UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHARON BLACKMON-MALLOY, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 01-2221 (EGS/JMF)
	:	
UNITED STATES CAPITOL POLICE,	:	
	:	
Defendant.	:	
	:	

REPORT AND RECOMMENDATION

This case was referred to me by Judge Sullivan for a Report and Recommendation regarding Defendant's Motion to Dismiss for Lack of Jurisdiction [#298].[1]

This case has been before this Court and the D.C. Circuit Court of Appeals for over eleven years, yet remains at the jurisdictional stage. The factual and procedural background of this case is quite lengthy, and has been summarized in prior proceedings. I will begin by reviewing briefly the proceedings that lead to the instant motion to dismiss, and the concomitant burden on the plaintiffs to show that their claims are properly before this Court, before they can be heard on the merits.

BACKGROUND

I. History of the Case

The plaintiffs are all officers with the United States Capitol Police, each of whom claim that the Capitol Police Board discriminated against them with respect to assignments,

[1] Initial citations to documents in the record will include the name of the document and the document number on ECF. All subsequent citations to that same document will include the document number only.

promotions, and disciplinary decisions on the basis of the officers' race. See generally Fourth Amended Complaint [#278] at 1. More specifically, the plaintiffs complain they were "subjected to (1) a racially hostile work environment, and/or (2) race discrimination in promotions, other selections, work assignments, discipline, and termination, and/or (3) retaliation." Id. at 2-3.

The heart of the defendant's motion to dismiss is the defendant's claim that few, if any, of the named plaintiffs exhausted their administrative remedies, as required by the Congressional Accountability Act ("CAA").[2] I previously issued a Report and Recommendation regarding a motion for reconsideration of Judge Sullivan's dismissal of many of the claims at issue before this court once again. Report and Recommendation [#151]. Appeal was eventually taken from Judge Sullivan's order on the motion to dismiss, and the D.C. Circuit issued three rulings important to the motion before the Court today: 1) that the exhaustion requirement present in the CAA was jurisdictional; 2) that the doctrine of vicarious exhaustion does not apply to excuse officers' non-compliance with the CAA's jurisdictional prerequisites; and 3) that officers were not required to attend counseling or mediation in person for their claims to be deemed exhausted. Blackmon-Malloy v. U.S. Capitol Police, 575 F.3d 699, 699 (D.C. Cir. 2009). The D.C. Circuit then remanded the case to this Court, instructing the Court to determine "which officers made timely requests under sections 1402 and 1403 and provided notices of their claims upon requests, and which officers received end of mediation notices and made timely elections pursuant to section 1404 [of the CAA]." Id. at 714, n.5. In response to the Circuit Court's instructions, Judge Sullivan ordered the plaintiffs to file another amended complaint—the fourth—pleading

[2] The CAA is the only avenue for relief for employees of the legislative branch asserting claims of discrimination. Although employment discrimination claims are normally brought under Title VII of the 1964 Civil Rights Act, those provisions, as enacted, did not apply to employees who work in the legislative branch of the government. In 1996, however, via the CAA, Congress extended certain Title VII protections to legislative branch employees, including within the CAA certain anti-discrimination and anti-retaliation provisions. See 2 U.S.C. §§ 1302, 1311, 1317.

subject matter jurisdiction with specificity, *i.e.*, how and when each named plaintiff exhausted the administrative remedies required by the CAA for each claim. Order [#271]. That complaint was filed on May 10, 2010. [#278]. In response to that complaint, the defendant filed the instant motion to dismiss, claiming that the vast majority of the plaintiffs did not and could not show exhaustion under the CAA, and therefore, the Court lacks jurisdiction to hear the plaintiffs' claims.

II. The CAA Administrative Review Process

The CAA requires a four step process before an employee-plaintiff may file suit in federal court. First, the employee must request counseling from the Office of Compliance within 180 days of the alleged violation of the employee's rights. 2 U.S.C. § 1402(a).[3] The counseling period lasts 30 days, beginning on the date the request for counseling is received. 2 U.S.C. § 1402(b). Once the counseling period has concluded, and the employee is notified in writing, the employee has 15 days to request mediation with the Office of Compliance. 2 U.S.C. § 1403(b). At the end of the mediation, which lasts for 30 days, the employee may bring her claims either in federal court or before a board convened by the Office of Compliance. 2 U.S.C. §§ 1404, 1408(a). The complaint must be filed with the court or the Office of Compliance no sooner than 30 days but no later than 90 days after receiving notification of the end of mediation. 2 U.S.C. § 1404.

Strict adherence to this administrative review process is required by the CAA before any action may be commenced in federal court. 2 U.S.C. § 1361(d). Indeed, as held by the D.C. Circuit, exhaustion of these administrative remedies is a jurisdictional issue; without exhaustion, the courts have no authority to hear the employee's claims. See 2 U.S.C. § 1408(a) ("The district

[3] All references to the United States Code are to the electronic versions found on Westlaw or LexisNexis.

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."); Blackmon-Malloy, 575 F.3d at 705-06 ("The conclusion that Congress intended the three-step process to be jurisdictional is consistent with the statutory scheme that Congress established to handle discrimination (and other) claims by its employees.").

The CAA administrative regime and the Office of Compliance were created to provide employees of the legislative branch "an opportunity to settle claims prior to commencement of formal administrative or judicial proceedings." Blackmon-Malloy, 575 F.3d at 706. This purpose underlies the various administrative steps plaintiffs must go through before they can bring suit. By giving notice of the claim to the employer and participating in the counseling and mediation process, the parties can attempt to reach resolution before initiating the type of protracted, resource-intensive litigation present throughout this case.

DISCUSSION

I. Standard of Review

On a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of proving, by a preponderance of the evidence, that jurisdiction is proper over each claim asserted. Fed. R. Civ. Pro. 12(b)(1); Auburn Reg'l Med. Ctr. v. Sebelius, 686 F. Supp. 2d 55, 61 (D.D.C. 2010) (citing U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000)); Bennett v. Ridge, 321 F. Supp. 2d 49, 51 (D.D.C. 2004); Thompson v. Capitol Police Bd., 120 F. Supp. 2d 78, 81 (D.D.C. 2000). Even though a motion to dismiss is not a motion on the merits, because the plaintiff bears the burden of proof, her "factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to

state a claim." Bennet, 321 F. Supp. 2d at 52 (citing Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001)); Gordon v. Office of the Architect of the Capitol, 750 F. Supp. 2d 82, 87 (D.D.C. 2010).

In determining whether the court has subject matter jurisdiction, the court "is not limited to the allegations contained in the complaint." Johnson v. Holder, 598 F. Supp. 2d 50, 54 (D.D.C. 2009). Rather, "the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197-98 (D.C. Cir. 1992).

The D.C. Circuit, in reviewing a prior opinion in this case, explicitly held that because administrative exhaustion is a jurisdictional prerequisite to being heard in federal court, the Court is "not empowered to apply the equitable doctrine of vicarious exhaustion to excuse compliance with [the CAA's] requirements." Blackmon-Malloy, 575 F.3d at 706. In other words, each individual plaintiff must plead exhaustion as to each individual claim with the required specificity in order to be heard on the merits. Plaintiffs may not survive a motion to dismiss by "piggy backing" off other claims or plaintiffs to gain jurisdiction; a plaintiff does not gain jurisdiction on a non-exhausted claim by virtue of bringing a properly exhausted one, nor can one plaintiff establish jurisdiction on a non-exhausted claim simply by virtue of its similarity to another plaintiff's claim that was properly exhausted.

II. Analysis

As noted above, Judge Sullivan ordered the plaintiffs to "file a new complaint pleading subject matter jurisdiction as set forth in the D.C. Circuit's decision." [#271] at 2. The defendant argues in its motion to dismiss that the Fourth Amended Complaint is insufficient for a variety of

reasons, including: 1) that for many plaintiffs and their claims, no factual support for the claim was put forth; 2) that many of the claims were disallowed under prior rulings in this case, and those holdings were not disrupted on appeal; and, perhaps most importantly, 3) that the latest complaint is filled with cursory or conclusory statements regarding exhaustion that fail to include any dates or factual support (*i.e.*, "The plaintiffs requested counseling and received End of Mediation Notices from the Congress's Office of Compliance as a result of these discriminatory experiences," [#278] at 3; "All the Plaintiffs in this category, among others, made timely requests for counseling . . . to the Office of Compliance; provided the Office with any and all information requested, received End of Mediation Notices; and timely filed in the U.S. District Court within 90 days thereafter." [#278] at 8, 9, 10, 13). See Memorandum in Support of Defendant's Motion to Dismiss the Fourth Amended Complaint [#299] at 2.

Defendant's argument has merit. Plaintiffs often *state* that they have exhausted their claims, without giving any of the information necessary for the Court to determine whether or not that is true, a point previously made by Judge Sullivan.

Additionally, Judge Sullivan criticized the plaintiffs for filing pleadings that are not in accordance with this Court's orders, or which assert claims that were already dismissed as not viable. See Minute Order of February 15, 2008 ("Plaintiffs are cautioned that the Amended Complaint must adhere strictly to this Court's previous Orders and the Report and Recommendation and Supplemental Report issued by Magistrate Judge Facciola and adopted by Judge Sullivan in this case; to the extent the Amended Complaint attempts to incorporate new claims, or includes claims that have previously been dismissed by the Court, the Court will impose sanctions and/or dismiss the Amended Complaint forthwith."). Unfortunately, plaintiffs' fourth bite at the apple is plagued with many of the same errors and lack of support as prior

complaints. As described in detail below, I am left with no other choice but to recommend once again that the vast majority of the claims be dismissed.

A. Previously Dismissed Claims and Plaintiffs

A few categories of claims may be disposed of at the outset.

First, the plaintiffs assert, once again, a discrimination claim on behalf of black officers "who would otherwise have participated in the promotion process but concluded that participation was futile based on the racist history of the promotion process." [#278] at 21. However, in a prior ruling, Judge Sullivan held that only those who actually participated in the 2000 promotional process have potentially viable claims for non-promotion, because the participation opt-in date for the 2000 Sergeant's and Lieutenant's exam was more than 180 days before any of the plaintiffs began the CAA administrative review process. Blackmon-Malloy v. U.S. Capitol Police Bd., 338 F. Supp. 2d 97, 110-12 (D.D.C. 2004) (affirmed in part, Blackmon-Malloy v. U.S. Capitol Police, 575 F.3d 699, 699 (D.C. Cir. 2009)) . That holding was neither addressed nor disturbed on appeal, and therefore must stand. Thus, I recommend that all claims falling under this category, listed alphabetically by officer in Exhibit 9 to the Fourth Amended Complaint, be dismissed with prejudice for lack of jurisdiction.[4]

Second, the plaintiffs continue to assert disparate impact claims – listed in Exhibits 4 and 5 – which were, like the futility argument described above, specifically disallowed by Judge Sullivan's previous ruling. Blackmon-Malloy, 338 F. Supp. 2d at 112.[5] The disparate impact

[4] For example, Kendrick Young is listed in the Fourth Amended Complaint only in Exhibit 9. [#278-9]. This plaintiff, therefore, should be dismissed with prejudice, as no other claim is put forth.

[5] "It is clear the plaintiffs have not alleged that the 'excessively subjective' system had a disparate impact on African Americans within 180 days of the first request for counseling. Plaintiffs have not alleged that the 2000 Sergeant's or Lieutenant's promotion process had a disparate impact on African American officers. Plaintiffs have not alleged that an African

claims were not alleged within 180 days of the first request for counseling, and therefore were not timely. These claims should also be dismissed with prejudice.

Third, at different points in the case, a number of plaintiffs 1) were voluntarily dismissed from the case; 2) indicated they wanted to be dismissed; 3) failed to respond to show cause orders requiring them to assert why they should not be dismissed; or 4) were deemed by both parties to be out of the case for failure to have properly exhausted their administrative remedies. See, e.g. Parties' Joint Report in Response to the Court's March 8, 2010 Order [#275] at 2-3. The parties also previously agreed that certain plaintiffs had not properly exhausted their administrative remedies. Id.

Plaintiffs assert that some of those individuals filed declarations in support of their opposition to defendant's motion to dismiss, and therefore, "it is clear that they are no longer interested in withdrawing from the case." Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss [#331] at 69. However, plaintiffs who are voluntarily dismissed are not reinstated into a case simply by virtue of filing a new declaration in support of an opposition to the defendant's motion. They must instead move to vacate their dismissal from the case.[6]

American officer was denied a promotion based on the existence of a command discipline or performance notes in his or her personnel file or received unfavorable assignments within 180 days of the first request for counseling. Without a timely request for counseling and mediation, these claims also fail." Blackmon-Malloy, 338 F. Supp. 2d at 112.

[6] "A voluntary dismissal without prejudice results in a *tabula rasa.* It renders the proceedings null and void and leaves the parties in the same position as if the action had never been prosecuted." Jorge v. Rumsfeld, 404 F.3d 556, 563 (1st Cir. 2005); Breen v. Peters, 529 F. Supp. 2d 24, 28 (D.D.C. 2008). Moreover, a final order of judgment is not necessary to voluntarily dismiss a plaintiff from a case: "When the plaintiff files a notice of dismissal before service by the adverse party of an answer or of a motion for summary judgment, the dismissal takes effect automatically: the trial judge has no role to play at all." Randall v. Merrill Lynch, 820 F.2d 1317, 1320 (D.C. Cir. 1987). This Circuit has also held that voluntary dismissals of plaintiffs and all their claims operate as "adjudications on the merits" and are considered "final judgments"

Additionally, two plaintiffs—Clinton Bradford and Shafton Adams—were instructed to show cause as to why their claims should not be dismissed with prejudice. Order to Show Cause [#218]. They did not respond. Even though the plaintiffs argue that they should be given a second chance, their claims must be dismissed. The D.C. Circuit's remand does not amount to an open-season opportunity for all plaintiffs previously dismissed to suddenly re-assert their claims without any regard to prior decisions or inaction in this court. Only certain issues were raised and ruled on by the appellate court, and I do not recommend yielding to the plaintiffs' assertions that we must begin from scratch, especially when most of Judge Sullivan's prior rulings had nothing to do with—and were therefore not impacted by—the reasoning and holdings of the D.C. Circuit.

To the extent that the Fourth Amended Complaint asserts claims on behalf of any of plaintiffs previously dismissed voluntarily or who should have been dismissed for failing to respond to a show cause order, I recommend that those claims be denied as well.

As for those plaintiffs who indicated to their class counsel that they wished to withdraw from the case just before the filing of the Fourth Amended Complaint, I recommend that these claimants be dismissed as well. These include 1) Shawn Deneal; 2) Yvonne Dove; 3) Marcus Edwards; 4) Charles Nanton Jr.; 5) Anthony Washington; 6) Jolania White Sharps (Cobbin); and 7) Rodric Myers. [#275] at 3-4.

B. Claims Not Properly Noticed

Much of defendant's motion to dismiss and the plaintiffs' opposition concerns whether the defendant was sufficiently put "on notice" of each claim by each plaintiff under the CAA.

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subject to Rule 60, which requires the dismissed plaintiff to move the court for relief from the previous notice of dismissal. Id.; Fed. R. Civ. P. 60(b). Absent a Rule 60(b) motion, therefore, the court lacks authority to reconsider the claims of a previously dismissed plaintiff.

For multiple plaintiffs, defendant repeats the same language that the plaintiffs "failed to provide the Capitol Police Board with notice of any of the claims during the administrative process," Notice of Filing Second Amended Memorandum in Support of Defendant's Motion to Dismiss the Fourth Amended Complaint [#315-1] at 48, or "failed to provide the Capitol Police Board with any information regarding the factual basis for his claim during the administrative process." Id. at 74. The defendant believes that because of certain plaintiffs' failures to identify any factual support showing 1) when the alleged violation occurred; or 2) that their claim was raised at the administrative level at all, they are "unable to show that [they] requested counseling within 180 days of an allegedly discriminatory act." Id. Indeed, it would appear impossible to determine compliance with the CAA without at least *some* information about each claim, including its nature and the date when the alleged violation occurred.

Plaintiffs counter this point by asserting that mediation is an "informal process," and that the parties should not be obligated to "provide every detail of the incidents complained of." [#331] at 51. Plaintiffs point to Artis v. Bernake, 630 F.3d 1031 (D.C. Cir. 2011), a Title VII case, for support, noting that there, the D.C. Circuit held that a handful of anecdotes of disparate treatment were sufficient to put the Federal Reserve Board on notice of the class' claims. Id. at 1038. Although this may be true, the jurisdictional pleading requirements in a case brought under the CAA are decidedly different from those in a Title VII action. See Blackmon-Malloy, 575 F.3d at 706 (holding that the CAA's timely filing requirement, unlike Title VII's, is jurisdictional, and doctrines of vicarious exhaustion, applicable in Title VII cases, do not apply here). What is true for Title VII, therefore, is not necessarily true for actions brought under the CAA. When timely satisfaction of an administrative regime is jurisdictional, dates and details matter. Plaintiffs who did not provide any details about their claim—including, at a minimum,

the date of the alleged violation and what the alleged violation was—cannot show that their claims were timely raised and exhausted. Further, plaintiffs cannot rely on the properly noticed claims of their fellow officers in satisfying their own jurisdictional requirements, nor can they simply say "this claim was timely exhausted" without putting forth any evidence showing as much.

Contrary to the plaintiffs' assertions, therefore, the defendant is not trying to subject the mediation sessions to "re-examination by the court," [#331] at 55, nor is it challenging the D.C. Circuit's clear instruction that the court's evaluation of whether jurisdiction is proper is a "limited inquiry," Blackmon-Malloy, 575 F.3d at 714. The defendant merely argues that, with hundreds of plaintiffs and many more claims in and out of this case over the last eleven years, there are some claims for which absolutely *no* information was provided, and in others, the assertions were so general or vague that it is impossible to tell whether the claims were raised and the administrative process exhausted.

It would defeat the purpose of the CAA's administrative regime if a group of 200+ claimants were deemed to have put the defendant on sufficient notice of their claims merely because their attorney said that "these 150 experienced a racial slur" or that "these 100 were unfairly disciplined" without providing any indication of when those events allegedly occurred. If such blanket statements, and nothing more, constituted "notice" of each claim and timely exhaustion, there would be no point to engaging in counseling or mediation, because the employer would be at a loss to determine what went wrong and how any violations could be remedied.

Plaintiffs counter that, if a claim was not properly identified, or if the exact date of the alleged violation was not put forth, it is because the Office of Compliance did not ask the

plaintiffs to identify their claims with specificity when the administrative process began. [#331] at 31. For that reason, plaintiffs argue, it would be unfair to require them to now assert specific dates for the alleged acts to show they occurred within 180 days of their request for counseling. Id. This argument also fails. Because the plaintiffs bear the burden of proof with regards to jurisdiction, which includes showing that each claim was timely brought and properly noticed, plaintiffs must be able to show 1) exactly when the event occurred; and 2) that all subsequent steps of the administrative process were satisfied. Even if the Office of Compliance did not specifically ask at that time, plaintiffs must be able to show timeliness if they want their claims heard in federal court, especially given the strict instructions of both the D.C. Circuit and Judge Sullivan. Conclusory statements that "all plaintiffs exhausted in a timely fashion" are simply insufficient to meet the standards imposed by the CAA, and any claim without documentation actually *showing* timely exhaustion does not meet this requirement.

As the defendant correctly points out, hostile work environment claims are "different in kind" from discrimination claims brought in response to discrete acts. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Rather than occurring on a specific date, these claims are about pervasive conduct over a period of time. So long as an officer sought counseling within 180 days of any act that contributed to the hostile work environment claim, that claim would be timely. Id. at 117. That does not mean, however, that other claims based on discrete acts, previously held to be time-barred or non-exhausted, should be permitted to proceed merely because they were "recast," as defendant puts it, as hostile work environment claims in the latest complaint. [#315-1] at 23. Unless raised as such at the administrative level, and without any evidence affirming exhaustion of that specific claim, any hostile work environment

claims now asserted by the plaintiffs cannot possibly be considered in a manner consistent with the court of appeals' determination that the exhaustion requirements are jurisdictional.

With regards to the original plaintiffs who proceeded to counseling in April 2001, there appears to be a genuine factual dispute whether Mr. Ware, their attorney at the time, raised the hostile work environment claim on each of their behalf. See [#331] at 57-54; [#365] at 9-10. Plaintiffs assert that, because the administrative complaint "provided details for a few Plaintiffs and general information as to the issues raised by almost all of the Officers . . . the [Capitol Police Board] was put on notice that a hostile work environment . . . was an issue for all Plaintiffs . . . and the fact that Attorney Ware did not give dates or specific incidents that contributed to such an environment does not prevent his statement from constituting adequate notice for the purpose of mediation." [#331] at 58-59.

The defendant, for its part, states that Mr. Ware did not assert this claim at counseling or in mediation, nor did he note in his prior declaration filed with this Court that the hostile work environment claim was raised on behalf of all plaintiffs. Reply in Support of Defendant's Motion to Dismiss the Fourth Amended Complaint [#365] at 9-10. The defendant also points out that in the numerous other proceedings conducted in this case over the last ten years, never before have all the plaintiffs asserted, or purported to assert, a hostile work environment claim. Id. at 11.

Although it is true that many of the discrete acts alleged by the plaintiffs could, in the aggregate, support a hostile work environment claim, that analysis is not proper at this juncture. Such an inquiry is better left to either a 12(b)(6) motion or to a motion for summary judgment under Rule 56. Our only concern at the moment is whether the hostile work environment claims were previously raised, and if so, by whom. Only those who asserted the claim in the administrative process—and can demonstrate such an assertion—may proceed. This means that,

in order to proceed, individual plaintiffs must have raised information sufficient to put the defendant on notice of his or her hostile work environment claim during the administrative process. A blanket statement from the attorney that "all plaintiffs raise this claim" is no more sufficient than the blanket claims of exhaustion, present throughout the complaint, which I criticized above.

In the remainder of this report and recommendation, I will highlight those plaintiffs who have sufficiently demonstrated that their hostile work environment claims were properly raised during the administrative process. Apart from those few, I recommend that all others claims in this category be dismissed with prejudice for failing to show that their claim was properly exhausted.[7]

C. Remaining Claims and Plaintiffs

This brings us to the remaining plaintiffs. In my previous Report and Recommendation [#151], I reviewed the documents submitted by plaintiffs and concluded that the vast majority of their claims should be dismissed with prejudice. I included four charts with my Report – Appendix A, listing the claims represented to be exhausted by plaintiffs' counsel; Appendix B, listing all claims not supported by evidence of exhaustion and needing to be dismissed with prejudice; Appendix C, listing those claims from Appendix A that should be dismissed without prejudice because they needed supplemental support; and Appendix D, aggregating only the presently viable claims. [#151-1, 2, 3, 4]. Appendix D showed that only eight plaintiffs had exhausted administrative remedies on at least one of their claims: 1) Shafton Adams; 2) Sharon Blackmon-Malloy; 3) Clinton Bradford; 4) Duvall Phelps; 5) Vernier Riggs; 6) Regina Bolden-Whitaker; 7) Arnold Fields; and 8) Frank Adams. [#151] at 25. The defendant concedes that

[7] The "blanket statement" approach is taken with regards to many other claims as well. The same reasoning holds true for those claims, as discussed in Part C, *infra*.

many of these plaintiffs have exhausted administrative remedies on at least one claim. See [#365] at 23-26. I will discuss each of those plaintiffs in more detail below.

On appeal, the D.C. Circuit overruled this Court's previous determination that the officers must have participated in counseling or mediation in person, rather than via a representative, in order to exhaust those remedies. Blackmon-Malloy, 575 F.3d at 710. To the extent that I recommended that claims or claimants be dismissed with prejudice *solely* on the grounds of failing to appear in person for counseling or mediation, the D.C. Circuit's opinion makes such claims and claimants viable once again. For example, I initially recommended that plaintiff Richard Webb's discrimination and hostile work environment claims be dismissed because "Officer Webb did not appear personally at any mediation sessions related to those claims." [#151] at 25. As that holding is no longer good law, Officer Webb should not be precluded from bringing his claim only on this ground.

As the defendant correctly points out, however, some of these claims are not asserted in the Fourth Amended Complaint, and if they are, the assertion is too cursory or general to glean whether administrative remedies were timely exhausted. Throughout the complaint, for each category of claims, the plaintiffs put forth individual narratives of some officers, followed by an exhibit listing all of the officers asserting that claim. I am inclined to agree with the defendant that this approach fails in two respects: 1) it does not follow the strict instructions of the Court of Appeals or Judge Sullivan that each claim for each plaintiff must be stated with specificity, and must include the relevant dates and timeliness under the CAA; and 2) it provides no factual support upon which any reasonable court could determine whether a claim was properly exhausted.

The instruction from the Court of Appeals was clear. Merely asserting that "this is what happened to X, and it happened to A, B, C, and D, too" does not alert either the defendant or the Court to the information necessary to determine whether A, B, C and D made a timely complaint. The merits cannot be reached without knowing 1) when the alleged incident occurred; 2) whether it was raised with specificity to the Office of Compliance in a timely fashion; and 3) whether the rest of the administrative review process was timely completed. Instead of pleading the foregoing for each claim brought by each officer, as they were instructed to do, and as the defendant was able to do in its voluminous motion to dismiss, the plaintiffs left the brunt of this work to the Court.

After a review of all the documentation submitted – both for the original motion to dismiss, and the instant one – I must conclude, once again, that the vast majority of the plaintiffs are unable to satisfy their burden for each of their claims, for at least one of the following reasons: 1) they did not timely exhaust at least one step of the administrative process; or 2) they did not provide adequate documentation showing that, for *each* claim, they exhausted administrative remedies timely and properly.

I will proceed much as I did in my previous report in this case. Below, I will discuss some of the more complicated cases in detail, highlighting my recommendations as to which claims should and should not proceed. I will also raise issues resulting from the parties' inaccurate and often unnecessarily confusing pleadings, where such issues result in a need for clarification. Any plaintiffs not discussed in the following paragraphs should be dismissed outright because absolutely no evidence was submitted on their behalf showing 1) that they properly raised their claims in the administrative process; 2) that they exhausted that process; and

3) that they timely proceeded to federal court, in either Civil Action No. 01-2221 or one of the consolidated cases.

Finally, in Appendix B at the end of this report, there is a list summarizing which plaintiffs and claims I recommend be allowed to go forward. Conversely, I recommend dismissal of all claims and plaintiffs not present on this list.

1. Frank Adams

The defendant concedes that Lt. Adams has at least one viable claim for discrimination. [#365] at 25. Lt. Adams originally alleged 57 different incidents spanning the period between November 30, 1994 and July 1, 2004. [#151] at 8-9. Many of those claims were dismissed as untimely, as a request for counseling was not submitted within 180 days of the alleged violation. Id. I allowed 33 of those claims to go forward. Id.; see also [#151-1] at 1. I recommend that the court maintain jurisdiction over those actions that survived in my previous Report and Recommendation.

The defendant previously conceded jurisdiction for Lt. Adams's hostile work environment and adverse actions claims filed in the lead case. [#151] at 9. Defendant also concedes, via its reply to plaintiffs' opposition to the motion to dismiss, that Adams "appears timely for his non-selection to John Hopkins PELP program (August 28, 2003), non-selection to a management college (September 11, 2003), non-selection to the FBI Academy (October 27, 2003), threat of transfer (November 3, 2003), and involuntary transfer (November 6, 2003)" claims, as well as his non-selection to Captain claim dated Nov. 24, 2005. [#365] at 30. Those

claims, asserted in Civil Action Nos. 04-0943 and 06-0653, respectively, should therefore go forward.[8]

2. Shafton Adams

The pleadings and briefings surrounding this plaintiff are confusing, to say the least. I previously held that Special Agent Adams' hostile work environment claim could go forward; this was the only claim asserted on behalf of this plaintiff. [#151] at 11-12. However, this claim was not re-asserted in the current complaint.[9] In the Fourth Amended Complaint, Special Agent Adams only asserts claims for racist actions and retaliation.[10] [#278-3, 10]. Neither of these two claims is described in any detail in the new complaint, making it impossible to determine when they occurred and if they were raised at the administrative level.

Moreover, the defendant's briefings in the motion to dismiss appear to contradict one another. In the brief in support of the motion, the defendant points out that Special Agent Adams failed to respond to a show cause order, issued April 17, 2008, which noted that failure to respond would result in a dismissal of his claim. [#218] at 1. The defendant claims this is grounds to dismiss all of Special Agent Adams' claims. Yet, in its reply brief to the motion to dismiss, the defendant 1) asserts that Special Agent Adams "has not shown that he is timely for his non-selection for the criminal investigatory and intelligence investigator positions," yet 2)

[8] These claims were previously dismissed without prejudice "until such evidence is provided" establishing exhaustion. [#151] at 10. Although no certification of compliance was submitted from the Office of Compliance certification, the defendant concedes jurisdiction, so these claims should survive.

[9] The Court finds it curious that Special Agent Adams' name is absent from the list of names in Exhibit 1. Although it appears that almost all of the remaining plaintiffs are now asserting hostile work environment claims via this exhibit, Special Agent Adams, one of the few plaintiffs previously held to have a viable claim in this area, is absent from the list.

[10] Special Agent Adams is also listed on Exhibit 9, but for reasons stated above, this claim should fail. The retaliation claim appears to be for discipline for bringing his child to work. [#365-2] at 41.

includes him on a list of plaintiffs who have satisfied the jurisdictional requirements for at least one claim. [#365-3] at 1. As for Special Agent Adams' other claims, no documentation was submitted with the Fourth Amended Complaint or plaintiffs' opposition to the motion to dismiss that affirmatively shows exhaustion.

It is impossible on this record to determine what claim is being asserted, whether it was exhausted, and whether jurisdiction is conceded for that claim. I will therefore order the following before making a final recommendation to Judge Sullivan on this plaintiff: Special Agent Adams will have ten days from the date of this opinion within which to state as clearly as possible what claim(s) he is asserting and why he believes they are exhausted in accordance with the principles articulated in this Report and Recommendation. Defendant will have ten days to respond, and at that point, the Court will determine what (if any) claims this plaintiff may assert.

3. Sharon Blackmon-Malloy

Defendant concedes that Lt. Blackmon-Malloy exhausted two claims for discrimination – one stemming from receipt of a CP-550 performance note in March 2001, and another for receipt of five performance notes for an incident occurring in February, 2001. [#315-1] at 294. These claims are described in the complaint at ¶ 70. It also appears that then-Sgt. Blackmon-Malloy exhausted her administrative remedies with regards to her retaliation claim for non-promotion from the 2003 lieutenant promotion exam, asserted in Civil Action No. 04-0320, and the defendant concedes as much in its reply brief. [#365] at 30. Finally, defendant concedes that Lt. Blackmon-Malloy's claim of retaliatory exposure to second-hand smoke, asserted in Civil Action No. 02-1859, is timely. Id. I therefore recommend that these claims go forward.

Although Lt. Blackmon-Malloy is listed on numerous other exhibits to the complaint, no other circumstances or proof of exhaustion is offered on those claims other than in general terms. I must therefore recommend that any additional claims be dismissed.

4. Regina Bolden-Whitaker

I previously held that Officer Bolden-Whitaker had exhausted her administrative remedies on two claims – one for retaliation for refusing to wear body armor, which appeared in the original case, Civil Action No. 01-2221, and another unspecified claim of retaliation brought under Civil Action No. 03-2644, which I now understand to be retaliation for refusing to sign a deputation form. See [#151-4]; [#365] at 24. The defendant concedes that the retaliation for refusing to sign a deputation form claim has been adequately exhausted. [#365] at 31.

Details of these claims are absent from the body of the Fourth Amended Complaint, although previously elaborated-upon allegations are "incorporated by reference." [#278] at 29. Bolden-Whitaker's name is listed in Exhibits 1, 2, 3, 4, and 10, but no support is given to show these claims were raised at the administrative level and properly exhausted. I therefore recommend that any non-retaliation claim asserted by Bolden-Whitaker be dismissed.

As to the body armor claim raised in Civil Action No. 01-2221, defendant now claims Bolden-Whitaker could not possibly have exhausted her administrative remedies, because that case was filed the same day she received her end of counseling notice – October 29, 2001. [#365] at 24. Plaintiffs, in their opposition brief, also note that Bolden-Whitaker "requested counseling at the OC in September 2001" for the body armor claim. [#331] at 47. The defendant is correct in its assertion that, if counseling was requested in September 2001, Bolden-Whitaker would not have exhausted her administrative remedies until December at the earliest, given that she would need to 1) receive her end of counseling notice; 2) proceed with mediation; and 3)

receive an end of mediation notice before bringing her claim in court. [#365] at 24. Indeed, in my previous recommendation, I noted that mediation concluded December 6, 2001 – a month and a half after the complaint in Civil Action No. 01-2221 was filed. [#151-4] at 2.

In the Title VII context, "the Circuit Court has held . . . where a plaintiff fails to completely exhaust her administrative remedies prior to filing suit, but exhausts them after filing and before dismissal, the Court should excuse the plaintiff's prior failure to exhaust." Holmes v. PHI Serv. Co., 437 F. Supp. 2d 110, 123 (D.D.C. 2006) (citing Williams v. Wash. Met. Area Transit Auth., 721 F. 2d 1412 (D.C. Cir. 1993)). "Whether a plaintiff has cured her failure to exhaust administrative remedies prior to bringing a civil action by exhausting those remedies after filing her complaint depends on whether the exhaustion requirement at issue imposes a jurisdictional or non-jurisdictional barrier." Holmes, 437 F. Supp. 2d at 118-19. As I previously explained, Title VII differs from the CAA in that the D.C. Circuit has explicitly held that exhaustion under the CAA is a jurisdictional prerequisite to bringing a suit in federal court. Therefore, although a failure to exhaust before filing a Title VII suit may be cured by subsequent exhaustion, this is not the case under the CAA. "If a particular exhaustion requirement constitutes a jurisdictional prerequisite to suit, the Court may not excuse its failure." Id. (citing Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004). I therefore recommend that Officer Bolden-Whitaker's body armor claim be dismissed.

5. Clinton Bradford

In the Fourth Amended Complaint, Officer Bradford is listed in Exhibits 1, 3, 4, 5, 10 and 11, but not in the body of the complaint. [#278-1, 2, 3, 4, 5, 10, 11]. Additionally, a declaration by Officer Bradford was filed along with the plaintiffs' opposition to the motion to dismiss, wherein he asserts that he was discriminated against by not being selected for a K-9 position and

subjected to a racially discriminatory statement regarding the reason for denial. [#331-6] at 39-40. Officer Bradford alleges that he participated in the counseling and mediation process under the lead case, Civil Action No. 01-2221. Id. No other facts are alleged with regards to this plaintiff and no documentation from the Office of Compliance was submitted.

I originally held that enough evidence of exhaustion was produced to allow Officer Bradford's claims of non-promotion and hostile work environment to go forward. [#151] at 16. However, on April 17, 2008, Judge Sullivan issued a show cause order, indicating that Officer Bradford wished to have his claims dismissed and requiring him to respond and show cause why that should not occur. [#218]. Judge Sullivan noted that failure to respond would result in the dismissal of his claims. Id. Plaintiff Bradford failed to respond in time. Accordingly, these claims should be dismissed in conformance with Judge Sullivan's order.

6. Tyrone Brooks

This plaintiff appears in the Fourth Amended Complaint only under Exhibit 9, a list of individuals claiming that participation in the promotion process was futile. Yet, his name also appears in the list of plaintiffs, provided to this court, whom the parties agreed had properly exhausted their claims. [#275] at 1. Further, in its reply brief, the defendant asserts that Officer Brooks may go forward on his claim for retaliation with respect to the 2002 Sergeant promotion process, brought in federal court under Civil Action No. 04-320. [#365] at 26. Officer Brooks is not, however, listed in the corresponding exhibit for this claim in the Fourth Amended Complaint. [#278-7].

For the reasons described above, the claim that he should be excused from exhausting his administrative remedies because doing so would have been futile must fail. *Supra* at 7. As for

the retaliation claim, I recommend that that this claim be allowed to proceed because the defendant appears to concede jurisdiction.

7. Sandra Brown-James

In the Fourth Amended Complaint, Sandra Brown-James is listed under exhibits claiming hostile work environment, racist actions, disparate treatment, and non-promotion with respect to the 2000 Sergeant's exam. [#278-1, 3, 5, 7]. She is also listed on the joint status report as a plaintiff whom the parties agree properly exhausted her claims. [#275] at 1-2.

This plaintiff presents a peculiar problem, however, which is raised with a handful of other plaintiffs, discussed below. Despite its concession in the parties' joint submission just one month before the Fourth Amended Complaint was filed, that jurisdiction over this plaintiff was appropriate, defendant later asserted that this plaintiff voluntarily dismissed her discrimination claims in 2008, and that those claims are no longer before the Court. [#315-1] at 75.

Apart from listing her name in various exhibits, plaintiffs fail to provide any other information about her claims. A certification from the Office of Compliance was submitted along with the plaintiff's opposition memorandum, indicating that administrative remedies were exhausted for Case No. 03-CP-82, but it is unclear which claims were raised during that administrative review. [#331-5].

Given all this confusion, I must seek clarification from the parties as to which claim – if any – was properly exhausted in 03-CP-82. If there is a claim that was properly exhausted, I find it strange that the defendant would claim that this plaintiff was previously dismissed, and therefore jurisdiction over any of her claims is improper, while at the same time submitting her name on a list of agreed upon plaintiffs who may proceed. Clarification on that point is also necessary before any final action is taken. The parties will file jointly a praecipe indicating

whether they agree as to what claim was properly exhausted in 03-CP-82. If they cannot agree, plaintiffs will file a statement so indicating within ten days of the issuance of this Report and Recommendation, and defendant may respond thereto ten days thereafter. At that time, I will make my final recommendation on this plaintiff to Judge Sullivan.

8. Arnold Fields

I previously found that this plaintiff exhausted his claims in the consolidated cases, Civil Action Nos. 02-1346, 03-1505, and 03-2644, for hostile work environment and retaliation. [#151] at 17; [#151-4] at 2; [#331] at 29. Fields is also listed in the parties' joint status report as a plaintiff who may proceed with at least some of his claims. [#275].

In its motion to dismiss, the defendant asserts that any claim made in Civil Action No. 01-2221 is untimely because the only events discussed during the administrative review under that case occurred more than 180 days before counseling was sought. [#315-1] at 106.

Because I previously found that exhaustion was proper for Fields' claims in Civil Action Nos. 02-1346, 03-1505 and 03-2644, I recommend that those claims for retaliation and hostile work environment be allowed to proceed.[11] Any other claim purportedly asserted by Fields in the Fourth Amended Complaint, by virtue of the inclusion of his name in various exhibits, should be dismissed, as no evidence was provided showing those claims were properly exhausted. This means that Fields should be able to go forward with his claims for hostile work environment and retaliation, but not discrimination.

[11] Defendant also concedes that the jurisdictional burden was satisfied for specific claims of retaliation related to Officer Fields' 2002 performance evaluation and the "Family Friendly Leave investigation." [#365-4] at 8. Assuming that these are the same allegations as in Civil Action Nos. 02-1346, 03-1505, and 03-2644, I agree that they should proceed.

9. Gary Goines

In the Fourth Amended Complaint, Goines is only listed in various exhibits. [#278-1, 2, 3, 4, 7, 9]. No supporting facts are alleged elsewhere in the complaint. The defendant contests that Goines provided notice during the mediation period only for claims that were untimely, in that they occurred more than 180 days before the request for counseling was made. [#315-1] at 114.

In Civil Action No. 04-0320, Goines alleged discrimination with respect to the Sergeant promotion process from 2002-2004. [#278] at 27. Documentation was submitted with the plaintiffs' opposition brief indicating that Goines completed the administrative process for this claim. [#331-5]. Goines is also listed as a plaintiff whom the parties agreed had properly exhausted at least one claim. [#275]. Once again, it is unclear to which claim the parties agreed. However, given that documentation was provided for 03-CP-95, that claim—presumably for discrimination in the promotion system and retaliation—should be allowed to go forward. All other claims should be dismissed for failure to provide adequate documentation of exhaustion.

10. Tammie D. Green

Although the parties agreed that this plaintiff could go forward on at least one claim in the 2010 status report, [#275], curiously, this plaintiff appears nowhere in the Fourth Amended Complaint. Both sides address Ms. Green in the motion to dismiss and opposition, but it appears the defendant might have confused Ms. Green with a different plaintiff, Clifford Green. Plaintiffs must not have noticed the error either, as they respond to the motion as if Tammie Green was listed in the complaint.

I previously held that Officer Green could not proceed because she failed to appear at mediation in person. [#151] at 18. At that time, Officer Green was proceeding only on a claim of

discrimination in the 2003 promotion process. Id. at 17. Obviously, given the D.C. Circuit's ruling, failure to appear in person at mediation is no longer grounds for dismissal. And, even if I am to construe the Fourth Amended Complaint as incorporating all previous claims asserted on behalf of named plaintiffs in the lead case and the consolidated cases, the timeliness of Officer Green's retaliation claim under Civil Action No. 04-320 is disputed. Officer Green's declaration states that the end of mediation notice for this claim was issued on November 17, 2003, [#331-1] at 48, which would make the complaint in Civil Action No. 04-320 untimely, as it was filed more than 90 days after the end of mediation notice was served. The Office of Compliance certification, however, states that the end of mediation notice was given on December 5, 2003. [#331-5]. This inconsistency makes it difficult to tell whether or not the district court complaint was timely filed, and therefore, whether jurisdiction is proper.

Given that Officer Green is not listed anywhere in the complaint, I must request that the plaintiff submit clarification, in writing, no later than ten days from the filing of this Report and Recommendation, clarifying what claim(s), if any, Officer Green is asserting. Defendant may respond thereto within 10 days.

11. Ave Maria Harris

I previously held that Officer Harris's claim filed in Civil Action No. 03-2644, for retaliation and hostile work environment "due to the Capitol Police's investigation and discipline of her for failing to respond to an alarm while on her break," needed additional support in order to proceed. [#151] at 18-19. In its opposition brief, plaintiffs filed a certificate of compliance for two police board claims, 03-CP-44, and 04-CP-34. [#331-5]. Because the certification forms show exhaustion of her claim in the consolidated case, Civil Action No. 03-2644, and the

defendant concedes as much in its reply brief, [#365] at 30, I recommend that Officer Harris be allowed to proceed on that claim.

No evidence of exhaustion has been submitted for any claims brought under Civil Action No. 01-2221. Therefore, any claims asserted on behalf of Harris through the Fourth Amended Complaint's exhibits do not meet the jurisdictional burden. I recommend that those claims be dismissed.

12. Larry Ikard

In the lead case, Sergeant Ikard claims he was discriminated against on numerous occasions, including when he was not selected for promotion as a K-9 officer, and when a new dog was adopted and named "Huk." [#315-1] at 141. The defendant asserts that the K-9 selection process claim was premature, because at the time counseling was requested, promotional decisions were still being made. [#315-1] at 141-42. In support of this argument, the defendant points to Halcomb v. Senate Sergeant at Arms, 209 F. Supp. 2d 175 (D.D.C. 2002), in which the court held that a plaintiff's retaliation/non-promotion claim was premature because the plaintiff filed for counseling before all promotion decisions were made. In other words, plaintiff attempted to initiate the review process before her claim was ripe.

I previously dismissed Sgt. Ikard's non-promotion claim "in light of counsel's representation that [Ikard] did not personally attend counseling and mediation sessions in relation" to that claim. [#151] at 19. As that ground for dismissal is no longer valid, I recommend that Sgt. Ikard be permitted to proceed with his non-promotion claim.

With respect to Sgt. Ikard's hostile work environment and/or discrimination claim regarding the Capitol Police Board's adoption of a black retriever dog and naming it "Huk," defendant concedes that it was timely exhausted. [#315-1] at 123. This claim is set forth in the

Fourth Amended Complaint at 5-6, and should go forward. Sgt. Ikard's retaliation claim, premised on his not being promoted to a K-9 officer, however, was not alleged in the complaint in any detail, and there was no demonstration that administrative remedies were exhausted for this claim. I must, therefore, recommend dismissal of the retaliation claim.

13. John N. Johnson

Officer Johnson is listed in Exhibits 3 and 7 of the Fourth Amended Complaint. [#278-3, 7, 9].[12] The parties agree that Officer Johnson's claim of non-selection following the 2000 Sergeant's exam should go forward. [#315-1] at 156; [#275]. However, as no evidence was submitted to show exhaustion of Officer Johnson's claim for racist words or actions, I must recommend that it be dismissed.

14. Governor Latson

In the Fourth Amended Complaint, Officer Latson asserts discrimination in discipline, listed in Exhibit 4. [#278-4].[13] A statement in the body of the complaint also references Officer Latson: "Governor Latson [was] among the Plaintiffs discriminated against in the 2002 promotional process." [#278] at 20. Officer Latson is not, however, listed in Exhibit 7 or 8, the two exhibits listing all those complaining of non-promotion. To confuse matters more, in their opposition to the instant motion, plaintiffs submitted a compliance certification letter stating that Officer Latson completed the administrative process on December 5, 2003, for claim number 03-CP-85. [#331-5]. This appears to be the claim for non-promotion. Why the plaintiffs would submit certification of exhaustion for a claim they do not adequately state in the complaint is confusing. Moreover, Officer Latson is listed among those plaintiffs as to whom the parties

[12] Officer Johnson is also listed in Exhibit 9, but for the reasons discussed elsewhere in this opinion, that claim is not viable and should remain dismissed.

[13] Governor Latson is also listed in Exhibit 9, but for the reasons discussed elsewhere in this opinion, that claim is not viable and should remain dismissed.

agree a claim may go forward. [#275]. Given this Court's authority to look beyond the pleadings themselves to all the information available in the case, Herbert, 974 F.2d at 197-98, I will construe the Fourth Amended Complaint to assert a non-promotion claim on behalf of Officer Latson and I recommend that he be allowed to proceed, as he appears to have exhausted his administrative remedies.

I previously dismissed any discrimination claim made by this plaintiff under Civil Action No. 01-2221 for failure to provide adequate evidence of exhaustion of the administrative process. [#151-2] at 16. I therefore recommend that Officer Latson's claim for non-promotion survive this motion to dismiss, but all others, including those listed in Exhibit 4, be dismissed.

15. Kevin Matthews

In its motion, the defendant concedes that Officer Matthews properly exhausted his administrative remedies for his claim of discipline he received on February 13, 2001. [#315-1] at 180. However, Matthews is also listed in Exhibits 1, 2, 3, 4, 5, 9, 10, and 11, without any factual background for these claims or evidence that administrative remedies as to those claims were exhausted. I therefore recommend that only the claim for discipline on February 13, 2001 go forward, and any other claims be dismissed.

16. Michael Malloy

The defendant appears to concede that Officer Malloy timely exhausted his non-promotion claim. [#315-1] at 175-76. He is also listed, without any explanation, in Exhibits 1, 2, 3, 4, 5, 7. I therefore recommend that only his claim for non-promotion go forward.

17. Danny McElroy

Officer McElroy is listed on several exhibits, but not in the body of the complaint. [#278-2, 3, 9, 10]. Certification of exhaustion from the Office of Compliance was submitted with the

plaintiff's opposition to the instant motion for administrative complaint number 03-CP-75, stating that the administrative process for this claim ended on December 5, 2003. [#331-5]. This claim appears to be one of non-promotion, eventually brought under the consolidated Civil Action No. 04-320.

Once again, however, there appears to be an error in the complaint, as McElroy is not listed in Exhibit 7 or 8 – the exhibits for those claiming non-promotion. As discussed above, I recommend construing the Complaint to incorporate other claims previously made on behalf of a plaintiff, unless there is a specific reason to not do so.

However, that does not solve Officer McElroy's problems, because the evidence submitted to show exhaustion of this non-promotion claim is inconsistent. McElroy's own declaration states that mediation ended on November 17, 2003, [#331-5] at 55, but the certification provided by the Office of Compliance states that the end of mediation notice was given on December 5, 2003. [#331-5] at 33. This date makes a difference – if the end of mediation notice was received on November 17, 2003, then the complaint needed to be filed in district court on or before February 16, 2004 to be considered timely. The complaint in Civil Action No. 04-320 was filed on February 26, 2004. If the end of mediation notice was sent on December 5, 2003, however, as the Office of Compliance letter indicates, the plaintiffs had until March 4, 2004 to file. Under that interpretation, the district court case was timely filed.

Given that the compliance certification letter is likely to be more accurate than a plaintiff's memory, I recommend that Officer McElroy be permitted to proceed on his non-promotion claim.

Officer McElroy also asserts claims for racist words/actions and discipline, brought under Civil Action No. 01-2221. [#278-2, 3, 10]. However, no facts were alleged in support of

exhaustion of such claims in the Fourth Amended Complaint. He attests to these claims, as well as to his participation in the administrative process on those claims, only by a declaration re-submitted with the plaintiffs' opposition to the instant motion. [#331-5] at 53-54. Officer McElroy asserted various claims in Civil Action No. 01-2221, one of which occurred in March 2001, and therefore appears to be timely. It appears that this claim was previously dismissed for failure to appear in person at mediation. [#151-2] at 17. As that is no longer an issue, I recommend that Officer McElroy's 2001 claim for improper discipline, stemming from the facts alleged in his declaration, [#331-5] at 53-54, go forward as well. All other claims lack support for exhaustion, and therefore must be dismissed.

18. Brent Mills

Officer Mills is listed in Exhibits 1, 2, 3, 4, 5, 7, 9, 10 and 11, but no information is provided in the body of the complaint. The parties previously agreed that Officer Mills had at least one viable claim. [#275]. Officer Mills appeared as both a named plaintiff in Civil Action Nos. 01-2221 and 04-320. In the lead case, Officer Mills alleged discrimination in that he was denied a promotion. [#151] at 22. I recommended that this claim be dismissed for failure to exhaust administrative remedies, because the plaintiff's declaration was incomplete and inconsistent with his counsel's assertions regarding dates of counseling and mediation. Id. I further recommended dismissal without prejudice with respect to his claim in Civil Action No. 04-320 for retaliatory non-promotion in 2003, noting that additional evidentiary support was needed to account for the dates counseling was initiated and the administrative process was completed. Id. at 22-23. Given the documentation now submitted with the plaintiffs' opposition to the instant motion certifying that Officer Mills completed the administrative process on this retaliation claim, [#331-5] at 20, I recommend that this claim be allowed to proceed.

Finally, in the Fourth Amended Complaint, Officer Mills attempts to assert new, additional claims as well, such as hostile work environment, [#278-1], racist words and actions [#278-2, 3], discipline [#278-4, 10], and discrimination in assignments, [#278-5]. No evidence was submitted to show exhaustion on these claims. I therefore must recommend that they be dismissed.

19. Duvall Phelps

Officer Phelps asserts multiple claims in the Fourth Amended Complaint, including that he was "constructively discharged and forced into early retirement." [#278] at 24. Officer Phelps construes this as a discrimination-in-discipline claim, and is listed under Exhibit 10. [#278] at 26; [#278-10]. The defendant correctly points out that this claim, asserted in the lead case, is untimely, because Officer Phelps entered into a settlement agreement regarding his retirement in June 2000, and did not seek counseling until 10 months later, on April 28, 2001. [#365] at 24. This claim should therefore be dismissed with prejudice.

Officer Phelps was also a named plaintiff in a consolidated complaint of retaliation in Civil Action No. 03-2644. [#278] at 29. In that complaint, he alleges he was denied access to the Capitol complex in retaliation for being a plaintiff in the lead case, Civil Action No. 03-2644, and that on another occasion, he was escorted out of a building in retaliation for filing his lawsuit. Id. Officer Phelps also alleges a hostile work environment as it relates to those claims. Id. Finally, Officer Phelps alleges that he was discriminated against when items were stolen from his car including his police credentials, while parked in a secure Capitol Police location. Id. at 12.

The defendant concedes that Officer Phelps is timely with respect to his claim for retaliation based on his credentials being stolen from his car. [#365] at 29. However, regarding

the other two allegations, the defendant asserts that he received end of mediation notices for those claims on April 23 and May 23 of 2003, but did not file Civil Action No. 02-2644 until December 29, 2003—more than seven months past the CAA deadline. [#365] at 29. This is contradicted by the certification provided by the Office of Compliance, attached to plaintiffs' opposition to the instant motion, which states that mediation for claim 03-CP-62 ended October 23, 2003.

I previously held that all of Officer Phelps' claims could proceed, on the basis of assertions in Officer Phelps' declaration. [#151] at 23. I see no reason to disturb that holding, especially on the basis of the compliance certification. I therefore recommend that all claims asserted by Officer Phelps in Civil Action No. 03-2644 be allowed to go forward.

20. **Vernier Riggs**

Sergeant Riggs asserts two claims in the Fourth Amended Complaint: discrimination with respect to denials of sick leave, [#278] at 10, and being verbally reprimanded for wearing the wrong shirt on April 13, 2001, [#278] at 29, a claim raised in consolidated Civil Action No. 04-320.

With regards to the sick leave claim, Sgt. Riggs alleges that she was harassed when she asked for leave for a period up through October 2000. The defendant argues that Sgt. Riggs can only be deemed to have timely requested counseling on this claim for individual incidents of harassment occurring after October 14, 2000 – 180 days before counseling was requested. [#278] at 297. I agree with this assessment, and therefore recommend that Sgt. Riggs be permitted to proceed only on claims of specific incidents of harassment occurring after October 14, 2000.

Sgt. Riggs' claim of unfair discipline for being reprimanded for wearing the incorrect shirt should also be allowed to proceed. The defendant appears to concede as much. [#315-1] at

297 ("Ms. Riggs timely exhausted this *discrimination* claim"); [#365-4] at 8. I therefore recommend that this claim be allowed to go forward.

To the extent that other claims are asserted, I recommend that they be dismissed, as no evidence of exhaustion was presented for those claims.

21. Leonard Ross

In the Fourth Amended Complaint, Officer Ross asserts claims of discipline and discrimination in promotions, and is listed in Exhibit 4 and 10. [#278-4, 10]. The non-promotion claims do not appear to be timely, as Officer Ross does not assert any facts supporting an allegation that he was denied a promotion within 180 days of his request for counseling. Without this showing, it is impossible to determine whether this Court has jurisdiction over his non-promotion claims.

The defendant concedes, however, that Officer Ross has timely retaliation claims regarding discipline on June 27, 2002 and July 29, 2002, for discussing investigations when ordered not to do so. [#365] at 30. I therefore recommend that those claims go forward.

22. Conrad Smith

The defendants point out that in 2007, Conrad Smith requested that the Court dismiss him as a plaintiff in this case. [#151-2] at 22. Judge Sullivan, in his order granting the motion for entry of final judgment, dismissed all plaintiffs who were listed in Appendix B and C of my March 19, 2007 Report and Recommendation. Final Order [#223]. Although many of those plaintiffs had their claims remanded for re-consideration, nothing in the Blackmon-Malloy opinion from the D.C. Circuit indicates that its holdings are intended to reverse the previous dismissal of plaintiffs who wanted to be removed from the case. A strong argument is made by the defendant, therefore, that Conrad Smith is no longer properly before this Court.

Yet, he appears (like Reginald Waters, described below) on a list of plaintiffs for which the parties agree at least one claim is viable. [#275]. As that list appears in a joint status report from the parties, I am perplexed why defendant asserts in that report that Smith has a viable claim, yet denies viability as to all claims in its motion to dismiss.

Smith is listed in multiple exhibits to the Fourth Amended Complaint, but not in the body of the complaint, and this discrepancy is not addressed by either the plaintiffs or the defendant in their briefs on the motion to dismiss. If there is a viable, properly-exhausted claim, it is unclear what it is, or why it is even being raised if the defendant was already dismissed. I therefore must request clarification before deciding whether this plaintiff's claims should be dismissed. This plaintiff shall, within ten days of this Report and Recommendation, submit an explanation to this Court as to what (if any) claim he is asserting, and why he believes that it was exhausted in accordance with the principles articulated in this Report and Recommendation. The defendant may respond within ten days, and at that time, I will issue my final recommendation on this plaintiff.

23. Reginald Waters

This plaintiff's name only appears in various exhibits to the Fourth Amended Complaint, and not in the body of the complaint itself. No details are given regarding this plaintiff's claims, when they arose, and when each administrative step was satisfied. It their opposition brief, the plaintiffs submitted a certification of compliance stating exhaustion of remedies for case number 03-CP-77, but it is unclear from the documentation which claims were raised during that process and are therefore exhausted. Confusing things more, Reginald Waters, like Conrad Smith, above, appears on the list of plaintiffs submitted to the court for which the parties agreed at least one claim was viable, but the list does not indicate the claim to which the parties agreed. [#275].

In later submissions, such as the motion to dismiss and its corresponding reply brief, the defendant asserts that no claims are viable for Reginald Waters. I therefore ask that the plaintiffs submit clarification regarding what claim(s), if any, Officer Waters is asserting. That submission is due no later than ten days from the filing of this Report and Recommendation. Defendant may respond within ten days thereafter. I will then issue my recommendation regarding whether Officer Waters may proceed in this case, and if so, on which claims.

24. Richard Webb

Officer Webb alleged discrimination related to the K-9 promotions process. Specifically, he alleges that he "was not included among the recruits on the K-9 mini-list announced on April 18, 2001, which instead include[d] less experienced white recruits." [#278] at 19. The Fourth Amended Complaint also lists Officer Webb under the appendices for those claiming hostile work environment, racist words or actions, denial of normal privileges, and unfair denial of promotion during the 2002-2004 promotion period. [#278-1, 2, 3, 4, 7].

I previously held that Officer Webb could not proceed on his K-9 unit non-promotion and hostile work environment claims because he did not appear in person for mediation sessions. [#151] at 24-25. As that holding is no longer valid, and certification of completion of the administrative process was provided by the Office of Compliance, those claims should be allowed to proceed. [#331-3].

Webb also was named as a plaintiff in Civil Action No. 04-320, where he complained of non-promotion during the 2002-2004 promotion period. The Office of Compliance certified that Officer Webb completed the administrative process on January 6, 2004 for this claim. [#331-5] at 23. This claim should also be permitted to proceed.

However, no evidence was submitted to show timely exhaustion on any other claim. Therefore, for any other claim Officer Webb attempts to make in the Fourth Amended Complaint, I recommend that it be denied for lack of jurisdiction.

25. Frank Wilkes

Officer Wilkes is listed in Exhibits 1, 2, 3, 5, 7 and 9 of the Fourth Amended Complaint. [#278-1, 2, 3, 5, 7, 9]. In the previous joint status report, Officer Wilkes is listed as a plaintiff whom the parties agree has exhausted at least one of his claims. [#275] at 1-2. However, in its motion to dismiss, the defendant claims that insufficient facts have been alleged to determine whether Officer Wilkes has exhausted any of his claims. [#299] at 253.

Similar to the cases of Tammie Green and Danny McElroy, there is a discrepancy with respect to the date that the end of mediation notice was given for Officer Wilkes' non-promotion complaint brought under Civil Action No. 04-320. The certification letter from the Office of Compliance Certification and Officer Wilkes' declaration indicates that Officer Wilkes properly exhausted administrative remedies for his non-promotion claim on December 5, 2003, which would make the filing of the complaint on February 26, 2004, timely. [#331-5] at 16. However, Officer Wilkes' own declaration states that the end of mediation notice was issued on November 17, 2003, which would make the district court case untimely. [#332-5] at 12. Consistent with my conclusions for other plaintiffs, stated above, the compliance certification document should control. Accordingly, Officer Wilkes' non-promotion claim should go forward.

I previously held that Officer Wilkes' claims brought in the lead case, Civil Action No. 01-2221, should be dismissed with prejudice because no date was given for the alleged violation, meaning that it is impossible to determine whether his administrative actions were timely. [#151-2] at 26. This error was not corrected in the declaration submitted in opposition to the motion to

dismiss, as the only dates provided were for incidents that occurred well more than 180 days before any request for counseling was made. [#332-5] at 13-14. I therefore recommend that any claims asserted in Civil Action No. 01-2221 remain dismissed.

CONCLUSION

The vast majority of the plaintiffs in this case should be dismissed for failure to exhaust their administrative remedies as required under the CAA. Many plaintiffs may be dismissed at the outset as per prior agreements between the parties. These plaintiffs are listed in Appendix A. Those plaintiffs who have submitted enough evidence of exhaustion to proceed past the motion to dismiss are identified in Appendix B. I recommend that only those plaintiffs and claims listed in that appendix be allowed to proceed. For all others, I recommend dismissal with prejudice. Finally, there are five plaintiffs for whom additional clarification is necessary. Those plaintiffs are identified in Appendix C. Counsel for those plaintiffs should refer to the discussion of each plaintiff above, and submit all the additional information in accordance with my instructions and deadlines. After receipt of that information and the defendant's response, I will issue my final recommendation as to those five plaintiffs.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

Digitally signed by John M. Facciola
DN: c=US, st=DC, l=Washington, email=john_m._facciola@dcd.uscourts.gov, o=United States District Court for the District of Columbia, cn=John M. Facciola
Date: 2012.12.14 14:36:55 -05'00'

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPENDIX A

Individuals who were once involved in the lawsuit but the parties agree have not exhausted their claims, and thus are not within the Court's jurisdiction

List compiled from Parties' Joint Report in Response to the Court's March 8, 2010 Order [#275] at 1-2.

3. Akins, Charles
10. Bailey Washington, Monica
15. Black, Clarence
33. Butler, Alphonso
37. Cannady, Stephen
39. Cathion, Keith
40. Chestnut, Bonnie
41. Christian, Joe
50. Curtis, Monte
51. Curtis, Ronald
53. Davis, William C.
54. Deas, Joe
56. Dickens, Willie
58. Dingle, Raymond
67. Emory, Keith
70. Evans Herring, Kim Y.
72. Farmer, Rhonda
80. Gibson, George
85. Graves, Eric
89. Green, Alvin
107. Hart, Moses
108. Hickman, Frentress
120. Jackson, Meldon
123. Jacobs, Henry
126. Jenkins, Carleton
128. Jenkins III, Thomas L.
130. Jeter, Jr., Clarence
132. Johnson, Frank
134. Johnson, Willie
136. Jones, Jr., Naudain
138. Jones, Mervin
141. Kennedy, James
142. Kennedy, Mack
145. Kyle, Dorothy
148. Landrum, Janice
150. Lassiter, Sylvia
175. McNair, Samuel
176. Mihilis, Spiro
179. Moffett, Alfred
193. Newton, Marcelus
195. Nowden, Clarence
201. Patterson, Marvin
205. Pinnix, James P.
206. Pittman, Kenneth
208. Powell, James
209. Powell, Sr., Albert
211. Proctor, Jr., James
214. Rainey, Barry
215. Reid, Doris
223. Rose, Thomas
234. Shields, Leroy
251. Steward, Robert
260. Thompson, Kennieth
261. Thorne, Jasper
262. Trader, David
273. Weems, Stephanie
281. Whitt, James
282. Wilkerson, Daniel
289. Williams, Roosevelt
292. Williams, Thomas

The number assigned to each plaintiff corresponds to the number assigned to each plaintiff in the notice of appeal the plaintiffs filed with the Court on September 12, 2007.

Claims listed in the Fourth Amended Complaint that were dismissed on 11/29/11 via Minute Order and are therefore no longer before the court

Alphonso Butler
Masood Darsanni
Yvonne Dove
Kim Y. Evans-Herring
Michael Funderburk[14]
Alvin Green
James Griffin
Frentress Hickman
Henry L. Jacobs
Mack Kennedy
Ollie McCoy
Calvin K. Shields, Jr.[15]
Robert Stewart
Kennieth F. Thompson
Jasper Thorne
David A. Trader
Steven Washington[16]
Victoria J. Williams[17]
Reginald P. Wilson[18]

[14] Listed in Ex. 1, 4, 9. [#278-1, 4, 9]

[15] Listed in Ex. 6. [#278-6].

[16] Listed in Ex. 1, 4, 9 [#278-1, 4, 9].

[17] Listed in Ex. 6. [#278-6].

[18] Listed in Ex. 3, 4, and 10 [#278-3, 4, 10].

APPENDIX B
Viable Claims

Plaintiff	**Claims that may proceed**	**Case Number**
Adams, Frank	Discrimination/hostile work environment for racial slurs/language	01-2221
	Discrimination in selection for Johns Hopkins PELP program, management college, and FBI National Academy; Negative comments, threats of transfer, and involuntary transfer	04-0943
	Lt. with less seniority was promoted; denied Captain promotion and denied request to transfer	05-0491
	Non-selection to Captain position	06-0653
Blackmon-Malloy, Sharon	Incorrect score on Lt. exam, receipt of CP-550 performance notes and CP-534	01-2221
	Exposure to second hand smoke	02-1859
	Non-promotion following 2003 Lt. Promotions exam	03-2644
Bolden-Whitaker, Regina	Retaliation for refusing to sign a deputation form	03-2644
Brooks, Tyronne	Retaliation re: non-promotion in 2002	04-320
Fields, Arnold	Hostile work environment and retaliation, including retaliation related to his 2002 performance evaluation and the Family Friendly Leave investigation	02-1346, 03-1505, 03-2644
Goines, Gary	Discrimination in the Sgt. Promotions process	04-0320
Green, Tammie	Non-promotion	
Harris, Ave Maria	Retaliation for failure to evacuate building during an alarm	03-2644
Ikard, Larry	Non-promotion to K-9 officer position and hostile work environment/discrimination when dog was adopted and named "Huk"	01-2221
Johnson, John N.	Non-selection following 2000 Sgt. Exam	01-2221
Latson, Governor	Non-promotion in the 2002 promotional process	04-320
Matthews, Kevin	Discipline received on February 13, 2001	01-2221
Malloy, Michael	Non-promotion from 2000 Sgt. Exam	01-2221
McElroy, Danny	Improper discipline in 2001 for stepping off his post	01-2221
Mills, Brent	Retaliation in non-promotion in 2003	04-320
Phelps, Duval	Retaliation in being denied access to the Capitol complex, being escorted out of the building, and having his credentials stolen from his car	03-2644
Riggs, Vernier	Denial of sick leave from October 14, 2000 and October 30, 2000	01-2221
	Unfair discipline for wearing the incorrect shirt	04-320
Ross, Leonard	Retaliation for discussing details of internal investigations	02-2481
Webb, Richard	Denied promotion to K-9 Unit, hostile work environment	01-2221
	Retaliation in non-promotion during 2002-2004 promotion period	04-320
Wilkes, Frank	Non-promotion claim	04-320

APPENDIX C

Additional clarification is needed for these plaintiffs/claims

Please see the corresponding page number for details

Plaintiff	**Page number in Report and Recommendation**
Adams, Shafton	17-18
Brown-James, Sandra	22
Green, Tammie	24-25
Smith, Conrad	33-34
Walters, Reginald	34-35