

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>Cynthia Artis, et al.,</b>	)	
<b>Plaintiffs,</b>	)	
<b>v.</b>	)	<b>CASE NO. 01-0400 (EGS)</b>
<b>Alan Greenspan, Chairman of</b>	)	
<b>The Board of Governors of</b>	)	
<b>The Federal Reserve System,</b>	)	
<b>Defendant</b>	)	

**PLAINTIFFS’ SUPPLEMENTAL BRIEF - WHETHER  
MS. KIMBERLY HARDY TIMELY EXHAUSTED ADMINISTRATIVE REMEDIES**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Pursuant to the direction of this Court by its Order of February 29, 2008, this brief addresses the single issue of “...whether Ms. Kimberly Hardy timely exhausted her administrative remedies“. The agency has challenged only the plaintiff’s fulfillment of the pre-complaint counseling requirement. That issue, in turn, depends entirely upon three factual determinations which are disputed by the plaintiffs. These issues are:

I. Did a “counseling session” take place on the afternoon of Wednesday, January 15<sup>th</sup>, 1997, between counselor Rosemarie Nelson and Ms. Kimberly Hardy?

II. At that “counseling session” did Hardy disclose to the counselor, Rosemarie Nelson, the circumstances, names and dates of her individual complaints of race-based discrimination and were such claims timely disclosed with respect to the effective date of the violations claimed?

III. Did Hardy’s written description of the nature of her class claims, submitted to the counselor, in response to a request by the counselor, fulfill Hardy’s responsibilities to follow the “...class complaint procedures and the responsibilities of the agent of the class” contained in the Board’s Regulations. (§ 268.204 (b))<sup>1</sup>?

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<sup>1</sup> Herein the Board’s regulation cites are used instead of the underlying Federal Regulations appearing at 29 CFR, Chapter XIV, Part 1614, §105(b) applicable to Pre-Complaint Processing .

This supplemental brief will demonstrate the answers to the above questions are indisputable in the affirmative.

## STATEMENT OF FACTS

### **Effect of Board Regulations; Timely Counseling Of Hardy Did Occur on January 15, 1997:**

(1) The regulations requiring counseling place the responsibility upon the **employee** only to “consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.” (§ 268.204(a)). Further, to be timely, an aggrieved person must initiate contact with a counselor within 45 days of the effective date of the discriminatory personnel action (§ 268.204(a)(1)). Here, Ms. Hardy unquestionably “initiated counseling” because the counseling session occurred (on January 15, 1997).<sup>2</sup> Unquestionably she was actually counseled, on January 15<sup>th</sup>, 1997 and that fact is admitted by counsel for the Board in correspondence<sup>3</sup> with undersigned counsel. The January 15th counseling session was well within the 45 day statutory limit (from the alleged violations) for initiating contact with a counselor. The calculation of time elapsed between the effective date of the alleged discriminatory events and initiation of counseling follows.

### **Ms. Hardy’s Counseling Actions Were Timely:**

(2) The Agency’s employment evaluations are made in the fall of each year, generally in October. Based upon those decisions, ratings, advancements, bonuses and promotions are announced in December (here of 1996), and the pay adjustments become effective the first pay-day in January. Here, if the continuing nature of the violations alleged is ignored, as defendant

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<sup>2</sup> Exhibit 5, Attachment B to the Counseling Report, letter from Pls. counsel W. Charlton dated Jan. 31, 1997, pg. 1, ¶ 1, line 1; See also, Exhibit 6, letter Dated January 22, 1997, from Defs. Counsel Bransford, pg. 1, last line.

<sup>3</sup> (See Exhibit 6, Bransford letter dated January 22, 1997, pg. 1 ¶s 2, 3, listing Kimberly Hardy as number 1 in the list of grievants at the counseling session).

urges, each independent decision applicable to Ms. Hardy would occur during her first pay-day in January, 1997. That in fact is what occurred here. Ms. Hardy, in her counseling session on January 15, 1997 was therefore within the 45 day limit for initiating counseling.

(3) It is true, as defendant's counsel has urged, that the nature of the complaints of Ms. Hardy were the same in 1995, 1996, and 1997 (and in fact until she resigned in 1999). However, each of the discriminatory employment decisions, although following the same policy, pattern and practice, and demonstrating the same bias were, and must be viewed under applicable law as a separate event. In other words, each failure to follow equal employment opportunity principles when an employment decision is made is an independent adverse employment decision. The starting date for challenge on the basis of race is the effective date of each such decision. The latest discriminatory decisions applicable to Hardy became effective on January 1, 1997.

(4) Similarly, Ms. Hardy's actions in preparing, signing and delivering her specification of the class issues, as requested by the counselor on January 15, 1997 (at the close of the counseling session) were delivered to Ms. Nelson on January 17<sup>th</sup>, 1997, just two days after the request was received. (Exhibit 2, ¶ 3). Thus, both of the counseling specifications were timely initiated and completed as required in accordance with the regulations.

**Ms. Hardy In Fact Counseled Fully and Completely on Both Individual Claims and Class Claims:**

(5) Once the employee initiates contact, it is the **agency's responsibility** to explain agency procedures (for both individual and class claims) to the complainants. For individual complaints, the agency must advise the grievant at the initial counseling session, in writing, of the individual's, "rights and responsibilities", and the employee must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter (§ 268.204(a)).

(6) For class claims, as here, "If the aggrieved person informs the Counselor that he or she wishes to file a class complaint the Counselor shall explain the class complaint procedures

and the responsibilities of a class agent” (§ 268.204(b)). The counselor, Rosemarie Nelson did not follow either one of these required procedures.

At no time did Hardy receive any advice of her rights and responsibilities in writing during her initial counseling session. As to class complaint procedures Hardy was told by Ms. Nelson to put her class claims in writing and Hardy in fact did so. (Exhibit 2, pg. 1-5, Bates Numbers 00193-00197). As to being informed as to of class action procedures it never happened; she simply followed instructions to submit the allegations and other required information in writing.

(7) Ms. Hardy initiated contact with the Counselor, and completed her individual counseling session on January 15<sup>th</sup>, 1997. She fully described her individual complaints in the counseling session on January 15, 1997 (Exhibit 4, Depo. Hardy, pg. 250, 251).

(8) In her individual counseling on January 15, 1997 Hardy disclosed that the personnel actions complained about in each of the years was the preferential treatment and ratings of the same white co-worker, Kathy Winter (Winter). Each cycle, Winter was preferred in performance appraisals, bonuses, advancements, and salary. Hardy's description of the preferences and the adverse effects upon her own situation specifically referred to the personnel cycle just preceding that counseling session. That most recent set of adverse actions began the preceding October, 1996.

(9) During her deposition on March 19<sup>th</sup>, 2004 Ms. Hardy was questioned by counsel for the Board about the details of the discrimination she suffered and complained about in 1997. Ms. Hardy responded as follows to question from opposing counsel about the 1997 session.

Pages 273-275 (Exhibit 4).

Ms. Hardy testified in her deposition that the counseling session that she attended on January 15, 1997 was an individual counseling session for her Pg. 273 L. 24, and they asked her individual questions. I gave him (Bransford, the attorney, not the counselor) “individual

information as well, yes, as well as class information and I did testify to that earlier” (Pg 275 L 11-13).

Page 286, 287 (Exhibit 4)

Q. Paragraphs A through K, does not provide any specific information about particular individuals that you were complaining about, correct?

A. Yes. However I did say earlier that I provided specific information about individuals in ‘95 and ‘97.

Q. The same individuals in ‘95 and ‘97, correct?

A. Yes. I was working in the same place.

Q. You provided the same information, same names?

A. Yes. The things that might have been different, salary, because I hope I got a raise from ‘95 to ‘97.

Q. Names of individuals you thought discriminated against you, names of people you thought were treated better, things—

A. They were the same, those people— the people were the same. The players didn’t change.

Q. And the events you were complaining about were the same.

A. As far as performance appraisal, salary, yes that stuff.

Ms. Hardy’s deposition testimony supports Ms. Hardy’s facts as stated in her declaration of February 14<sup>th</sup>, 2007 (Exhibit 7) that she did counsel in January 1997, that she was fully forthcoming as to details of her individual allegations of discrimination in that session, that the session occurred on January 15<sup>th</sup>, 1997 was considered by the Board through the Board’s counsel to be a counseling session in which she discussed details of dates and the nature of her individual complaint. Also the performance appraisals, salaries and the name of Hardy’s white co-worker

who received the preferential treatment were in fact discussed in the only session that occurred in 1997, on January 15, 1997.

(10). None of this information is included in Hardy's "EEO Counseling Report".(Exhibit 1, pg. 1). Nor was the fact of her contact with the counselor correctly reported, nor the fact that a specific counseling interview occurred on January 15, 1997 with more than 10 witnesses observing those happenings.

**Hardy Specified the Board's Discriminatory Policies As Requested by the Counselor:**

(11) As to Ms. Hardy's counseling of class claims, upon receiving the oral request from the Counselor late in the day on January 15<sup>th</sup>, 1997, Ms. Hardy participated in preparation, signing and delivering of a written specification of her class claims. That specification states on its face, page 1, that it was prepared at the request of the Counselor. This representation has never been challenged.

(12) Thus, in every action, and in every respect, Ms. Hardy did everything she was instructed to do, and in a very timely, reasonable and prompt fashion. Hardy requested through counsel the invocation of a group session. That session was consented to and participated in by the Board, but no group counseling was allowed. Instead, in lieu thereof, at the conclusion of the group session, after about two hours of wrangling with objections by the Board's counsel, the counselor (Ms. Nelson) stated that she had been ordered by her department head not to conduct counseling on class claims in a group.

(13) Ms. Nelson stated at that time that although she "could not counsel in a group, however, she could counsel individuals". Undersigned counsel then stated "counsel away" and Ms. Hardy in fact was counseled. The foregoing testimony refutes the entire position of the Board that counseling did not occur, and/or if it did occur, it contained no details. What more can be said? What more could have been done to complete the individual counseling process in a reasonable fashion? What facts were left out? It is submitted that the entire process was as

correct and complete as it could be under the existing circumstances of Board obstruction and denial of access to an open and fair counseling process.

(14) Then, upon completing Hardy's individual counseling, the counselor requested that Ms. Hardy and each of the complainants submit her perceptions of the class claims in writing. That is what Ms. Hardy did two days later on January 17<sup>th</sup>, 1997. (Exhibit 2).

(15) Therefore, Ms. Hardy not only attempted, but actually conveyed her complaints to the counselor, on both her individual claims and her class claims in order to fulfill her duty to give the Board sufficient information to informally resolve the matter. The Board's allegations to the contrary are simply wrong and refuted by the record referenced herein.

(16) During the entire counseling session on January 15, 1997, Ms. Nelson was keeping detailed notes. Ms. Hardy specifically observed that Nelson was keeping notes when she was giving details of her own individual discriminatory experiences (Exhibit 7, pg. 2 ¶ 3). Several days later, Ms. Hardy received a copy of the draft "counseling report" for herself. She immediately noted that all of her information given in the counseling session of January 15<sup>th</sup>, 1997 was omitted from that report. That is, no references to it even occurring were contained in the draft report.

(17) Hardy immediately called Ms. Nelson and asked the question as to why none of her facts were included in that report, and why there was no write up of her counseling facts.

(18) Ms. Nelson responded to Ms. Hardy's question, that "management told her that it was not considered a counseling session and to leave it out." (Exhibit 7, pg 2, ¶ 4).

(19) Finally, during the limited jurisdictional discovery allowed by this Court, undersigned counsel requested the notes of Ms. Nelson with respect to all of the complainants, including of course, Ms. Hardy. The agency responded that Ms. Nelson's notes have

disappeared.<sup>4</sup>

(20) Thus, the factual conflicts between the records of the Board as to Hardy's counseling as compared to Hardy's memory and plaintiffs notes can not be resolved by reference to Ms. Nelson original counseling notes. This situation is contrary to the rules for record retention applicable to the Board's EEOC records which are contained in EEOC management directives.

(21) As one result, this leaves the best evidence available on those events being the testimony of Ms. Hardy (the counselee) and Ms. Nelson (the Counselor). Deposition testimony of both of those witnesses support the position of the complainants that the counseling actually took place and was completed, as described by Ms. Hardy herein. (Hardy deposition, pg. 250-251).

**CLASS CLAIMS:**

(22). As stated supra, Ms. Hardy also discussed the class allegations during her individual session on January 15, 1997 to the extent she was allowed to do so. Ms. Hardy stated in her deposition on March 19<sup>th</sup>, 2004<sup>5</sup>.

Q. Did you discuss the [class] allegations in 66 A through K with the counselors at the Board, yes or no? [emphasis added].

A. Yes.

Q. When did you discuss those allegations with the counselors at the Board?

A. I discussed these allegations –these are similar allegations, the same allegations I discussed in 1995, as well as again in the January 15 [1997] counselors – counseling –

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<sup>4</sup> An adverse inference is proper where the defendant has failed to preserve relevant evidence which is required to be preserved *Webb v. District of Columbia*, 146 F.3d 964, 175 F.R.D at 148 (1998); *Battocchi v. Washington Hospital Center*, 581 A.2d 759, 767 (1990) (trial court must give adverse inference instruction “upon a finding of gross indifference to or reckless disregard for the relevance of evidence to a possible claim”)

<sup>5</sup> See, Exhibit 4. Excerpts, Hardy Deposition, pg. 270, 271 (marked for emphasis).



group counseling session. They were not – I didn't specifically say failing to pay, but that's what I talked about.

Q. In other words, they were not in this exact form?

A. Exactly.

Q. But the content was identical?

A. Yes.

In the Counseling session on January 15, 1997, Hardy explained that the result of the inferior, dishonest and unfair performance ratings are, for herself and all others similarly situated:

- (1) lower and unfair ratings,
- (2) lower and unfair bonuses,
- (3) lower and unfair advancement, and
- (4) lower and unfair resulting salary, which over time results in large discrepancies in salary and benefits.

(5) Hardy stated that for every black person she discussed the subject with, all agreed that this was the overall pattern and practice of the board.

Those discriminatory ratings events occurred again this year, and were specific to her (for the current year's ratings cycle). The cycle started with unfair inferior ratings in about October 1996. She was subjected to the discriminatory treatment in those three measurable respects in comparison to her white co-worker, Ms. Kathy Winter. Ms. Winter was for this year, and for all previous cycles, in a similar if not identical position with her. The work was the same, the responsibilities were the same, and Hardy's performance was equal or better than that of Winter.

The discriminatory ratings became effective, with a lower than fair salary and lower or no bonus, with the first payday in January 1997. Hardy contacted her counselor in late December 1996 or early January 1997. The actual counseling session took place on January 15<sup>th</sup>, 1997. Thus, the actual timing of her contact, and indeed, even the actual group counseling session was within the statutory 45 day period for the initiation of counseling. Nor was this timing any accident.

Ms. Hardy was well aware of the timing and counseling requirements of the statute (which she attempted to and meticulously did follow) because the Board had previously used this excuse to avoid its responsibilities. Pursuant to her attorney's statement to the counseling department and herself, she stated that she wished to "start all over again" with her complaints of discrimination for the new cycle just finished.

Ms. Hardy stated to her counselor that within her division, the legal division of the agency, she had, for the entire period of her employment at the board, a very simple and uniquely clear, easily compared position with just one similarly situated white employee in her department.

Thus, the counseling, which occurred for Hardy in January 1997 and was followed up pursuant to a request by Ms. Nelson that Hardy prepare and submit written class complaint specifications, was fully and completely accomplished.

Respectfully submitted,  
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**Certificate of Service**

I hereby certify that I filed in the ECF system for the District Court for the District of Columbia, on the 12<sup>th</sup> , day of March, 2008, Plaintiffs' Supplemental Brief to Plaintiffs Motion to Alter and Amend the Judgment in this case. And that further it is expected that electronic service will be made upon all parties and counsel in accordance with the standard procedures under that system.

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Counsel for the Plaintiffs and the Putative Class  
They Seek to Represent.

**INDEX OF EXHIBITS**

- EXHIBIT # 1 EEO Counseling Report for Kim Hardy, Prepared by EEO Counselor Rosemarie Nelson, March 4, 1997, with Attachments.
- EXHIBIT # 2 Restatement of the Nature of the Complaint, Kim Hardy, as requested by EEO Counselor, January 17<sup>th</sup>, 1997.
- EXHIBIT # 3 Part 268 – Federal Regulations Regarding Equal Opportunity
- EXHIBIT # 4 Excerpts, Deposition of Kimberly Hardy, March 19, 2004.
- EXHIBIT # 5 Plaintiffs' Counsel's Letter dated January 31, 1997 to Sheila Clark, EEO Office
- EXHIBIT # 6 Defendant's Counsel's Letter dated January 22, 1997 to Plaintiffs' Counsel dated January 22, 1997
- EXHIBIT # 7 Declaration of Kimberly Hardy, February 14, 2007