For Opinion See 2007 WL 6847408 , 2007 WL 1438763 , 2007 WL 841019 , 2006 WL 891163 , 338 F.Supp.2d 97

United States District Court, District of Columbia.
Sharon BLACKMON-MALLOY, et al., Plaintiffs,
v.
UNITED STATES CAPITOL POLICE BOARD, Defendant.
No. 01-02221 (EGS).
July 10, 2002.

Memorandum in Support of Motion to Dismiss or Strike Complaints

Respectfully submitted, Roscoe C. Howard, Jr., D.C. Bar #246470, United States Attorney.Mark E. Nagle, D.C. Bar #416364, Chief, Civil Division.Laurie Weinstein, DC Bar #389511, Assistant United States Attorney, Tenth Floor, 555 4th Street, NW, Washington, DC 20001, (202) 514-7133.Of Counsel: Peggy Tyler, Architect of the Capitol.

Defendant, the United States Capitol Police Board (the Board), by and through undersigned counsel, respectfully submits this Memorandum in support of its motion to dismiss plaintiffs' complaint in its entirety, pursuant to Fed. R. Civ. P. Rules 8, 12(b)(1) and 12(b)(6). This case is a putative class action relating to employment discrimination allegedly experienced by minority United States Capitol Police (USCP) officers. Two different attorneys are currently purporting to represent the proposed class, Joseph Gebhardt and Associates, and Nathaniel Johnson. Between them, they have filed three amended complaints in this case, each incorporating by reference the initial complaint of more than120 paragraphs.[FN1]

FN1. On June 28, 2002, plaintiffs' counsel Gebhardt filed a Motion to Disallow Nathaniel D. Johnson from Serving as a Class Counsel. The defendant takes no position on this motion.

The four complaints that plaintiffs have filed are inherently inconsistent. Each of three amended complaints incorporate the original flawed complaint. All together, they fail to state a valid claim under the CAA and therefore, should be dismissed. First, the waiver of sovereign immunity under the Congressional Accountability Act (CAA) does not permit class actions. Second, even if a class action could be pursued, the putative class members' claims reflected in the complaints do not meet the standards under Fed. R. Civ. P. Rules 8, 12, and 23 of the Federal Rules. Under Rules 12(b)(1) and (6), the complaints fail to establish this Court's jurisdiction and state a claim upon which relief may be granted. Individual plaintiffs, including the proposed class agents and representatives, have failed to exhaust their administrative remedies under the CAA. Most identified individuals' complaints are untimely; most of the alleged events described in the complaint occurred more than 180 days prior to any one individual requesting counseling under the CAA. In fact, the CAA did not become effective until January 1996 and allegations in the complaints go back far earlier than that date. In addition, many of plaintiffs' allegations in this case fail to state a claim as a matter of law. In particular, some of the allegedly discriminatory acts at issue -- involving assignments, transfers, and some disciplinary actions -- are simply not actionable because they do not rise to the level of “adverse employment actions,” as that term has been defined by the Court of Appeals in *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999) and subsequent cases.

Finally, the Complaints (all four) do not meet the pleading requirements of Fed. R. Civ. P. Rule 8 in which a short, plain statement of the case and allegations sufficient to confer jurisdiction are required.

Accordingly, defendant requests that plaintiffs' complaints be dismissed in their entirety.[FN2]

FN2. At the very least all claims should be dismissed other than individual plaintiffs' claims involving non-promotion occurring within the 2000 promotion year to the extent that those specific claims may be timely. *See,* for example, discussion of Officer Blackmon-Malloy's individual complaint about the promotion process at 28, *infra.*

I. Procedural Status

There have been four complaints filed to date in this case.

A. *Original Complaint*

The original Complaint, filed in October 2001 by attorney Charles Ware (Original Complaint), alleged employment discrimination with regard to a class described as "African American/black male or female U.S. Capitol Police officer or recruit, past or present, active or retired, whose employment rights have been violated by the Defendant." Compl. at ¶ 115. This complaint also included paragraphs alleging sex discrimination against female officers, Compl. at Count 11 and Count 13.[FN3]

FN3. The fifteen counts in the Original Complaint are the following: Count I - Race Discrimination; Count II - Sex/Gender Discrimination; Count III - Abusive Discharge; Count IV - Civil Conspiracy; Count V - Intentional Infliction of Emotional and/or Mental Distress or Anguish; Count VI - Disparate Treatment/Hostile Work Environment; Count VII - Sexual Harassment; Count VIII - Discrimination in Promotions based on Race and Color; Count IX - Discrimination in Promotions based on Sex; Count X - Discrimination in Hiring Based on Race and Color; Count XI - Discrimination in Assignments Based on Sex; Count XII - Discrimination in Assignments based on Race and Color; Count XIII- Discrimination in Hiring Based on Sex; Count XIV - Discrimination in Discipline based on Race and Color; Count XV- Reprisal and/or Intimidation.

The relief requested in the Original Complaint includes an injunction against the alleged behavior of defendant, compensatory damages, re-hiring of terminated employees, immediate promotion of non-promoted employees, immediate increase of number of male and female black/African American hires; increase of number of male and female black/African American officers in higher ranks, discipline of identified discriminators, back pay, front pay and "other financial awards," attorneys fees and costs, and other relief as necessary. Compl. at 43-44.

B. *First Amended Class Action Complaint*

Attorney Charles Ware then withdrew from representation of the class and the First Amended Class Action Complaint was filed February 26, 2002, by attorney Joseph Gebhardt and Associates (First Amended Complaint). That complaint describes a class as "all current and former African American officers employed by the United States Capitol Police from November 4, 1998, to present who have been subjected to discrimination in promotions, other selections, work assignments, discipline and termination, and who have completed counseling and mediation through the Office of Compliance." First Amended Compl. at ¶ 12. The complaint further elaborates that the class is "all African American officers, both current and retired, employed by the Defendant United States Capitol Police Board from November 4, 1998 to the date of the Court's Order granting relief (or prelimin-

ary approval of any consent decree) in this action."[FN4]

FN4. This class definition is the only one that contains a time limitation regarding past allegations, although, as described below, at 11-12, given that the earliest request for counseling was April 12, 2001, only actions taking place within the preceding 180 days of that date may be brought to this Court.

The First Amended Complaint incorporates by reference all of the Original Complaint. First Amended Complaint at ¶ 3. This amended complaint describes basically two counts, Count 1 is a disparate treatment allegation and Count 2 is a disparate impact allegation. Neither Count includes sex discrimination claims.

Relief sought includes a declaratory judgment that the Capitol Police engage in unlawful employment practices, permanent injunction prohibiting officers and agents of the Capitol Police from engaging in discriminatory practices, a permanent injunction to adopt employment practices in conformity with the requirements of CAA and Title VII, including court monitored systems for promotions, other selections, work assignments, performance evaluations, discipline and termination that are race neutral, award back pay and front pay and other job benefits to make whole, compensatory damages, reasonable attorney fees and costs, including expert fees, other just relief. First Am. Compl. at ¶ 47.

C. *Amended Class Complaint - Captioned Ikard v. U.S. Capitol Police Board*

Subsequently, another Amended Class Complaint, captioned *Ikard v. U.S. Capitol Police* Board, (Ikard I)[FN5] was filed on March 3, 2002. Ikard I does not include another definition of class but identifies Mr. Ikard and "all other Plaintiffs" as citizens of the U.S. and members of a protected class (race-African American and color-black). There were 29 plaintiffs listed in the caption. Ikard I further identifies what appear to be other classes, including Thomas Spavone (Hispanic), and Shirley Bland, Arva Johnson, Sheryl Lutrell, Mary J. Rhone, Patricia Sumlin[FN6] and Rita Wheeler (sex discrimination).[FN7] While Ikard I lists only ten counts,[FN8] it also incorporates the original complaint. Ikard I at ¶ 13.

FN5. This complaint and the one subsequent to it with the named plaintiff identified as Larry Ikard, *et al.*, were filed by attorney Nathaniel Johnson. Apparently, counsel just changed the name of the caption but kept the originally assigned case number.

FN6. This appears to be an error and refers to Officer Patricia Sumber.

FN7. It is clear that neither of these other "classes" pass the numerosity requirement under Rule 23. Furthermore, to the extent these groups may not have the same interests as those of African American males, Hispanic and female and black officers could be adversaries with regard to competition for the same promotions and assignments. It is inappropriate to even consolidate cases when the parties have an adversarial relationship, let alone combine into one class. *See Enterprise Bank v. Saettele*, 21 F.3d at 233, 236-37 (8th Cir. 1994). Moreover, four proposed class members are white: Mark Harrison, Luann Moran, Spiro Milhilis, and Yvonne Dove and one, Dina McIlwain, is apparently Indian.

FN8. The Counts in Ikard I are Count I - Disparate Treatment Based on Race and Color/Racial Discrimination; Count II - Disparate Treatment in Promotion Based on Race and Color; Count III - Disparate Treatment in Hiring and Training Based on Race and Color; Count IV - Disparate Treatment in Work Assignments based on Race and Color; Count V - Disparate Treatment in Discipline based on Race and Color; Count VI - Racial Hostile Work Environment; Count VII - Sex/Gender Discrimination; Count

VIII - Disparate Treatment in Assignments based on Sex; Count IX - Retaliation; Count X - Intentional Infliction of Emotional Distress.

The relief requested in Ikard I includes an injunction prohibiting the complained of practices, $100,000,000.00 for compensatory damages, backpay, interests and emotional distress damages, attorneys fees and costs, and other relief as necessary. Ikard I at 14.

D. *Plaintiffs' Second Amended Class Complaint (Ikard II*)

Finally, the last amended complaint, also captioned with Ikard is titled "Plaintiffs Second Amended Class Action Complaint" (Ikard II). Ikard II was filed on March 12, 2002 and entered on the docket on April 14, 2002. That complaint incorporated the Original Complaint and the "Corrected Amended Complaint," which apparently refers to Ikard I. Ikard II at 1. Ikard II adds an additional class member to the 29 named in Ikard I (Howard Whitehurst) and a Count XI, titled "Disparate Impact Discrimination." This Count primarily consists of the same statistical arguments presented in the original Complaint. In a section entitled Class Allegations, Ikard II notes that there are "at least 380 potential class members, based on the current number of African-American and Hispanic officers employed by Defendant." Ikard II at ¶ 72. In addition, this complaint identifies the common issues of law and fact applicable to the class (both male and female African Americans) as involving promotions, training, work assignments, disciplinary actions, racially hostile work environment, retaliation, and infliction of emotional distress. Ikard II at 5-6.

II. *The Congressional Accountability Act*

This case is being brought under the Congressional Accountability Act, 2 U.S.C. §1301, *et seq.*, (CAA).[FN9] Plaintiffs' complaints are legally deficient in several fundamental respects, primarily due to plaintiffs' failure properly to construe the CAA. The CAA provides the *exclusive* procedure by which legislative branch employees like plaintiffs can commence a judicial proceeding seeking to remedy an alleged unlawful employment discrimination. The Complaints are replete with errors that reflect plaintiffs' failure to structure their claims and prayers for relief in accordance with the requirements set forth by Congress in the CAA. This memorandum will first provide an overview of the Act and the specific circumstances under which Congress has waived its sovereign immunity under the Act to be sued in federal court for employment-related claims. Next the memorandum will identify those aspects of the Complaints that must be dismissed or struck.

FN9. Under the CAA, only the Board is a proper defendant. Section 1408(b) of the CAA permits a "covered employee" to bring suit under the CAA only against "the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." 2 U.S.C. § 1408. The statute specifically lists nine entities that may be an "employing office," including the U.S. Capitol Police Board. *See* 2 U.S.C. § 1301(3)(A)-(I).

A. *Overview of the CAA*

In January 1996, the CAA took effect and extended the rights and protections of eleven laws covering various labor, civil rights and workplace matters to employees in the legislative branch of the federal government.[FN10] In particular, it extended the rights and protections of Title VII and other employment statutes to the employing offices of Congress. *See* 2 U.S.C. § 1302(a); *Moore v. Capitol Guide Board*, 982 F. Supp. 35 (D.D.C. 1997). However, while the CAA extended the rights and protections of Title VII and other statutes to the legislative branch, it did so only to the extent designated by the CAA. *See* 2 U.S.C. § 1302. Title VII itself does not extend coverage to legislative branch employees. *See* 42 U.S.C. § 2000e-16(a). The portions of the civil rights

statutes that apply in the legislative branch are set forth in 2 U.S.C. § 1311. This section of the CAA specifically applies the rights and protections of 42 U.S.C. § 2000e-2 (identifying specific employer practices which are unlawful), but does *not* apply 42 U.S.C. § 2000e-3 (identifying other unlawful employment practices) in either this section or in the CAA's specific prohibition of reprisal, 2 U.S.C. § 1317. *See* 2 U.S.C. § 1311(a)(1). Thus, the CAA does not simply incorporate by reference the civil rights or other statutes in their entirety. Clearly, not all of Title VII's procedures and provisions govern the CAA. *See* 2 U.S.C. § 1302. Law developed under the applicable provisions of Title VII, however, should be applied to cases under the CAA. *See* 2 U.S.C. § 1405(h).

FN10. Specifically, the CAA provides that:
The following laws shall apply, as prescribed by this chapter, to the legislative branch of the Federal Government:
(1) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).
(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).
(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
(4) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.).
(5) The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.).
(6) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).
(7) Chapter 71 (relating to Federal service labor-management relations) of Title 5.
(8) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).
(9) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).
(10) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).
(11) Chapter 43 (relating to veterans' employment and reemployment) of Title 38.
2 U.S.C. §1302.

B. *The CAA Does Not Provide for Class Actions*

In stark contrast to regulations under Title VII, however, neither the CAA or its regulations (Procedural Rules, Office of Compliance, July 1997, as amended February 12, 1998) provide any direction for the filing of a class complaint. *Cf.* 29 C.F.R § 1614.204(b) ("[a]n employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with Sec. 1614.105.") with CAA's requirement that each covered employee must participate in the mediation and counseling process. 2 U.S.C. § 1408(a). There are no provisions in either the statute or the procedural regulations/polices that permit this requirement to be circumvented by the use of a class mechanism.

The only previous CAA case styled as a putative class action, *Harris, et al. v. Office of the Architect of the Capitol*, Civil Action No. 97-1658 (EGS), was settled in 2001. The Office of Compliance (OC) took the position in that case, as they have here, see Letter from William Thompson, Executive Director, Office of Compliance, Exhibit A, that a class action could not be maintained under the CAA. In recognition of the OC's position, the Settlement Agreement specifically required that each class member, including those identified after the execution of the Agreement, was required to exhaust the counseling and mediation procedures of the CAA in order to be eligible for the relief provided in the Settlement Agreement.

C. *The CAA Contains Specific Exhaustion Requirements*

Under the CAA, Congress has waived its sovereign immunity and consented to be sued in federal court only for conduct covered explicitly by the CAA and then only after a plaintiff has exhausted enumerated jurisdictional prerequisites to obtaining a federal judicial forum.

(a) Jurisdiction

The *district courts* of the United States *shall have jurisdiction over any civil action commenced* under section 1404 of this title and this section *by a covered employee who has completed counseling* under section 1402 of this title *and mediation* under section 1403 of this title. *A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.*

2 U.S.C. § 1408(a) (emphasis added). Significantly, each individual employee is required to complete counseling and mediation.

Section 1402 provides that such counseling must be requested and completed within a specific time period:
To commence a proceeding, a covered employee alleging a violation of a law made applicable under part A of subchapter II of this chapter shall request counseling by the Office [of Compliance]. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the date of the alleged violation.

2 U.S.C. § 1402(a) (emphasis added).

The complaints do not contain averments that would allow the Court to determine that jurisdictional prerequisites to filing an action under the CAA have been met. *See* Fed. R. Civ. P. 8(a)(1) (requiring "a short and plain statement of the grounds upon which the court's jurisdiction depends"); Fed. R. Civ. P. 12(b)(1) (allowing dismissal for lack of jurisdiction); *Kokkenen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994)(It is to be presumed that cause lies outside federal court's limited jurisdiction, and burden of establishing contrary rests upon the party asserting jurisdiction); *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83 (1993) (initial burden of establishing trial court's jurisdiction rests on party invoking jurisdiction); *Natural Resources Defense Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998) (party invoking federal jurisdiction bears burden of establishing existence of standing); *Commodity Futures Trading Com'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984) (federal court presumptively lacks jurisdiction in a proceeding until a party demonstrates that jurisdiction exists; a party must therefore affirmatively allege in his pleadings the facts showing the existence of jurisdiction); and *see also*, *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972) ("Insofar as the complaint seeks recovery from the United States in tort, it was also deficient in that, apart from other considerations, it failed to allege the presentation of a claim to the appropriate Federal agency and a final disposition of the claim by that agency"). In fact, many putative class members have not met the requirements of 2 U.S.C. § 1402, and should be dismissed outright.

Jurisdiction is established by allegations of operative facts bringing the controversy within the scope of the statute conferring jurisdiction, not by recitation of the statute in the complaint. The Complaints fails to allege the "operative facts" that establish the exhaustion of an administrative claim or that any such exhaustion was timely completed. Exhaustion of the administrative claim process is a jurisdictional prerequisite. 2 U.S.C. § 1408(a). [FN11] The complaints contain statements that plaintiffs have completed counseling and mediation, but does not allege that all proposed class members completed these administrative procedures within the time frames established under the Act, particularly that the request for counseling shall be made not later than 180 days after the date of the alleged violation. *Thompson v. Capitol Police Board*, 120 F. Supp 2. 78, 81 (D.D.C. 2000). Accordingly, as described below, the Court should dismiss the complaints as they provide this Court no basis upon which to determine whether each putative class member satisfied the threshold jurisdictional prerequisite to filing this action.

FN11. In addressing this issue under Title VII, and concluding that timely exhaustion was *not* jurisdictional under Title VII, the Supreme Court gave great weight to the language of the jurisdictional statute: The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.
Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-94 (1982) (footnotes omitted).
To the contrary, the CAA does, in fact, specifically limit the Court's jurisdiction to cases in which the plaintiff has timely exhausted the administrative remedies. *See* 2 U.S.C. § 1408(a).

III. *Many Proposed Plaintiffs Have Failed to Exhaust their Administrative Remedies.*

It is well established that each of the individually-named plaintiffs in a putative class action must stand or fall on his own before the Court can reach any class certification issues. *See, e.g., Newberg on Class Actions* (3d Ed.) at § 2.09 (if the named plaintiffs lack individual standing to bring their claims, then the Court should dismiss the complaint prior to reaching the class certification issue).[FN12] In this case, many of the individual named plaintiffs have not complied with the jurisdictional requirements of the CAA by failing to exhaust their administrative remedies, and are therefore not appropriate plaintiffs in a putative class action.

FN12. By this date, defendant is also filing a motion to delay briefing on the issue of class certification until this present motion is decided.

A. *Many Individuals Did Not Timely Request Counseling*

As described above, in order to bring a claim under the CAA, a covered employee must request counseling within 180 days of the alleged violation. 2 U.S.C. §1403. The purpose of the requirement under the CAA for each covered employee to engage in counseling and mediation is the same as for the requirement under Title VII for individuals to file complaints within their agencies or companies before going to federal court. That is, the intent of the act is to allow the defendant employers to remedy situations before the involvement of the federal court. As stated by the D.C. Circuit, "the requirement of some specificity in a charge is not a 'mere technicality.' " *Park v. Howard University*, 71 F.3d 904, 908 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 811 (1996) (quoting *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1111 (7th Cir. 1992)). The enforcement procedures of Title VII-echoed in the administrative exhaustion requirements under the CAA --represent "a careful blend of administrative and judicial enforcement powers" in which the federal agency plays "a crucial administrative role ... in the eradication of employment discrimination." *Brown v. General Servs. Admin.*, 425 U.S. 820, 833 (1976). Exhaustion of administrative remedies is required "in order to give federal agencies an opportunity to handle matters internally whenever possible and to ensure that the federal courts are burdened only when reasonably necessary." *Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985). Accordingly, the administrative complaint must be sufficiently specific to allow the agency to perform its statutory duty. *Park, supra*, 71 F.3d at 908. "The administrative charge requirement serves the important purposes of giving the charged party notice of the claim and 'narrow[ing] the issues for prompt adjudication and decision.' " *Id.* at 907.

Consistent with these purposes, an employment discrimination lawsuit is "limited in scope to claims that are 'like or reasonably related to the allegations of the charge *and* growing out of such allegations.' " *Park, supra*, 71 F.3d at 907 (quoting *Chisholm v. U.S. Postal Service*, 665 F.2d 482, 491 (4th Cir. 1981)) (emphasis added). Put another way, "claims within a Title VII suit must be such as could reasonably be expected to be encompassed within an administrative investigation if one did follow the charge." *Id.*, n.1. To the extent problems are

therefore raised with the agency prior to a lawsuit, the agency has an opportunity to correct whatever problems are alleged or perceived. Failure of individuals to participate in the administrative process make it impossible for the employer to address these concerns.[FN13]

FN13. It should be noted that defendant does not waive its right to contest timeliness by participating in mediation. *Thompson v. Capitol Police Board*, 120 F. Supp. 2d 78, 82 (D.D.C. 2000).

The burden is on the plaintiff to establish that a federal court has jurisdiction. In order to establish such jurisdiction under the CAA, the plaintiffs must allege compliance with the administrative prerequisites to suit. Plaintiffs have not done so in this case.

B. *Most Former Employees Have Not Complied with CAA*

In this case, also apparently considered among the putative class are multiple employees whose positions with the Capitol Police ended before the CAA even existed. *See* Exhibit B, List of Former Employees Identified as Potential Plaintiffs. Of the 50 potential class members who are former employees, 16 who requested counseling in 2001 left the service before the effective date of the CAA, and an additional 22 did not request counseling within 180 days of their departure. *Id.* Another eight never requested counseling at all. Of the four employees who left after the effective date of the CAA and may have timely requested counseling, one, Clarence Haizlip, who retired on November 30, 2000, complained that the promotion process was discriminatory but does not allege when he participated in the process. First Am. Compl. at ¶ 28. He did not participate in the 2000 promotional process. Exhibit C, Persons Electing to Not Participate in the 2000 Promotional Process. He also alleges that he applied in April 2000 for a bus driver position, id., but he did not request counseling until April 12, 2001, a full year later well outside the 180 days proscribed by the CAA. *See* Exhibit M, All Individuals Identified in Filed Complaints, including date counseling requested. No information on the claims of the other three, John Euill, Tanya Williams, and Clabe Wright, is available and none of those three participated in mediation. *See* Letter of Jean Manning to Office of Compliance, Exhibit D; Declaration of Toby Hyman, Exhibit D-1, and Declaration of Frederick Herrera, Exhibit D-2.[FN14] Therefore, the plaintiffs have failed to demonstrate that the Court has jurisdiction with regard to the claims of any former employee.

FN14. Under Section 1403(c), the mediation period is to last 30 days "beginning on the date the request for mediation is received" and it "may be extended for additional periods at the joint request of the covered employee and the employing office." 2 U.S.C. § 1403(c). While the defendant's counsel working on these matters were willing to continue the mediation period to allow all individuals to participate, *see* Exhibit D, plaintiffs' counsel chose not to continue with mediation. As a result, many of the potential class members did not actually participate in mediation.

C. *Most Named Employees Are Not Shown to Have Complied with CAA* For the 299 individuals who are either listed in one of the complaints or whose name

surfaced during the mediation process, defendant only has information regarding the actual complaints of the individual for approximately 99 of them. Of those potential class members, over half, fifty four persons, requested counseling in an obviously and demonstrably untimely manner. Many of the others do not have clearly articulated claims of any sort. For at least 198 additional individuals, neither defendant nor the Court has any information regarding the individual's compliance with the jurisdictional requirements. Exhibit E, Individuals for Whom No Specific Allegations Are Known.

D. *Some Individually Identified Plaintiffs Did Not Request Counseling*

A number of the individually identified plaintiffs never even requested counseling. *See* Exhibit F, Parties Who Did Not File a Request for Counseling. This exhibit includes 29 individuals, including the eight former employees who did not request counseling. No evidence of a request for counseling exists nor was the fact of their requests specifically alleged. Therefore, these individuals also have not complied with the CAA and should be dismissed.

E. *Some Plaintiffs Did Not Timely Request Mediation; Many Did Not Mediate at All*

Under Section 1403, employees must request mediation not later than 15 days after receipt of notice of the end of mediation.[FN15] Based on our review of the Certificates of Official Records provided by the Office of Compliance, thirteen individuals who requested counseling failed to request mediation within the fifteen day window of opportunity for them to do so. *See* Exhibit G, Persons Who Did Not Timely Request Mediation. Those individuals therefore must also be dismissed. Moreover, only eight individuals actually participated in mediation. See Declaration of Toby Hyman, Exhibit D-1, and Declaration of Frederick Herrera, Exhibit D-2.

FN15. Section 1403(a) reads:
Not later than 15 days after receipt by the employee of notice of the end of the counseling period under section 1402 of this title, but prior to and as a condition of making an election under section 1404 of this title, the covered employee who alleged a violation of a law shall file a request for mediation with the Office.
2. U.S.C. § 1403(a).

F. *Plaintiffs Must Have Engaged in Counseling on Issues Raised*

Plaintiffs also may not bring to this Court issues that were not the subject of their request for counseling. CAA, §§ 1402, 1403 Cf. *Park v. Howard University, supra.,* (claims not specifically presented administratively may not be raised for first time in District Court.) In this case, plaintiffs do not allege that the subject of their complaints was in fact the subject of their requests for counseling. When the defendant attempted to obtain this information from the Office of Compliance, the Office refused. *See* Exhibit H, Letter from Office of Compliance objecting to subpoena by defendant. At this point, therefore, neither the defendant nor the Court has information sufficient to demonstrate that the Court has jurisdiction over any of the individual plaintiffs' complaints.

Because of these failures, the complaints fail to comply with Fed. R. Civ. P. Rule 12(b)(1) and do not establish jurisdiction, they fail to state a claim upon which relief may granted under Rule 12(b)(6) and they fail to meet the requirements of Fed. R. Civ. P. 8(a)(2) that the complaints contain a "short and plain statement of the claims showing that the pleader is entitled to relief." To comply with Rule 8, and therefore, Rule 12(b)(1) and (6), and properly state a claim, plaintiffs have the burden of alleging sufficient facts on which a recognized legal claim can be based. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (4th Cir. 1991). Plaintiffs have failed to allege specific facts sufficient to establish that the Court has jurisdiction over the individuals identified. Because this burden to establish this Court's jurisdiction is on the plaintiff, the complaints must be dismissed for failure to show such jurisdiction exists.

IV. *Complaints' General Allegations Not Sufficient to State a Claim*

Plaintiffs generally allege that they have been subjected to discrimination in a wide variety of employment endeavors. *See* complaints generally. Rather than substantiating these claims with facts describing, for example, the nature of the alleged adverse action, who took it, the precise circumstances under which it was taken, and its consequences for the named plaintiff, plaintiffs assert a litany of generalities and conclusions. They contend that

the adverse actions and injury include disrespectful treatment, retaliation, a hostile environment, denial of promotion, improper job assignments, unjust evaluation and discipline.

These accusations are devoid of any specific "facts as to when, how, to whom, and with what results such discrimination has been applied." *Ogletree v. McNamara,* 449 F.2d 93, 98 (6th Cir. 1971) (Complaint was dismissed where it provided little more than conclusory allegations of systematic racial discrimination). Furthermore, they are insufficient to notify defendants as to the basis for the claims against them. *See General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 161 (1982) (" '[W]ithout reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend' "). Such "[c]onclusory allegations without supporting factual averments are insufficient to state a claim." *Hall v. Bellmon,* 935 F.2d at 1110; *see Jackson v. Richards Med. Co.,* 961 F.2d 575, 580 (6th Cir. 1992) (Merely insinuating vague and conclusory allegations of presumed misconduct is insufficient to state claim). While there is some information regarding the class agents in attachments to the Original Complaint and in the First Amended Complaint, ¶¶ 22-35 (describing the class agents and others), this is not sufficient to establish that there are legitimate bases for the Court's jurisdiction in this matter.

A. Plaintiffs' Statistical Allegations Do Not State a Claim

Plaintiffs' insertion of purported statistics concerning the representation of African Americans in the Capitol Police is unavailing. Original Complaint ¶¶ 15-49; First Amended Complaint at ¶¶ 20-21; Ikard II at ¶¶ 64-69. The statistics do not add specificity to the claims of the named plaintiffs. *Adams v. Bethlehem Steel Corp,* 736 F.2d 992, 994 (4th Cir. 1984). Furthermore, they are not probative, since "a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force." *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657 (1989). *See also,* 42 U.S.C. 2000e-5, setting forth the burden of proof in disparate impact cases.

Statistical evidence must be based on sound scientific theory. *Frazier v. Consolidated Rail Corp.,* 851 F.2d 1447 (D.C. Cir. 1988). Thus statistical evidence is not probative unless a valid comparison can be made to the relevant population data. *Whitacre v. Davey,* 890 F.2d 1168, 1172 (D.C. Cir. 1989), *cert. denied,* 497 U.S. 1038 (1990); *Metrocare v. WMATA,* 679 F.2d 922, 930 (D.C. Cir. 1982). Plaintiffs here allege discrepancies between the population of the District of Columbia as a whole and the minority representation within the Capitol Police force. Original Complaint at ¶¶ 28-29. This alleged analysis does not properly raise a claim. The only potentially proper question under the law is the discrepancies between the qualified applicant pool versus the actual work force. The complaints therefore do not allege a statistical discrepancy relying on that analysis.

B. Allegations Regarding the Promotional Process and Hiring (Disparate Impact) Also Do Not State a Claim

In addition, plaintiffs here merely allege some generalized discrimination in the promotion process without identifying a particular element of the process that leads to the disparate impact they allege exists. Under Title VII, 2000e-2(k) disparate impact as unlawful discrimination may only be found when the
complaining party demonstrates that a respondent used a particular employment practice that causes a disparate impact on the basis of race, ..., and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity ....

28 U.S.C 2000e-2(k) (emphasis added). A plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove,* at 657. "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may

lead to statistical imbalances in the composition of their work forces." *Id.; see also id.* at 650 (proper comparison is between racial composition of jobs at issue and racial composition of qualified population in relevant labor market); *Cone v. Longmont United Hosp. Ass'n,* 14 F.3d 526, 532 (10th Cir. 1994) (same); *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419, 1430 (10th Cir. 1993) (same); *Ortega v. Safeway Stores, Inc.,* 943 F.2d 1230, 1245 (10th Cir. 1991) ("[I]t is error to simply compare raw statistics showing that a higher percentage of men were rehired than women").

In analyzing the sufficiency of the complaint, the Court need accept as true only plaintiffs' well-pleaded factual contentions, and not their conclusory allegations. *See Dunn v. White,* 880 F.2d 1188, 1190 (10th Cir. 1989) (quoting *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984)), *cert. denied,* 493 U.S. 1059 (1990). Because plaintiffs make only the most broad and nebulous claims here, the Court should reject their contentions and dismiss the complaint with prejudice. *See Adams v. Bethlehem Steel Corp.,* 736 F.2d 992, 994 (4th Cir. 1984) (Plaintiffs had no basis for redress where complaint broadly identified thirty-seven general practices by which employer allegedly discriminated against black employees, without offering specific instances of harm); *TV Communications Network, Inc. v. ESPN, Inc.,* 767 F. Supp. 1062, 1070 (D. Colo. 1991) (conclusory allegations that merely recited relevant antitrust principles and were not grounded in well-pleaded facts were insufficient to survive motion to dismiss), *aff'd,* 964 F.2d 1022 (10th Cir.), *cert. denied,* 506 U.S. 999 (1992).

With regard to promotion to higher ranks, plaintiffs have not pled that qualified individuals have been denied such promotions, nor identified a particular or specific element of the process that creates a disparate impact.

C. *Not All Class Members Are Eligible to Challenge Promotion Process*

1. *Many Individuals Were Not Eligible for Promotion*

It is well-established that plaintiffs may not complain about a failure to promote when they did not seek to be considered for the promotion. *Cones v. Shalala,* 199 F.3d 512, 516-17 (D.C. Cir. 2000) (in order to state a *prima facie* case for failure to promote, plaintiff generally must demonstrate that she applied for and was qualified for the available position); *Bundy v. Jackson,* 641 F.2d 934, 951 (D.C. Cir. 1981) (same). In this case, as demonstrated in Exhibit C, at least 149 individuals identified as potential class plaintiffs elected to not participate in the most recent promotion process, that in the year 2000. Since that promotion process is the only one for which *any* potential plaintiff filed a timely request for counseling, individuals who elected not to participate in the process cannot state even a prima facie case of discrimination in the process. Furthermore, a number of additional potential class members are only privates or privates with training and in as much only Privates First Class (PFC) are eligible to participate in the first level of the promotion process to sergeant, any officers below the rank of PFC cannot state a claim with regard to the promotion process.

2. *Work Assignments and Disciplinary Action Claims Are Not Adverse Actions*

Finally, many of plaintiffs' allegations in this case fail to state a claim as a matter of law. In particular, some of the allegedly discriminatory acts at issue -- involving assignments, and some disciplinary actions, such as written performance notices placed in file for only short period, are simply not actionable under Title VII, because they do not rise to the level of "adverse employment actions," as that term has been clarified by the Court of Appeals in *Brown v. Brody,* 199 F.3d 446 (D.C. Cir. 1999) and later cases.

A "CP-550" is a "Personnel Performance Note" which consists of a "one-sided form to be used in recording notes concerning an employee's performance or conduct during a performance evaluation rating period." Gener-

al Order 2201, Exhibit I. These notes can be positive, corrective or even neutral, for instance to document training that had occurred. *Id.* CP-550s are specifically described as "temporary documents" and maybe retained only for two rating periods. *Id.* at 4. Under the terms of the collective bargaining agreement, however, a personnel note must be purged from the individual's files within a year. Exhibit J, Section 27 of the Collective Bargaining Agreement.

In *Brown,* the D.C. Circuit held that a "common element for discrimination and retaliation claims against federal employers, and private employers, is... some form of legally cognizable adverse action by the employer." *Brown,* 199 F.3d at 453. The Court rejected the contention that "*any* sort of personnel action undertaken for discriminatory reasons suffices." *See* id. at 453. (emphasis added). Instead, a plaintiff must demonstrate that she has suffered "materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm." *Id.* at 457. Specifically, to meet the "adverse personnel action" requirement, the plaintiff must make a clear showing of a material adverse employment action that involves tangible economic effect on plaintiffs employment, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 456 (quoting *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761 (1998)) (other citations omitted). Based on this definition, the D.C. Circuit held in *Brown* that the plaintiffs claims regarding an involuntary lateral transfer, the denial of a bid for a desired transfer, a "fully satisfactory" evaluation, and a letter of admonishment, did not rise to the level of adverse personnel actions. Id. at 459-460.[FN16] *See also Bailey v. Henderson,* 94 F.Supp.2d 68 (D.D.C. 2000) (granting summary judgment in part based on *Brown); Simms v. U.S. Government Printing Office,* 87 F. Supp. 2d 7, 9 (D.D.C. 2000) (same).

> FN16. Importantly, the *Brown* panel emphasized that this section of its opinion had been circulated and approved by the entire Court and that it thus constituted the law of the Circuit. *See Brown,* 199 F.3d at 455 (*citing Irons v. Diamond,* 670 F.2d 265, 268 n. 11 (D.C. Cir. 1981)).

Here, many of plaintiffs' claims plainly cannot survive *Brown.* For example, some of the plaintiffs complain that they either received or failed to receive reassignments, *i.e.,* lateral transfers, without any reduction in salary, grade or benefits. *See,* e.g., Original Complaint ¶ 54; First Am. Compl. at ¶ 34. However, such claims are expressly barred by *Brown,* which held that "a plaintiff who is made to undertake or who is denied a lateral transfer -- that is, one in which she suffers no diminution in pay or benefits -- does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities." *Brown,* 199 F.3d at 457; *Stella v. Mineta,* 284 F.3d 135 (D.C. Cir. 2002)(D.C. Circuit noting its summary affirmance of District Court's decision that involuntary lateral transfers are not adverse actions). *See also Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job insufficient to state a claim under Title VII). Because plaintiffs do not allege that they suffered any loss in salary, grade or benefits, or any other "objectively tangible harm," with respect to their "lateral transfer" or re-assignment claims, such claims should be dismissed.

Some of the plaintiffs also complain that they were given undesirable assignments -- again, without affecting their salary, benefits, or grade. *See,* e.g. First Am. Compl. at ¶ 34. However, the courts have held that such claims are similar to claims regarding lateral transfers and accordingly are not actionable under the same kind of analysis as in Brown.[FN17] *See also Crenshaw v. Georgetown University,* 23 F. Supp.2d 11, 18 (D.D.C. 1998), *aff'd.,* No. 98-7194 (D.C. Cir. Aug. 13, 1999) (holding, prior to *Brown,* that change in duties without corresponding reduction in pay is not an adverse action); *Johnson v. DiMario,* 14 F. Supp.2d 107, 111 (D.D.C. 1998)

(same).

FN17. These types of complaints in fact concern the day-to-day workplace frustrations that are so common-place and minor that to adjudicate them risks the very "judicial micromanagement of business practices" that the D.C. Circuit warned against in *Brown. See Brown,* 199 F.3d at 452 (*quoting Mungin v. Katten, Mungin & Zavis,* 116 F.3d 1549, 1556-57 (D.C. Cir 1997)).

Similarly, some of the plaintiffs complain that they received disciplinary actions in the form of written notices to their personnel folders. *See,* e.g., First Am. Compl. at ¶¶ 22, 24. However, plaintiffs do not contend that these written notices affected their grade or compensation or any other objectively tangible element of their work. Accordingly, plaintiffs' claims are again barred by the Court of Appeals's decision in *Brown. See* 199 F.3d at 459-460 (holding that disciplinary letter not an adverse action under Title VII). *See also, Trawick v. Hantman,* 151 F. Supp.2d 54, 61, n. 9 (D.D.C. 2001) (Court questions whether disciplinary warnings without effect are adverse action under CAA).

In *Russell v. Principi,* 257 F.3d 815 (D.C. Cir. 2001), this Circuit reiterated its holding in *Brown* that poor performance appraisals are not necessarily adverse actions. The court held in *Russell,* 257 F .3d at 819, that a loss of a bonus could constitute an adverse action under Title VII in the specific circumstances of that case in which it was undisputed that the size of the employee's bonus was directly tied to her performance rating, and that a higher rating *automatically* meant a larger bonus. *Id.* Unlike the bonus in *Russell,* plaintiffs here do not allege that they have suffered any consequences to their pay or benefits as a result of the individual written notices known as 550s. The case law makes clear that a written reprimand or admonishment that is placed in an employee's personnel file is not an adverse action. In *Stewart v. Evans,* 275 F.3d 1126, 1136 (D.C. Cir. 2002), the Court specifically recognized that "formal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary or other benefits do not constitute adverse employment actions." *See also Milburn v. West,* 854 F. Supp. 1, 14 (D.D.C.1994) (memorandum "for the record" that recounted employee misconduct and requested more formal discipline against employee deemed not actionable even though it was placed in employee's permanent file), *summ. aff'd. sub nom., Walker v. West,* 1995 WL 117983 (D.C. Cir. 1995) (per curiam). A "reprimand that amounts to a mere scolding, without any disciplinary action which follows, does not rise to the level of adverse action." *Brodetski v. Duffey,* 199 F.R.D. 14, 21 (D.D.C. 2001), quoting *Childers v. Slater,* 44 F. Supp.2d 8, 20 (D.D.C. 1999). Therefore, the written disciplinary notices that plaintiffs have received are nothing more than mere scoldings without effect on pay or benefits.[FN18]

FN18. Although some disciplinary actions may result in the loss of pay or benefits, plaintiffs still must effectively plead compliance with the CAA for any of those allegations. *Cf., e.g.,* discussion of Luther Peterson with discussion of McArthur Whitaker, *infra.*

3. *Intentional Infliction of Emotional Distress*

The plaintiffs' initial complaint and the two subsequent Ikard complaints specifically allege the tort claim of intentional infliction of emotional distress. Plaintiffs' claim of intentional infliction of emotional distress should be dismissed because the only possible jurisdictional basis for this claim against the defendant would be under the Federal Tort Claims Act (FTCA).[FN19] *See Kline v. Republic of El Salvador,* 603 F. Supp. 1313, 1316 (D.D.C. 1985). The FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, is a limited waiver of sovereign immunity for certain monetary claims against the United States. Absent full compliance with the conditions placed upon waiver of that immunity, however, the Court lacks jurisdiction to entertain tort claims against the United States. *GAF Corp. v. United States,* 818 F.2d 901, 904 and n.86 (D.C. Cir. 1987). One such condition is contained in 28 U.S.C. §

2675(a), which provides:

> FN19. Plaintiff has also named the wrong defendant under the FTCA. Under the clear terms of the FTCA, only the United States is a proper defendant. *See* 28 U.S.C. § 2679(a).

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied ...

Id.; see GAF Corp. v. United States, 818 F.2d at 904 n. 7.

Plaintiffs have failed to submit an administrative tort claim to the Capitol Police in this case. *See* Declaration of Sgt. Diane M. Schmidt, Exhibit R. Accordingly, plaintiffs' claim of intentional infliction of emotional distress should be dismissed.

4. *Abusive Termination*

A number of potential plaintiffs are identified as being victims of "abusive discharge" which apparently refers to discriminatory discharge for the purposes of this lawsuit. As described above, however, of the individuals who were terminated or left the employ of the Capitol Police, only four apparently timely requested counseling. *See* discussion, *supra*, at 14-15. Therefore, no class allegation can salvage these otherwise untimely claims.

5. *Retaliation*

A number of individuals claim they have been retaliated against for filing the complaints with the Office of Compliance relating to this lawsuit. For those claims, the individuals should also file a request for counseling and exhaust their administrative remedies. Although exhaustion of administrative remedies is not always necessary with regard to retaliation claims, that is a determination that must be made on a case-by-case basis. *See Harris v. Secretary, U.S. Department of Veterans Affairs*, 126 F.3d 339, 346 (D.C. Cir. 1997). This is one of the cases in which the Court may find it appropriate to require exhaustion. *Id.* at 346 ("Although the District Court has discretion to entertain unexhausted Title VII reprisal claims ... it will normally hear such claims alongside the underlying discrimination claim. Where the District Court will not hear the underlying discrimination claim, requiring exhaustion of administrative remedies may obviate the need to hear the case at all."). Because many of the underlying complaints must be dismissed and because many of the alleged "retaliations" involve transfers and performance appraisals which are not adverse actions, requiring exhaustion on these issues is appropriate.

6. *Claims of Gender Discrimination Are Not Appropriate for this Action*

In addition to claims based on race, at least some of the putative class plaintiffs are alleging disparate treatment based on gender. *See* Original Compl. at ¶¶ 55, 56; Ikard I at ¶¶ 43-

48. Gender discrimination claims do not fit with those of the putative class. In fact, female officers and male black officers could be adversaries with regard to competition for the same promotions and assignments. It is inappropriate to even consolidate cases when the parties have an adversarial relationship, *Enterprise Bank v. Saettele*, 21 F.3d at 236-37, let alone define the class to include such potential antagonists.

The interests of the class members alleging discrimination on the basis of gender, therefore, are in direct conflict

with the interests of the class member(s) who are alleging discrimination based on race. In addition, the inclusion of males and females in the class prevents the claims of the representatives from being typical of those of the class.

IV. Individual Putative Plaintiff's Claims

While sufficient information to establish jurisdiction for many of the claims of the proposed class plaintiffs was not provided in any of the four complaints, the information that was provided for individuals only emphasizes that this Court does not have jurisdiction over the great majority of identified claims. In this section, we review each putative plaintiff for whom more information than just a name was provided and show that the only claims that can conceivably survive a motion to dismiss are those relating to the 2000 promotion process.[FN20]

FN20. We also note that a number of putative class members have previously participated in administrative complaints or suits that were resolved. Without additional information from the plaintiffs or the Office of Compliance regarding the subject matter of those complaints, it is entirely possible that the issues are untimely brought to Court or subject to res judicata because they have already been decided. For example, potential plaintiff Mark Harrison filed a case, Civ. No. 01-2214, D. C. District Court (EGS), that was dismissed for failure to prosecute. Also, potential plaintiff Kenneth Thompson filed a suit that was dismissed as well. *Thompson v. Capitol Police Board*, 120 F. Supp 2. 78, 81 (D.D.C. 2000). Cases decided administratively and not pursued within 90 days of the receipt of the notice of end of mediation also would be untimely.

Sharon Blackmon-Malloy, Class Agent

Officer Blackmon-Malloy alleges that her score on the promotion examination was downgraded because of her race. Original Complaint ¶ 52. As described above, the examinations for promotion at the Capitol Police are conducted by an outside agency. In this case, the Fields Agency conducted the examination and someone from that agency informed Ms. Blackmon- Malloy of her score of 75 on the written portion of the test. Original Compl at ¶ 52; First Amended Compl. at ¶¶ 8, 22. According to the outside contractor, that score was a mistake. *See* Attachment to Exhibit 21 to Original Complaint, Letter from Cassi L. Fields, President of Fields Consulting Group, to Sharon Blackmon-Malloy, dated November 27, 2000. While Officer Blackmon-Malloy may have a timely claim, however, it is a disparate treatment claim, *see* ¶ 54, not an disparate impact claim, and she does not allege that others were treated differently.[FN21] Nor does she allege that Ms. Field's letter is pretextual.[FN22]

FN21. It should be noted that Ms. Blackmon-Malloy's ability to represent the class regarding the 2000 promotion process is also suspect under these circumstances since there is no allegation that any other individual's scores were re-adjusted downward after their initial report. Under 28 U.S.C 2000e-2(k), plaintiffs in a disparate impact case must specifically identify the particular practice or procedure that leads to the disparate impact. In Ms. Blackmon-Malloy's case, her allegation is that the re-scoring is what caused her to not obtain a promotion, not that the test itself was improper.

FN22. Because this correspondence was included with the complaint in this matter, the Court need not look beyond the pleadings to determine if plaintiff Blackmon-Malloy has stated a claim for relief. If the Court does consider information outside the pleadings, it may convert this motion to one for summary judgment under Rule 56 by providing plaintiff an opportunity to respond. Fed. R. Civ. P. Rule 12 (b)(6) .

To the extent that Officer Blackmon-Malloy is complaining about disciplinary notes in her files, such notes are

not adverse actions under the law unless they have a tangible objective effect on the conditions of employment of plaintiff. *See* discussion, *supra*.. Such disciplinary notes, much like the letter of admonishment described in *Brown v. Brody,* 199 F. 3d at 459-460, do not by themselves rise to the level of adverse actions.

Gary D. Goines

Officer Goines is also identified in the Original Complaint as a potential plaintiff. However, Exhibit 16 to the Original Complaint, is a memorandum dated March 18, 1999, from Officer Goines relating to charges of harassment. Since Officer Goines did not request counseling until April 12, 2001, his complaint is untimely and must be dismissed.[FN23]

> FN23. It should be noted that based on Exhibit 16, it is clear that Officer Goines was represented by counsel at the time of his March 1999 memorandum.

Earl Allen, Jr.

Officer Allen alleges that he suffered from a hostile work environment, harassment and race discrimination "while serving on dignitary protection details in Ohio, Tennessee, etc." Original Compl. at ¶ 52. No date is identified in the complaint with regard to these allegations but mediation documents provided indicate that Mr. Allen's complaints involved actions that took place in 1993 and 1997, making his request for counseling in May 2001 completely untimely. *See* Mediation Documents[FN24] for Allen, Exhibit K.

> FN24. To the extent defendant offers any documents provided to it through the mediation process, those documents will be only provided to the extent necessary to indicate the nature of the allegation or claim. This would not be necessary but defendant has been unable to obtain the individual requests for counseling, *see* discussion, *supra.*, at 17, that would otherwise reveal the basis of the complaint.

Frank Adams

Sargent Adams claims he was denied a promotion even though his section commander recommended him for one but no date of this action is alleged. Original Compl. at ¶ 53. He also alleges in Ikard I that his authority was undermined and that he was subjected to frivolous internal affairs investigations. Ikard I at ¶ 32. No date for these actions is alleged and the mediation documents possessed by defendant indicate only that Sgt. Adams was concerned about a promotion process in 1994. *See* Exhibit L. Sgt. Adams also alleges he was discriminated against when his supervisor disseminated a memorandum written by Sgt. Adams that was critical of the Union. Ikard I at 54-55. This is clearly not something that rises to the level of an adverse action under the law. Sgt. Adams also alleges retaliation but provides no detail nor dates. Id.

Duvall Phelps

Officer Phelps claims he was the target of race discrimination, hostile work environment and intentional infliction of emotional distress and that he was forced to retire. Original Compl. at ¶ 53. He is also identified as a Class Agent in the First Amended Complaint at ¶ 26. He claims he was forced into early retirement on October 31, 2000, id., but he did not request counseling until May 9, 2001, Exhibit M, missing the 180 day deadline to request counseling by days. Moreover, Officer Phelps' complaint is not typical of the class in that most class members are not former employees claiming they were forced to retire. This allegation is a classic disparate treatment claim that Officer Phelps should have pursued as required by the CAA and which he did not so pursue.

Larry Ikard

Officer Ikard's primary complaint appears to be that he was denied a request for assignment to K-9 squad. Original Compl. at ¶ 54. Exhibit 15 to the original complaint is a statement of facts by Ikard dated December 12, 1999, in which he outlines that and a number of complaints. Original Complaint, Exh. 15. Office Ikard, however, requested counseling on April 12, 2001, well beyond the statutorily proscribed 180 days he had to request counseling under the CAA.

Linval Jones

Linval Jones is identified as a potential plaintiff at Original Compl. at ¶ 54 but there is no allegation, and no evidence, that Jones ever requested counseling for any alleged discriminatory action at all. *See* Exhibit F, Persons Who Did Not File A Request for Counseling.

Alfred Moffet

Alfred Moffet is also identified as a potential plaintiff at Original Compl. at ¶ 54 and Exhibit 11 to that Complaint refers to his last day of work as October 29, 1999. There is no allegation and no evidence that Moffet ever requested counseling as required by the CAA. Exhibit F.

Leroy T. Shields

Officer Shields is alleged to be a potential plaintiff in the Original Complaint at ¶ 54 because he was allegedly abusively discharged. Original Compl. at ¶ 54. Officer Shields sent a letter to Blackmon-Malloy dated Jan 3, 2000 (attached to Original Complaint as Exhibit 11) to complain about his discharge but there is no evidence that he ever requested counseling or participated in mediation. Exhibit F.

David Fleming

Officer Fleming is also identified as a potential plaintiff in the original complaint but the only information provided is found in Exhibit 17 to the Original Complaint in which Officer Fleming references a November 17, 2000 incident which resulted in no adverse action taken against him. Therefore, Officer Fleming has not stated a claim.

LaVerne Johnson Reynolds

Officer Reynolds is also identified in the Original Complaint as a potential plaintiff because she suffered from disparate treatment and a hostile work environment. Original Compl. at ¶ 54. However, Exhibit 19 to the Original Complaint is a memorandum dated May 17, 2000, regarding an incident that occurred with Officer Reynolds in March 2000. Officer Reynolds, however, did not request counseling until April 2001, making her claims untimely.[FN25]

FN25. Also, Exhibit 22 relates to her non-selection for instructor vacancy dated November 13, 2000. If this is what she is complaining about, it may be timely but it is not clear from complaint that this is in fact her concern.

Derek Waters

Officer Waters alleges he was abusively discharged. Original Compl at ¶ 60. Officer Waters is currently the plaintiff in another lawsuit, *Waters v. U.S. Capitol Police Board*, Civ. No. 01-0920 (RJL), in which he is also claiming discrimination based on race. *See* Notice of Related Case filed by Defendant on June 4, 2002. It is en-

tirely possible that Officer Water's claims in this action are identical to his claims in his already underway action.

Darius Rose

The only place Mr. Rose is mentioned is in Exhibit 23 to the Original Complaint, which consists of a series of memoranda about the Capitol Police's refusal to hire Mr. Rose in 1999. There is no allegation and no evidence that Mr. Rose ever contacted the Office of Compliance to request counseling with regard to his non-hiring. *See* Exhibit F. Therefore, Mr. Rose may not participate in any action since he failed to exhaust his administrative remedies.

Luann Moran

Officer Moran is identified as a potential plaintiff on the basis of gender discrimination, Original Compl. at Exhibit 24.[FN26] That exhibit, however, contains Officer Moran's allegations of sex discrimination dated February 16, 2000. Officer Moran did not request counseling until May 11, 2001, making her claims untimely as well. Exhibit M. In addition, defendant has reason to believe that Officer Moran may have participated in a separate counseling and mediation process which was concluded before this suit began.

FN26. According to the Capitol Police Data Base, Officer Moran is white which makes it unreasonable for her to represent or participate in a class of African-Americans. Exhibit M.

FIRST AMENDED COMPLAINT

Dale Veal, Class agent

Dale Veal, identified as a class agent in the First Amended Complaint, complains of overtime denials in 1999 and 2000. Officer Veal did not request counseling until April 12, 2001, *see* Exhibit M, making October 12, 2000, the earliest date from which he could have valid complaints. In the First Am. Compl. at ¶ 23, his only complaint is described as that white officers received overtime that he did not receive through 1999 and 2000. During mediation, however, he raised issues regarding overtime assignments, offensive statements and discipline from 1987 until 2001. *See* Exhibit N. Obviously, Officer Veal does not have a jurisdictionally valid claim for any event that occurred prior to October 12, 2000.

Vernier Riggs, Class Agent

Officer Riggs claims she was retaliated against for filing a complaint with OC on April 12, 2001, by subsequently getting written up for wearing short sleeve shirt. First Am. Compl. at ¶ 24. She also complained about things being omitted from her performance review that were added later. *Id.* Officer Riggs also complains that she was denied an opportunity to interview for position because she was in the hospital and that her leave requests are denied when similarly situated white officers' requests are not. *Id.* No information about the date of the interview denial is provided and none of the other actions even remotely rise to the level of an adverse action.

Luther Peterson, Class Agent

Officer Peterson claims that he was unfairly disciplined, First Am. Compl. at ¶ 25, for a Sept. 5, 2000, incident in which he discharged his weapon off duty. *Id.* In October 2000 he received notice of Internal Affairs Division investigation and was subsequently docked 64 hours. Officer Peterson claims that a white officer did not receive

discipline for discharging his weapon off duty. While this may be a claim of disparate treatment, it does not support a claim of disparate impact and does not fairly represent the totality of the class member's complaints, since very few officers, black or white, are involved in disciplinary actions for discharging their weapons.

The First Amended Complaint, in addition to identifying "Class Agents" also goes on to specifically identify "Named Class members." As with the individuals already reviewed, most of those named individuals do not qualify to participate in this action.

Robert Braswell, Jr.

Officer Braswell is identified as a named class member in the First Amended Complaint at ¶ 27 with regard to his concerns about the promotion process. No date of his promotion concerns is provided, however, and Officer Braswell did not participate in the most recent promotional process, the only one for which his request for counseling would be timely. See Exhibit C, Election Not to Participate.

Officer Braswell also received a disciplinary report for missing a radio call and claims similarly situated white officers did not. First Am. Compl. at ¶ 27. Not only is this not an adverse action, since it does not materially affect the terms and conditions of his employment but the mediation documents provided indicate that this took place in 1993, pre-dating the CAA. *See* Exhibit O.

Clarence Haizlip

Officer Haizlip retired on November 30, 2000. First Am. Compl. at ¶ 28. He complains that the promotion process was discriminatory but does not allege what dates he participated in the process. He does allege that he applied in April 2000 for a bus driver position, see id., but he did not request counseling until April 12, 2001, a full year later and certainly not within the 180 days proscribed by the CAA. *See* Exhibit B.

Dianne Willis

Officer Willis is also identified as a potential class member, First Am. Compl. at ¶ 29. Officer Willis also complains about the promotional process but she did not compete in the 2000 process, the only one for which her request for counseling would be timely. *See* Exhibit M and Exhibit C. She also complains of changes in her shift but this is not an adverse action.

McArthur Whitaker

Officer Whitaker claims to have been unfairly disciplined. First. Am. Compl. at ¶ 30. Officer Whitaker retired in November 2001. *See* Exhibit B. He received a disciplinary action and was docked 8 hours for not following orders when he was informed that motorcycle patrols would be discontinued and he refused to discontinue his patrol because he claimed that he had not received sufficient notice. First Am. Compl. at ¶ 30. While the timing of these actions are not clear, he apparently received a disciplinary action on September 25, 2000. *Id.* Since he did not request counseling until April 12, 2001, his request was untimely.

Arnold Fields

Officer Fields complaint appears to only relate to retaliation. First Am. Compl. at ¶ 31. He claims he was investigated and received an unsatisfactory performance appraisal on August 29, 2001 as result of complaint he made about being assaulted by white female supervisor. Id. There is no evidence that Officer Fields requested counsel-

ing regarding that incident and no allegation that the incident affected the terms and conditions of his employment, and thus was not an adverse action. The mediation documents presented to defendant show that Officer Fields has complaints dating back to 1993, which are obviously untimely. Exhibit P.

Regina Bolden Whitaker

Officer Bolden-Whitaker complained about assignment distributions and claimed she was unfairly disciplined for not wearing her body armor. First Am. Compl. at ¶ 32. No date of this action is alleged. Neither assignments nor the disciplinary action are adverse actions and the failure of plaintiff to assert the time of this incidents require her complaints to be dismissed. Furthermore, the mediation documents presented by Officer Bolden-Whitaker only reference disciplinary actions in 1987, 1988 and a failure to promote in April 2000. Exhibit Q. Since she only requested counseling on April 12, 2001, Exhibit M, none of these complaints are timely.

Reginald Waters

Officer Waters complains about the promotional examination process. First Am. Compl. at ¶ 33. The only process that would be timely for Officer Waters is the 2000 promotion process for which he elected not to participate. Exhibit C.

Willie Johnson

Officer Johnson claims he was retaliated against for complaining about discrimination. First Am. Compl. at ¶ 34. However, Officer Johnson retired on January 3, 2000, and did not request counseling until May 2001, clearly untimely. Exhibit B. (Officer Johnson also complained of an undesirable re-assignment but does not indicate the date. Since he retired well before the 180 day time period for requesting counseling however, there is no way in which that claim could be timely.)

Leonard Ross

Officer Ross complains about the promotional process for the Capitol Police. First Am. Compl. at ¶ 35. Officer Ross did not participate in the 2000 promotion process. Exhibit B. This complaint therefore fails to state a claim.

IKARD I

Thomas Spavone

Thomas Spavone is identified in Ikard I as a Hispanic who was denied three promotions. Ikard I at ¶ 24. He requested counseling on May 9, 2001, but had elected not to compete in the 2000 promotion process, Exhibit C, the only one for which his request for counseling would be timely.

Brent Mills

Officer Brent Mills complained that he was denied promotion to sergeant on September 28, 2000. Ikard I at ¶ 25. Since he did not request counseling until April 12, 2001, Exhibit M, his request was untimely.

Robert Spratt

Officer Robert Spratt alleges that he was not allowed to compete for a special technician slot and that he was reassigned to a less desirable assignment. Ikard I at ¶ 26, 52, 53. No dates for these actions are alleged so the

Court cannot assume it has jurisdiction over either the special technician slot or the re-assignment, which additionally does not qualify as an adverse action.

Mary Rhone

Officer Mary Rhone claims she was retaliated against by assignment to an undesirable location for testifying before Congress on discrimination. Ikard I at ¶ 51. Not only is a re-assignment not an adverse action, but no dates of this action are alleged, leaving the Court without sufficient information to determine jurisdiction.

IKARD II

Howard Whitehurst

Officer Howard Whitehurst, added in the second Ikard complaint, alleges he was denied a promotion. Ikard II at ¶¶ 1-6. However, Officer Whitehurst did not participate in the 2000 promotion process, Exhibit C, which is the only one for which his request for counseling of April 12, 2001 would be timely.

As can be seen from the specific examples above, the complaints in this case fail to demonstrate that this Court rightly has jurisdiction over any of the claims raised, with the possible exception of questions regarding the 2000 promotion process for which no appropriate class representative has been identified.

CONCLUSION

The Court, therefore, should dismiss the Complaints with prejudice. In the alternative, the Court should dismiss with prejudice to all plaintiffs who have not exhausted their administrative remedies, or who have failed to state a claim. As to plaintiffs who may be able to show that they have complied with the CAA, the Court may order that the multiple complaints in this matter be stricken and permit those plaintiffs to re-file as individuals.

Respectfully submitted,

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2002 WL 34359739 (D.D.C.) (Trial Motion, Memorandum and Affidavit)

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