b(1) and (6), filed by Defendant, James Billington, Library of Congress (hereafter Defendant's Motion) on June 6, 2005. Defendants' Motion argues for dismissal of Plaintiffs' case because Plaintiffs allegedly failed to exhaust their administrative remedies prior to filing their Complaint in this court.

This court should dismiss Defendant's Motion for the following reasons:

- I. Plaintiffs properly followed the Library of Congress' EEO exhaustion process.
- II. The Agency's decision to terminate Plaintiffs' case at the administrative stage was improper and Plaintiffs should not be barred from proceeding with their case in this court.

**Argument**

- I. Plaintiffs properly followed the Library of Congress' EEO exhaustion process

On or about May 28, 2004, Plaintiff Christine Mills, representing the class of employees who are members relevant to this complaint, initiated the Library of

Congress' EEO administrative agency procedure. She alleged sixteen counts of unlawful age and race discrimination in violation of Title VII, as well as reprisal. *May 28, 2004 Complaint*, attached as Plaintiffs' Exh. 1. The Complaint raised issues of systemic discrimination and retaliation by Defendant in violation of applicable federal law. Plaintiffs specifically alleged that "from at least 2000 to the present, members of the class raised these issues with Library of Congress management from time to time, but no meaningful effort was made to address the discriminatory policies, practices and procedures." (*May 28, 2004 Complaint, Par. 3-6*).

A. The applicable standard of review for Defendant's Motion to Dismiss.

Defendant's Motion argued for dismissal of Plaintiffs' case under the Federal Rules of Civil Procedure, 12(b)(6)<sup>1</sup>. This court should construe the facts in Plaintiffs' complaint as true and all reasonable inferences in the light most favorable to Plaintiff. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002) (*cited in*) *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 338 F. Supp.2d 97, 101 (D.D.C. 2004). Defendant also produced evidence in the form of an affidavit from Claudia Withers, the EEO counselor assigned to Plaintiffs' case. Defendant has thus presented this court with disputed facts outside of the pleadings, and this court can treat Defendant's Motion as one for summary judgment. See *Richardson v. Rivers*, 335 F.2d 996, 998 (D.D.C. 1964); *Batson v. Powell*, 912 F. Supp. 565, 570 (D.D.C. 1996), as cited in, *Brodetski*, 199 F.R.D. at 17. Rule 56 provides that a party against whom a claim is alleged may move for summary judgment at any time. Fed. R. Civ. P. 56(b). A motion for summary

---

<sup>1</sup> Defendant improperly argues that this court can review matters outside of the pleadings on a Motion to Dismiss for Failure to State a Claim under Rule 12(b)(1). Defendant's **Motion**, p. 7; *C/f Haase v. Sessions*, 835 F.2d 902, 904-05 (U.S. App. D.C. 1987) (*as cited in*) *Rann v. Chao*, 346 F. 3d 192, 194 (U.S. App. D.C. 2003). Only Motions to Dismiss under Rule 12(b)(6) can be treated in the alternative by the court as a Motion for Summary Judgment. *Id.*

judgment may be made before a defendant files an answer, particularly where the only question involved is one of law. When a well-documented motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Summary judgment is appropriate when "there is no genuine issue as to any material fact, and ... the moving party is entitled to judgment as a matter of law" Fed. R. Civ. P. 56(c). The movant bears the initial burden of proving that there is "no genuine issue". *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once that burden has been met, the nonmovant must "go beyond the pleadings and ... designate 'specific facts showing that there is a genuine issue for trial'... In considering a summary judgment motion, a court is to believe "[t]he evidence of the nonmovant ... , and all justifiable inferences are to be drawn in [their] favor." (*citing*) *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, (1986). Additionally, the D.C. Circuit recognizes that "[i]n employment discrimination cases, summary judgment 'must be viewed with special caution because intentional discrimination...[is] difficult for a Plaintiff to establish.'" *Lutes v. Golden*, 62 F. Supp.2d 118, 122 (D.C. Cir 1999) *citing* *Plummer v. Safeway, Inc.*, 1995 WL 129100 1 (D.C. Cir 1995) (*citations omitted*). The court in *Lutes* noted that if the non-moving party supports their allegation or denials through affidavits or other competent evidence that sets forth specific facts to show that a genuine issue for trial exists, summary judgment should not be granted.<sup>2</sup> See *Lutes*, 62 F. Supp. at 122.

---

<sup>2</sup> Defendant attached to its Motion the affidavit testimony of Claudia Withers, dated February 14, 2005, concerning her informal investigation of Plaintiffs' claims of unlawful discrimination. Plaintiffs in rebuttal attach the affidavits of Christine Mills and Howard Cook, Plaintiffs' class agent representative, to Plaintiffs' Response in Opposition to Defendant's Motion. Ms. Mills and Mr. Cook specifically deny that plaintiffs'

B. Plaintiffs must exhaust their administrative remedies in order to proceed with their claims in this court.

It is well settled that federal employees must exhaust their administrative remedies as well as generally cooperate in the administrative exhaustion process prior to filing their claims in federal court. Plaintiffs' case could be dismissed if, for example, Plaintiffs refused to use or complete the established LOC administrative exhaustion process. *McRae v. Librarian of Congress*, 843 F.2d 1494-1496-97 (D.D.C. 1988) *Smith v. Koplan*, 366 F. Supp. 2d 266, 268 (D.D.C. 2005), ("If a complainant forces an agency to dismiss or cancel the complaint by failing to provide sufficient information to enable the agency to investigate the claim, he may not file suit.") (*citing*) *Artis v. Greenspan*,

---

class agent members or Mr. Cook ever refused to cooperate with Ms. Withers, and both deny ever failing to give Withers specific information she needed for processing their informal complaint. Affidavit testimony of Mills, pp. 2-4, and Cook, pp. 2-3. Plaintiffs' counsel also attaches an affidavit for discovery pursuant to Fed. R. Civ. Proc 56(f). Rule 56(f) provides that the Court may deny or continue a motion for summary judgment "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition . . ." Fed. R. Civ. P. 56(f). A party opposing summary judgment can file an affidavit "that particularly specifies legitimate needs for further discovery." *Price v. Greenspan*, 2005 WL 1492201 at pp. 5-6 (D.D.C. June 22, 2005). A court can grant a motion under Rule 56(f) so long as the party requesting more time for discovery can "indicate what facts she intend[s] to discover that would create a triable issue and why [he] could not produce [those facts or evidence] ... in opposition to the motion". *Id.*, See also, *Fisher v. Network Software Associates*, 227 F.R.D. 4, 8-9 (D.D.C. 2005) (*citing*) *Strang v. US Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.D.C. 1989). In other words, prior to deciding Defendant's Motion, Plaintiffs' counsel need specific deposition and interrogatory evidence from the EEO counselor Claudia Withers and management representative, Jesse James concerning Withers' investigation of Plaintiffs' claims. These facts are essential for Plaintiffs to properly reply to Defendant's Motion. Plaintiffs currently do not have any documents other than Withers' final agency report and Defendant's EEO final decision. Withers' report however, does not adequately explain the reasons why Plaintiffs' administrative case should have been cancelled. Further, it is entirely unclear as to what information Plaintiffs' class agent members allegedly failed to supply to Withers that prompted Defendant to terminate Plaintiffs' case instead of allowing Plaintiffs a chance to amend their complaint, pursuant to **LCR 2010-3.2-6D (If an allegation lacks specificity and detail, the Complaints Examiner shall afford the agent 10 workdays to provide specific and detailed information); and LCR 2010-3.2-6G (The Complaints Examiner may recommend that the Assistant Chief cancel a complaint after it has been accepted because of a failure of the agent to prosecute the complaint. This action may be taken only after the Complaints Examiner has provided the agent a written request, including notice of proposed cancellation, that he/she provide certain information or otherwise proceed with the complaint, and the agent has failed to satisfy this request within 10 workdays of his/her receipt of the request.)**. Without full development of all of the relevant and material facts in the record, the court can only surmise that Defendant's termination of Plaintiffs' case was improper. Dismissal of Defendant's Motion is warranted at this time.

332 U.S. App. D.C. 395, 400, 158 F.3d 1301, 1306 (1998), and *Wilson v. Pena*, 316 U.S. App. D.C. 352, 362-63, 79 F.3d 154, 164-65 (1996). Courts equate cases of failing to cooperate with the agency as cases where a Plaintiff has failed to exhaust [his/her] administrative remedies. *Id.* At 268, (*citing*), *Carmona v. O'Neill*, Civ. Action NO. 01-0115 (CKK), slip op. at 1 (D.D.C. Jan. 21, 2002). A lenient standard applies in evaluating whether an aggrieved party's actions met his or her administrative exhaustion responsibilities. *Brodetski v. Duffey*, 199 F.R.D. 14, 18 (D.D.C. 2001); LCR 2010-3.1 *et seq* , LCR 2010-3.2 *et seq.* (*citing*) *Love v. Pullman Co.*, 404 US 522 (1972); *Loe v. Heckler*, 768 F.2d 409, 416-17 (D.D.C. 1985); *Bethel v. Jefferson*, 589 F.2d 631, 641-42 (D.D.C. 1978); *Coles v. Penny*, 531 F.2d 609, 614-15 (D.D.C. 1976).

C. Defendant used inapplicable federal regulations in support of its  
Motion to Dismiss.

Defendant's references to the CFR in its **Motion**, pp. 10-11, that "a federal employee with a discrimination complaint must, among other things, produce such documentary and testimonial evidence as the [agency] investigator deems necessary", citing **29 CFR Sec. 1614.108(c)(1)**, and again in a footnote at p. 12, "an EEO counselor assigned to investigate an administrative complaint of discrimination may make an adverse inference where a complainant fails to respond to requests for information and an agency may base a dismissal upon such failure to respond or cooperate", citing **29 CFR Sec. 1614.108(c)(3) and 1614.107(a)(7)**, are entirely inapposite and irrelevant to this case. Library of Congress employees are not subject to the Code of Federal Regulations regarding claims of unlawful discrimination. **29 C.F.R. Sec. 1614.103(d)(3)**

**(2004) (This part does not apply to: ... Employees of the Library of Congress)<sup>3</sup>**; See **(LCR 2010-3.1, 2010-3.2 et seq.)**. Further, Defendant's **Motion**, at p. 9, mischaracterizes Library of Congress Regulations for EEO counselors who may need additional information from Plaintiffs in order to investigate or resolve claims of discrimination. Nowhere in LCR 2010-3.1 does it mandate that Plaintiffs' class members first had to provide EEO counselor Withers with factually specific information in order to have their claims of unlawful discrimination against management *investigated or resolved at the informal stage of the process*. **LCR 2010-3.1-8A (Investigation of Complaints); LCR 2010-3.2-5 (Filing and Presentation of a Class Complaint)**. Plaintiffs' class agent members were entirely correct when they informed Withers on July 15, 2004, that they did not have to provide her with specific claims of unlawful discrimination for an informal resolution of their complaint. *Id.* They were only required to raise charges of *sufficient specificity* to enable Withers to investigate their claims properly and effectively. **LCR 2010-3.1-8A**. "The complaint shall set forth specifically in detail: (1). A description of the Library personnel management policy of practice giving rise to the complaint; and (2). A description of the resultant personnel action or matter adversely affecting the [Plaintiffs' class member] agent[s]." **LCR 2010-3.2-5B** (emphasis supplied). Defendant's argument to this court, Defendant's **Motion**, pp. 4, 8-12, that Plaintiffs needed to be factually specific when they requested administrative processing of their discrimination claims is entirely misguided. Defendant's Motion must be dismissed.

---

<sup>3</sup> Defendant's Motion appears to border on being frivolous given Defendant's heavy reliance on the CFR for support of the arguments Defendant made in its Motion, pp. 8-12. Defendant's Motion must fail.

- D. Library of Congress employees have an internal EEO procedure they must follow in order to exhaust their administrative remedies.

Library of Congress employees can request that an EEO counselor “make whatever inquiry into the matter he/she considers necessary, with the aim of assisting the complainant and management in defining and understanding the problem or charge. [The counselor] also shall seek to resolve the problem on an informal basis to the satisfaction of all parties.” **LCR 2010-3.1-4C (pre-complaint procedures)**<sup>4</sup>. Further, “the complaint shall have *sufficient specificity* to enable the [investigating] officer to review the charges properly and effectively.” LCR 2010-3.1-8A. (emphasis supplied). The officer *may require* such additional specificity as is necessary to proceed with his/her inquiry. (emphasis supplied); **LCR 2010-3.1-8A (Investigation of Complaints)**.<sup>5</sup> With respect to class action complaints, “The [c]ounselor shall:

Advise the aggrieved person of the discrimination complaint procedures, of his/her right to representation throughout the pre-complaint and complaint processes, and of the right to anonymity only during the pre-complaint process; (2) Make whatever inquiry is believed necessary; (3) Attempt to resolve the discrimination complaint informally through discussion with appropriate officials(s); (4) Counsel the aggrieved person concerning the issue(s) involved; (5) Inform the Assistant chief, EEOCO (hereinafter “Assistant Chief”), and other appropriate officials when corrective action is believed necessary; (6) Keep a record of all counseling activities; and (7) Summarize actions and advice in writing both to the Assistant Chief and the aggrieved person concerning the issue(s) in the personnel management policy or practice.” **LCR 2010-3.2-4B.**

As will be revealed *supra*, Plaintiffs properly followed Defendant’s administrative exhaustion process while Defendant ignored its own regulations when processing Plaintiffs’ complaint.

---

<sup>4</sup> Library of Congress Regulations (LCR) 2010-3.1 and 2010-3.2 are attached to this Response as Plaintiffs’ Exhibit 2.

E. Plaintiffs did not fail to cooperate with the EEO counselor  
in the investigation of their complaint.

Defendant's factually unsupported arguments to this court are that Plaintiffs failed to exhaust their administrative remedies because Plaintiffs "unjustifiably failed or refused to participate in the administrative processing of their claim". Defendant's **Motion** at 8. Defendant is incorrect. Defendant suggest that Plaintiffs cannot show how their claims of unlawful discrimination were "factually specific" enough to have allowed Defendant the opportunity to properly conduct an informal administrative processing of their claims. Defendant's **Motion**, pp. 8-12. (9/20/2004, EEO Final Agency Decision, attached as Pltfs Exh 3). Defendant's arguments on this point are completely unsupported by applicable federal law, their own regulations, and more importantly, are unsupported by the factual record. This court should note that Defendant's final agency decision identified several of Plaintiffs' allegations that Defendant rejected and dismissed outright as either without merit or now moot under Cook v. Billington, (No. Civ. 82-0400, 1992 WL 276936 (D.D.C. Aug. 14, 1992), which was Defendant's prior, class action settlement. (9/20/2004, EEO Final Agency Decision, pp. 6-7)<sup>5</sup>. Defendant's EEO decision also proves that Defendant dismissed much of Plaintiffs' case on the merits, and belies Defendant's argument to the court in its **Motion**, pp. 8-12, that Plaintiffs refused to cooperate in the administrative processing of their claims.

In other words, the independent contract EEO counselor assigned to Plaintiffs' EEO case could not have issued her final agency report, nor could Defendant have

---

<sup>5</sup> For example, Defendant stated "We believe that your claims of continuing violations are without merit. "You, Mr. Cook, and the other Class Agents, were obviously proceeding on the theory that a claim of continuing discrimination [was] evidenced by a failure to promote you (allegations 6, 7, 9, and 10) or provide training (allegations 1, 5, 6, 7, and 13) for promotions." (9/20/2004, EEO final agency decision, p. 6). (Plaintiffs' Exh 3). (emphasis supplied).

decided several of Plaintiffs' claims on the merits had Plaintiffs "unjustifiably failed or refused to participate in the administrative processing of their claim." Defendant's **Motion** at 8. To the contrary, it was the assigned EEO counselor and Defendant who chose to ignore Library of Congress Regulations for properly investigating and resolving Plaintiffs' claims of unlawful discrimination. LCR 2010-3.1 *et seq.*; LCR 2010-3.2 *et seq.* Plaintiffs rigorously disputed Withers' assertions about their level of cooperation in the process, and contend that management was not acting in good faith regarding the investigation of their complaint. Affidavits of Mills, para.9, 11, p. 3, and Cook, para. 5, p. 2.

Withers ultimately learned that management was well aware that Plaintiffs' class members had alleged claims of unlawful discrimination, and that such claims were ongoing from many of Plaintiffs' class members since 2003, exactly as alleged by Plaintiffs in their complaint. Withers used that information to prepare her EEO Final Agency Report, and was able to provide a fairly detailed review and analysis of several alleged unlawful and discriminatory acts, policies, practices, customs, usages, patterns, and procedures that Plaintiffs raised in their complaint. Her analysis was entirely based upon what she learned from Plaintiffs' class agent members on July 15, 2004 and the management representative James on August 10, 2004. (9/7/04, EEO Final Agency Report, attached as Plaintiffs' Exh. 4). In other words, Plaintiffs provided Withers with a sufficient specificity of evidence to informally resolve their claims of unlawful discrimination. However, Defendant chose to ignore the informal stage of the process. This court should decide that Plaintiffs properly followed the administrative process in this case. This court should deny Defendant's Motion.

F. The EEO counselor failed to properly follow  
Library of Congress regulations for discrimination complaints.

The EEO counselor assigned to Plaintiffs' case was Ms. Claudia Withers, a 20 year veteran in litigation and settlement of employment discrimination matters. Defendant's **Motion**, p.3. Affidavit of Claudia Withers (hereafter Withers' Affidavit, attached as Plaintiffs' Exh. 5). EEO counselors are available for Library of Congress employees who have reason to believe that they have been discriminated against. **LCR 2010-3.1-4A**. The counselor is required to inquire into the allegations, assist complainants and management, and seek resolution of such matters on as informal and confidential a basis as possible. Counselors shall prepare all necessary records and they shall report promptly, in writing, to the Assistant Chief as required by the Regulation. **LCR 2010-3.1-3E**.

On July 15, 2004, Withers met with three of Plaintiffs' class members, Christine Mills, Priscilla Ijeomah, and Amy Barnes, (hereafter Plaintiffs' class agent members), as well as Howard Cook, their selected employee representative. This meeting was for counseling<sup>6</sup> on their informal complaint. **Withers' Affidavit**, p. 2. (Pltfs' Exh 5). This meeting lasted only about one hour. Affidavits of Mills, p. 1, and Cook, p. 1. Withers took little if any further action to attempt resolving Plaintiffs' claims of unlawful discrimination after hearing from these class agent members that management already knew about Plaintiffs' allegations of unlawful discrimination since 2003, that is was ongoing, and that she should review Plaintiffs' May 28, 2004 informal complaint, Affidavits of Mills, pp. 2-3, and Cook, p. 2. According to Plaintiffs, Withers was informed about specific examples of discriminatory conduct pertaining to herself and to

---

<sup>6</sup> It is unclear from the record whether Ms. Withers also served in the capacity as Complaints Examiner since Plaintiffs filed a class action case. **LCR 2010-3.2-6A**.

claims from other employees that were still unresolved by Defendant. Affidavit of Mills, pp. 2-3 and Cook, p. 2. Further, Withers did not attempt to bring any management representatives to the July 15, 2004 meeting for any informal resolution, as Plaintiffs' class agent members had requested. (Affidavits of Mills, p. 2, and Cook, p. 2), Withers' Affidavit, p. 3. (Pltfs' Exh 5).

Withers did not attempt any meaningful dialogue with Plaintiffs' class agent members and management officials, such as James Billington, Librarian, as Plaintiffs' class agent members insisted. (Affidavits of Mills, p. 2, and Cook, p. 2). Withers' Affidavit, para 7, p2. (Pltfs' Exh 5). Withers knew that Plaintiffs' class agent members expressed some doubt about using the informal complaint process for their case, and were concerned about Withers' abilities to investigate their complaints of discrimination. (Affidavit of Mills, p. 2, and Cook, p. 2). Withers' Affidavit, para. 4, p. 2. (Pltfs' Exh 5). However, Withers never tried to resolve any of these matters on an informal basis to the satisfaction of all parties, and she never attempted to alleviate Plaintiffs' concerns about how she was going to investigate or resolve their class action complaint, *as required* by Library of Congress Regulations. **LCR 2010-3.1-4C, LCR 2010-3.2-4B**; Affidavits of Mills, pp. 2-4, and Cook, pp. 2-3.

Withers also waited until August 10, 2004, before she had a meeting with management representative, Jesse James, and once again, did that without Plaintiffs' representative Mr. Cook, or any of Plaintiffs' class agent members also being present at the meeting. Withers' Affidavit, para. 12, p. 3. (Pltfs' Exh 5). Withers then stated that James provided her with a "somewhat more detailed response to the issues raised by the Complaints/class agents in the informal complaint." *Id.* This only confirmed what

Plaintiffs' class agent members said to Withers previously, i.e., management officials were well aware of Plaintiffs' claims of alleged discrimination raised by Plaintiffs as a class. However, Withers still chose not to speak to James Billington, Librarian or Donald Scott, Assistant Librarian, or anyone else other than the management representative, Jesse James.<sup>7</sup> This was despite recognizing the fact that Billington and Scott were the two officials named in Plaintiffs' informal complaint as "having responsibility for [Plaintiffs'] claims" of unlawful discrimination. (emphasis supplied); Withers' Affidavit, para 10, p. 3, (Pltfs' Exh 5); Affidavits of Mills, para. 4, p. 2, and Cook, para. 3, p. 2. On this point, Withers casually stated in her Affidavit that she was unable to learn "any more details or information about the class agents' concerns other than what was raised in their informal complaint dated May 28, 2004." *Withers' Affidavit, para. 11, p.4.* (Pltfs' Exh 5). Yet Withers also states that she was able to meet with Jesse James on August 10, 2004, without Plaintiffs' representative or any of Plaintiffs' class agent members also being present, and confirm or deny specific information about Plaintiffs' claims of unlawful discrimination. That information eventually made it into Withers' EEO final agency report, dated September 7, 2004. (9/7/04 final agency report), (Pltfs' Exh. 4).

Withers' report also discusses, in detail, numerous instances of Plaintiffs' claims of allegedly discriminatory conduct, based upon what she learned from Plaintiffs' class agent members and from what Withers learned from the management rep Jesse James. (*Compare* Plaintiffs' 5/28/04 complaint with Withers' 9/7/04 final agency report). In other words, Plaintiffs' class members were in fact able to "produce such

---

<sup>7</sup> Under **LCR 2010-3.2-4B(3)**, a counselor can attempt to resolve a discrimination complaint informally through discussion with appropriate officials.

documentary and testimonial evidence as [Withers'] deem[ed] necessary” to attempt resolving Plaintiffs’ complaint. **LCR 2010-3.1-4C**. Finally, Withers never informed Plaintiffs’ class agent members that their complaint could be dismissed for any failure to cooperate, or because their complaint was lacking in specificity or detail, or that the Plaintiffs’ class requirements were not being met. **LCR 2010-3.2-6B (Acceptance, Rejection or Cancellation)**. Accordingly, Withers did not properly follow Defendant’s regulations when she investigated Plaintiffs’ claims. The Agency’s abrupt decision to cancel Plaintiffs’ complaint for a failure to exhaust administrative remedies was thus improper.

Withers again met with Plaintiffs’ class agent members on August 18, 2004. This meeting was very brief -- lasting about fifteen (15) minutes. Affidavits of Mills, p. 3, and Cook, p. 2. It was unclear what additional information Withers felt was needed that would have assisted her in informally resolving Plaintiffs’ claims. Withers’ assertion that “the class agents refused to engage in a discussion with me about Library Management’s position,” (Withers’ affidavit, para. 14, p. 3), (Pltfs’ Exh 5), is overshadowed by the fact that at that time Plaintiffs had sufficiently specified to Withers documentary and testimonial evidence that was used by Withers to investigate further and determine whether Defendant was engaged in any acts or conduct of unlawful discrimination. Affidavits of Mills, para. 5-8, pp. 2-3, and Cook, para. 4, p. 2. Withers’ Affidavit, para. 14, pp. 3-4, (Pltfs’ Exh 5); (9/7/04, Final Agency Report, Pltfs’ Exh. 4). Her disputed statement that “the class agents refused to cooperate and participate in good faith with the counseling process”, Withers Affidavit, para. 17, p. 4, (Pltfs’ Exh 5), is entirely unsupported by the record. Further, Withers’ self serving statements that she

did all she could to obtain evidence from *three* of Plaintiffs' class representatives is unavailing. According to Ms. Mills and Mr. Cook, Withers was told to contact any of the Plaintiffs' class members she deemed necessary to informally resolve their complaint. Affidavits of Mills, para. 7, pp. 2-3, and Cook, para. 4, p. 2. There were hundreds of class members available to interview, but Withers apparently did not deem that large number of interested parties evidence of systemic discrimination either.

This court should also note that nowhere in Withers' Affidavit, filed in support of Defendant's Motion, does Withers ever state that she could not *properly or effectively* determine the merits of Plaintiffs' claims, *define and understand* the problem or charges raised by Plaintiffs' class members, or that Plaintiffs' class members alleged failure to provide Withers with information was not *sufficiently specific and thus necessary* for her to attempt resolving Plaintiffs' claims against Defendant. **LCR 2010-3.1-4C, 2010-3.1-8A**. Instead, Withers only states "the class agent's refusal to cooperate and participate in good faith with the counseling process stymied [her] ability to get information". Withers Affidavit, para. 17, p. 4, (Pltfs' Exh 5).

Withers never states in her Affidavit that any class members ever prevented or disrupted her ability to obtain any information she deemed necessary to resolve Plaintiffs' claims, despite their low level of interest in proceeding informally with their complaint. Moreover, Withers had relevant evidence from the management rep, Jesse James that should have made her realize that the informal resolution of Plaintiffs' claims would not occur. James told Withers on August 10, 2004 that Defendant had no intention of informally resolving Plaintiffs' claims of unlawful discrimination. Withers' Affidavit, para. 12, p. 3, (Pltfs' Exh 5). If Withers had any further problems in resolving

Plaintiffs' complaint that required other management attention, she should have referred Plaintiffs' case to the appropriate official(s) for further processing. This she did not do.

**LCR 2010-3.1-4C.**

II. The Agency's decision to terminate Plaintiffs' case at the administrative stage for failure to exhaust their administrative remedies was improper, and Plaintiffs should not be barred from proceeding with their case in this court.

A. Defendant's termination of Plaintiffs' case was improper pursuant to Defendant's own regulations.

Plaintiffs properly exercised their rights under the LOC administrative procedure, **LCR 2010-3.1 et seq.** and **LCR 2010-3.2 et seq.**, but received an improper termination of their case by Defendant. The agency is supposed to accept a class action complaint of unlawful discrimination for processing when it contains a sufficient specificity of facts or evidence of alleged discrimination. **LCR 2010-3.1-6; LCR 2010-3.2-5; 2010-3.2-6.** Given the extent of the probable class size of well over *eight hundred* employees, and the significant number of potential claims involved in this case, Withers should have foreseen that informal resolution might not be very effective method of approach. Withers always had the ability to contact the appropriate management official(s) for further assistance. **LCR 2010-3.1-4C.** However, she was apparently was ill-prepared for investigating Plaintiffs' claims, and thus, improperly conducted the informal stage of processing for Plaintiffs' case. Plaintiffs' class agent members provided Withers with sufficient information to investigate their claims and for attempted resolution of their issues with Defendant on an informal basis.

There is no evidence other than Withers' disputed testimony that Plaintiffs' class agent members "failed to cooperate in good faith with her", as Defendant would have this court believe. Defendant's Motion, p. 6. To the contrary, there is ample evidence in

the record that Withers failed to assist Plaintiffs' class agent members in *defining and understanding* the problem or charges they filed. This was improper under Defendant's regulations. **LCR 2010-3.1-4C**. Defendant's own admission that it was not interested in pursuing any informal resolution of Plaintiffs' claims further contradicts Defendant's arguments in its **Motion**, pp. 8-12, that Plaintiffs failed to exhaust their administrative remedies at the informal stage of the process. Defendant's unequivocal position was to wait for the formal stage of process before attempting any negotiated settlement with Plaintiffs. Withers affidavit, para. 12, p. 3, (Pltfs' Exh 5). Further, Withers never informed or otherwise provided Plaintiffs with any prior written statement that their complaint would be dismissed for a failure to prosecute or due to a lack of cooperation, as required by Library of Congress regulations. **LCR 2010-3.2-6G**.

Further, Withers did not specify in her final agency report whether Plaintiffs' case should be terminated for a failure to cooperate. LCR 2010-3.1-4C ("Where a counselor concludes that a matter does not involve discrimination, as defined by Section 2.A. of LCR 2010-2, he/she shall advise the complainant of such conclusion within the time period and pursuant to the procedures set out in Section 4.D."), **LCR 2010-3.2-13A (Report of Findings and Recommendations)** ("The Complaints Examiner shall transmit to the Librarian or his/her designee: (1) The record of the hearing; (2) His/her findings and analysis with regard to the complaint; and (3) His/her report of findings and recommended decision on the complaint, including corrective action pertaining to systematic relief for the class and any individual corrective action, where appropriate, with regard to the personnel action or matter which gave rise to the complaint.). Withers did not inform Mr. Cook or any of Plaintiffs' class agent members at any time about any

pending termination of their case. **LCR 2010-3.2-6G**. The Agency's sudden decision to terminate Plaintiffs' claims for a failure to exhaust their administrative remedies was thus improper, because unlike Defendant, Plaintiffs properly followed Defendant's administrative exhaustion process. Defendant's Motion must be dismissed.

- B. In this case, Defendant rendered its administrative exhaustion requirements moot, and it would be futile for Plaintiffs to attempt any further administrative exhaustion of their claims.

On August 10, 2004, the management representative James also told Withers that if Plaintiffs' class agent members could provide any "additional information" to him, then such information should be shared with him only *if they had merit*. (Withers' affidavit, para 12, p. 3, (Pltfs' Exh 5); Defendant's **Motion**, p. 5). This statement implies that prior to the conclusion of the informal process, Defendant pre-determined that Plaintiffs' claims were lacking in merit. After learning management's position on August 10, 2004, it should have been readily apparent to Withers that further attempts at informal resolution of Plaintiffs' case would be futile. Her meeting with Mr. Cook and Plaintiffs' class agent members on August 18, 2004 was unnecessary. When Plaintiffs' prepared their formal complaint it provided Defendant with many of the same set of facts and evidence that their informal complaint provided. (Plaintiffs' Formal Complaint, dated August 27, 2004, attached as Plaintiffs' Exhibit 6). However, Plaintiffs had no legitimate expectation of any proper handling of their case at the formal complaint stage given Defendant's failure to properly follow its own regulations at the informal stage of proceedings, and ultimately, Plaintiffs' futility in having any informal resolution of their complaint occur due to Defendant's conduct. Futility of outcome is a well established reason for waiving administrative exhaustion rules. This court noted in *Malcolm v.*

*Reno*, 129 F. Supp. 2d 1, 8 (D.D.C. 2000) (citing) *Athlone Industries v. Consumer Product Safety Commission*, 707 F.2d 1485, 1488 (D.D.C. 1983) that:

“The exhaustion doctrine was designed primarily to prevent premature interruption of the administrative process. In that regard it serves three main purposes. First it preserves the autonomy of the administrative agency by allowing the agency to apply its expertise and exercise its discretion in appropriate circumstances by giving the agency a chance to discover and correct its own errors, and by discouraging frequent and deliberate flouting of the administrative processes [which] could weaken the effectiveness of an agency. Second, application of the exhaustion doctrine aids judicial review which may [otherwise] be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. Third, requiring exhaustion in appropriate cases promotes judicial and administrative efficiency by prohibiting repeated interruptions of the agency proceeding and by increasing the possibility that no judicial decision will be necessary, since the complaining party’s rights may ultimately be vindicated on the agency level.” *Id.*

In this case, counseling was futile and therefore unnecessary. *Id.* Defendant’s September 20, 2004 EEO decision did not promote or observe any of the underlying principles enunciated by this court for proper administrative agency relief. Defendant’s EEO final decision stated that Plaintiffs’ case was terminated due to Plaintiffs’ refusal to cooperate, and due to Plaintiffs’ alleged failure to specify exact instances and dates of Plaintiffs’ class action discrimination at the informal stage of the process<sup>8</sup>. Defendant’s Sept. 20, 2004 EEO decision, at p. 5, (Pltfs’ Exh 3). Defendant’s arguments on this point are now moot because Defendant conceded the fact that Defendant had no intention of resolving Plaintiffs’ case at the informal level. Withers’ Affidavit, para. 12, p. 3, (Pltfs’ Exh 5).

---

<sup>8</sup> It is curious as to why Defendant now advocates for exhaustion of a remedy that Defendant acknowledges it had no intention of fulfilling.

Defendant also stated in its September 20, 2004 EEO decision to Plaintiffs that it believed that several allegations of Plaintiffs' claims of ongoing and continuing violations were without merit or moot under Cook v. Billington, (No. Civ. 82-0400, 1992 WL 276936 (D.D.C. Aug. 14, 1992). Defendant's 9/20/2004, EEO decision, pp. 6-7, (Pltfs' Exh 3). Accordingly it follows that Plaintiffs have exhausted their administrative remedies with respect to allegations {1, 5, 6, 7, 9, 10, and 13} of their complaint when Defendant cancelled in part, and dismissed in part, Plaintiffs' formal complaint. Defendant's Sept. 20, 2004 EEO decision at p. 7, (Pltfs' Exh 3). Finally, Defendant was able to make a partial determination of Plaintiffs' formal complaint on the merits. It is entirely unclear from the record as to why Defendant did not have *sufficiently specified* evidence to decide Plaintiffs' entire case on the merits.

Plaintiffs request that this court deny Defendant's Motion and allow Plaintiffs' entire case to proceed to trial in order to avoid any further waste of precious judicial resources. "Although Plaintiffs might be required to exhaust their administrative remedies before seeking judicial relief, the doctrine of administrative exhaustion is not absolute ... When the reasons for supporting the doctrine are found inapplicable, the doctrine should not be blindly applied." *Malcolm*, 129 F. Supp. 2d at 8. "The exhaustion doctrine should be applied flexibly, with an eye toward its underlying purpose." *Id.* In other words, Defendant's failure to act in good faith at the informal stage of Plaintiffs' complaint, and failure to follow its own regulations at either the informal or formal stages of Plaintiffs' complaint should sufficiently indicate to this court that Plaintiffs have exhausted Defendant's administrative agency exhaustion requirements in this case. *Id.*

### Conclusion

This court should either grant Plaintiffs an opportunity for pre-trial discovery pursuant to Rule 56(f) of the Fed. Rules of Civ. Proc., prior to deciding Defendant's Motion, or deny Defendant's Motion outright because Defendant failed to prove that Plaintiffs did not exhaust their administrative remedies in this case. *Id.*, See *Armstrong v. Reno*, 172 F. Supp. 2d 11, 20-21 (D.D.C. 2001) (Defendant failed to meet its burden of proving that Plaintiff failed to exhaust his administrative remedies). In either case, Defendant's Motion must be denied.

Respectfully submitted,

---

Michael J. Snider, Esq.  
Ari Taragin, Esq.  
Jeffery C. Taylor, Esq.  
Snider & Associates  
104 Church Lane, Ste 201  
Baltimore, MD 21208  
410-653-9060 phone  
410-653-9061 fax