IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA ARTIS, et al., Plaintiffs, v. BEN S. BERNANKE, CHAIRMAN OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant	:	CASE NO. 1:01-cv-400 (EGS)

DEFENDANT'S SUPPLEMENTAL BRIEF ON THE ISSUE OF EXHAUSTION

Following a hearing on February 27, 2008, this Court directed the parties to brief the issue of whether plaintiff Kim Hardy "timely exhausted her administrative remedies." Minute Order dated February 29, 2008. A review of the entire record of this matter, including the extensive jurisdictional discovery conducted by the parties, establishes that she did not. Accordingly, because plaintiffs' claim to exhaustion of administrative remedies is now based solely on the contention that Ms. Hardy exhausted such remedies, this Court should deny plaintiffs' Rule 59(e) motion to alter or amend judgment for defendant.

It is beyond dispute at this stage in these proceedings that the counseling requirement imposed on plaintiffs in public-sector EEO cases requires that they bring matters to an EEO counselor "in a manner that lends itself to potential resolution," providing "details and dates" regarding their complaints rather than simply "vague allegations of discrimination." Artis v. Greenspan, 158 F.3d 1301, 1306 (D.C. Cir. 1998). Plaintiffs assert that Ms. Hardy did this at a group meeting held on January 15, 1997. The record establishes the contrary. Moreover, even if Ms. Hardy had raised complaints as she claims, her complaints were not timely and provide no basis for altering or amending the Court's judgment.

1. Ms. Hardy's Belated Recollection Is Uncorroborated and Contrary To More Contemporaneous Accounts of the January 15 Meeting

It is clear that Ms. Hardy's claim of exhaustion must rest on nothing more than her participation in the group meeting on January 15, 1997. While she, like other plaintiffs, submitted a signed "Resubmission of Class-Action Complaint" on January 17, 1997, that document contains no specific allegation of discrimination suffered by Ms. Hardy individually, no "details and dates" that would lend themselves to resolution. See Plaintiffs' Supplemental Brief ("Pl. Supp. Br.") Ex. 2. And in her deposition, Ms. Hardy made clear that all of her concerns were expressed in the January 15 meeting and her January 17 resubmission letter. Hardy Dep. at 284:6-16 (see Exhibit 1 hereto for cited portions of this deposition). Thus, her exhaustion claim must stand or fall solely on her participation in the January 15, 1997 meeting.

The most contemporaneous accounts of that meeting, however, do not support Ms. Hardy's new version of what she claims occurred there. Neither do the 1999 affidavit or 2004 deposition testimony of the EEO counselor who was present at the meeting. Plaintiffs cite to no other testimony or evidence to support Ms. Hardy's belated recollection of events. Nor do they explain why this ostensibly crucial testimony, if true, was not presented to the Court in any of numerous earlier pleadings beginning with plaintiffs' December 1999 opposition to defendant's motion to dismiss. That plaintiffs only presented Ms. Hardy's version of events after this Court's January 2007 dismissal of the case, coupled with their failure to provide any explanation for that delay, certainly calls into question the veracity of Ms. Hardy's testimony. So too do the inconsistencies between Ms. Hardy's 2004 deposition testimony and the declarations she submitted under oath to this Court in February and March 2007, which serve to highlight the ever-evolving nature of Ms. Hardy's belated and apparently faulty recollection of a long-past event.

A. Contemporaneous accounts. Less than a week after the January 15 meeting, plaintiff Cynthia Artis described the meeting in an affidavit dated January 21, 1997. See Exhibit 2 hereto. In their December 6, 1999 Opposition to Defendant's Motion to Dismiss, plaintiffs characterized Ms. Artis's affidavit as "a complete record of the [January 15] meeting," see Ex. 3 at 13, but Ms. Hardy's participation in the meeting was so insignificant that it went entirely unmentioned in that affidavit (or, indeed, in the Opposition itself).

On January 22, 1997, the Board EEO Office's attorney, William Bransford, wrote to plaintiffs' attorney Walter Charlton to warn him that plaintiffs would have to do more than they had done at the January 15 meeting or since then to complete the counseling process. See Pl. Supp. Br. Ex. 6.[1] As Mr. Bransford described the meeting, Mr. Charlton delivered a pile of documents to the counselor and then

> repeatedly engaged in obstructionist behavior by stating that the above-referenced documents were your "entire case." On several occasions you stated that you would not permit your clients to answer questions that went beyond these documents. When you were pressed, you relented and did permit your clients to be questioned up to a point. However, you repeatedly interrupted and made the questioning conducted by Ms. Nelson quite difficult. In fact Ms. Nelson was able to interview only one of the nine employees present at the meeting, Kim Hardy. . . . [Ms. Hardy] indicated that the subject of this counseling was the allegation that minority secretaries have received lower performance appraisals, lower bonuses and have lower salary levels than non-minority secretaries. *When Ms. Nelson asked Kim Hardy and the other employees to provide specific details to support their allegations, including dates, names of employees affected, names of employees who received more favorable treatment and supervisors who were responsible, no information was forthcoming.* Your repeated interruptions made the production of such information quite difficult. (emphasis supplied.)

Id. at 3-4.[2]

[1] Mr. Bransford subsequently filed an affidavit stating that the January 22 letter "is a complete and accurate representation of what occurred at the January 15 meeting." See Ex. 4 hereto, Declaration of William L. Bransford dated October 15, 1999, at 3.

[2] This description is echoed in the testimony of counselor Rosemarie Nelson, who testified that at the January 15 meeting "the complainants weren't talking" because "Mr. Charlton was." Nelson Dep. at 267:6-12 (relevant portions

Rather than using the opportunity of individual counselor time to provide specific information about timely instances of discrimination against her, the record establishes that Ms. Hardy used that time to provide general, "class-based" responses of the type the D.C. Circuit held to be inadequate in Artis I. Ms. Hardy's own testimony reveals that during the meeting she was frequently advised by the EEO Office's attorney, Mr. Bransford, to provide answers "specifically to [her]," Ex. 1 at 108:22-109:1; 111:20-112:4, and when she persisted in responding without details, Mr. Bransford objected that, in Ms. Hardy's words, "you can't answer that way." Id. at 100:22-101:4; 102:20-103:6; 103:15-105:5; 108:17-109:14. This description is consistent with Mr. Bransford's contemporaneous description of the meeting, in which he recounted that various participants made general allegations about discriminatory practices but when asked to supply "specific details" to support their allegations, "no information was forthcoming." Pl. Supp. Br. Ex. 6 at 3-4.

Neither the March 1997 EEO Counselor's Report regarding Ms. Hardy nor the subsequent testimony of Rosemarie Nelson, the EEO counselor who was present at the January 15 meeting, supports Ms. Hardy's recollected version of the January 15 meeting. The Report, see Pl. Supp. Br. Ex. 1, contained no mention of anything said by Ms. Hardy at the January 15 meeting, and stated in full that an "[i]ndividual interview was not conducted per Hardy's representative instruction."[3] Two years later, Ms. Nelson signed an affidavit describing the January 15, 1997 meeting as follows:

---

of this deposition are attached as Exhibit 5). Notably, Mr. Charlton's responding letter to Mr. Bransford made no mention of any specifics provided by Ms. Hardy to counter Mr. Bransford's statement that "no information was forthcoming." See Ex. 6 hereto.

[3] Plaintiffs make much of Ms. Nelson's notes, asserting that they were the "best evidence" of the meeting and seeking an "adverse inference" because they were destroyed. Pl. Supp. Br. at 8 & n.4. But Ms. Nelson's notes are irrelevant because they were already incorporated into her comprehensive counselor's reports, Exhibit 5 at 48:17-49:13, while the same cannot be said for notes taken by Ms. Hardy (which were allegedly lost in a flood in 1999, Ex. 1 at 28:8-13), by plaintiff Kathleen Matthews, who threw out her notes in 2000, see Exhibit 7 at 77:7-17; 94:6-9, or by any other plaintiff or counsel, none of which have been provided to defendant in discovery.

> *Counseling did not take place at that meeting* because Bransford insisted that the group file individual complaints, and as per management's instruction to me, we were instructed NOT to counsel on the class issues as demanded by the persons there at the meeting. When the meeting ended, I was instructed to follow up on each complaint.

See Exhibit 8 hereto (Nelson Affidavit dated February 8, 1999) at 14-15 (emphasis supplied). Like Ms. Artis's contemporaneous affidavit, Ms. Nelson's 1999 affidavit – which plaintiffs also previously characterized as revealing "the correct facts of what actually occurred at that meeting," see Ex. 3 at 13 – said nothing about any participation by Ms. Hardy at the meeting.

Ms. Nelson's April 2004 deposition testimony was consistent with these more contemporaneous accounts.[4] She stated that she had not produced a counselor's report for the January 15 session "because I don't remember it being a full counseling session. I mean, there were a lot of people in the group. And it would have been, you know, just based on my experience, it would have been very difficult to try to conduct a counseling session. There was a lot of people there and it would have been hard. I just don't remember producing notes because of that." Ex. 5 at 55:13-20. With respect to Ms. Hardy in particular, Ms. Nelson stated that she "might have asked [her] a question" at the group meeting, but "it wouldn't have been enough for me to say that I conducted a session where I was going to be able to produce enough notes to create a report." Id. at 60:12-19. She testified that if Ms. Hardy had said anything with respect to her claims at that meeting, Ms. Nelson "would have included it in the [counselor's] report," id. at 222:12-19,[5] and that she completed the reports without any input from the Board's EEO office. Id. at 262:1-8. Ms. Nelson also noted that following the group meeting she attempted to meet

---

[4] Plaintiffs contend that Ms. Nelson's deposition testimony "support[s] the position of the complainants that the counseling actually took place and was completed," see Pl. Supp. Br. at 8, but their brief fails to cite any actual testimony from Ms. Nelson to support this statement.

[5] This is consistent with Ms. Nelson's testimony that her counseling reports included "every incident" that the counselee raised and "all information" the counselee gave her "with respect to every alleged incident of discrimination they reported." Id. at 224:1-16.

with Ms. Hardy individually, but that Ms. Hardy declined the individual meeting "because of her attorney's advice that she would not participate in individual counseling." Id. at 221: 2-16.

B. Ms. Hardy's New Version of Events. In contrast to the contemporaneous record and Ms. Nelson's subsequent accounts of what occurred at the January 15 meeting, Ms. Hardy's 2004 testimony – 7 years after the January 15 meeting – was often contradictory and confused. For example, Ms. Hardy initially testified that Ms. Nelson asked her "about four questions," but then stated that she could not recall what those questions were. Ex.1 at 121:17-25. When asked if she told the counselor "about any specific individuals that you thought had discriminated against you," Ms. Hardy stated "I don't think we got to that . . . . I don't recall" giving specific names of discriminators. Id. at 104:24 – 105:22. Later in the deposition, however, she claimed that she had given the counselor the names of her supervisors in the Legal Division who she believed had discriminated against her, and that she complained generally about her salary and performance evaluations being lower than those of white secretaries. See generally Ex. 1 at 102-124.

Ms. Hardy's evolving memory continues in the declarations she filed in this case last year. For example, during her 2004 deposition, Ms. Hardy reviewed the counselor's report relating to her and stated unequivocally that it had not been provided to her previously because if it had been, she would have contacted Ms. Nelson and told her "'This is not correct'" because it omitted the information she provided at the January 15 meeting. Id. at 229:7-231:2. However, in her February 2007 declaration, Ms. Hardy claimed that she had received the report and *did* in fact question Ms. Nelson about why the information she provided during the January 15 meeting was not in the report, and that Ms. Nelson told her that "management told her that it was not considered a counseling session and to leave it out." Pl. Supp. Br. Ex. 7 at 2 (dated February 14, 2007). Less than a month after that declaration, Ms. Hardy signed another declaration in which she said that she "*never* received a report of any of my complaints. When asked why, Ms. Nelson

replied that she did not think it was a counseling session." Declaration of Kim Hardy dated March 12, 2007 (emphasis supplied).[6] Thus, Ms. Hardy has sworn statements supporting three entirely different versions of the same event – she never saw the report prior to her deposition and never spoke to Ms. Nelson about it (deposition testimony), never saw a report on herself and asked Ms. Nelson why not (March 12, 2007 declaration), or did see the report and asked Ms. Nelson why her information was not included (February 14, 2007 declaration). Which of these versions, if any, is accurate simply cannot be determined at this point,[7] but Ms. Hardy's multiple inconsistent sworn recollections of the same event undermine the credibility of her memory and testimony. Similarly, Ms. Hardy initially testified in 2004 that the January 15 meeting ended before she "was even totally done" with her interview, because it was late and people had to leave. Ex. 1 at 139:22-140:6. Three years later, however, Ms. Hardy claimed that "[a]fter I had answered all of her questions, Ms. Nelson stated that the session for me was finished, and shortly after that the group session broke up." Pl. Supp. Br. Ex. 7 at 2. With such a constantly changing recollection of events, it is no wonder that even Ms. Hardy acknowledges that more contemporaneous accounts are likely to be more accurate than her memory. Ex. 1 at 166:7-16.[8]

These examples underscore the vagaries of memory and the weakness of plaintiffs' sole reliance on Ms. Hardy's belated recollection as against the more consistent contemporaneous accounts, and they call into serious question the veracity of the other claims Ms. Hardy has made

---

[6] This declaration, filed as an exhibit to Plaintiffs' Reply Memorandum to Defendant's Opposition to Plaintiffs' Motion to Alter and Amend Judgment dated March 12, 2007, is attached hereto as Exhibit 9. An even more colorful version of Ms. Hardy's alleged discussion with Ms. Nelson about the contents of the counselor's report is provided in Pl. Supp. Br. at 7, which has Ms. Hardy receiving a draft of the report "several days" after the meeting, and "immediately" calling Ms. Nelson about it. That account appears to be hyperbole at best, since it is supported by no sworn statement by any witness.

[7] For her part, Ms. Nelson testified that she provided the counselor's reports to Barry Taylor, see Ex. 5 at 260, and never mentioned any contact from Ms. Hardy regarding the report.

[8] See also Ex. 1 at 286:15-24, in which Ms. Hardy acknowledges that what she said in the 1995 counseling and the 1997 counseling "are all running together".

to support the plaintiffs' newly crafted argument that she was the one who provided the counselor with details of timely instances of discrimination to which she had been subjected. For example, in her February 14, 2007 declaration Ms. Hardy states that she provided detailed information to the counselor about the treatment of Kathy Winter, a white secretary in her division who assertedly received better performance appraisals and a cash award for doing the same work as Ms. Hardy. This claim, however, is entirely unmentioned by any other witness, including Ms. Hardy herself, at any time earlier in these lengthy proceedings. Surely if this issue had been discussed in such detail with the counselor in 1997, *someone* would have mentioned in the succeeding decade, particularly since the issue of whether plaintiffs provided this type of detailed information during the 1997 counseling sessions has been the sole issue in this matter since the Board's first motion to dismiss was filed in October 1999.[9]

Moreover, plaintiffs have failed to produce any other evidence to support Ms. Hardy's belated recollections of what occurred at the January 15 meeting. Plaintiffs cite to no testimony from any of the "more than 10 witnesses" present at the meeting, Pl. Supp. Br. at 6, or provide any documents to corroborate the statements Ms. Hardy now claims she made at that time. Thus the Court is left with Ms. Hardy's belated, constantly evolving, and self-serving recollections on the one hand, and the consistent contemporaneous accounts and testimony of Ms. Nelson on the other, regarding what really transpired at that meeting 11 years ago.[10] While plaintiffs' motivation for only now offering Ms. Hardy's account is obvious – to convince the Court to

[9] Plaintiffs continue to focus on the allegedly missing statement of rights. Pl. Supp. Br. 3-4. If Ms. Hardy did not receive a written statement of her rights at the January 15 meeting, it was because Ms. Nelson did not consider it a counseling session. Ex. 5 at 55. In any event, Ms. Hardy testified that she was well aware of her rights at the time of that meeting. Ex. 1 at 207.

[10] Even less probative than Ms. Hardy's recent recollections are the statements made in open court by plaintiffs' counsel at the February 27, 2008 hearing. Mr. Charlton was not under oath, and indeed has never been deposed concerning his recollection of the meeting because the plaintiffs entered into a stipulation that they would not base their claim of exhaustion on any statements by Mr. Charlton. See Stipulation Pursuant to Order of June 29, 2004 (Exhibit 10 hereto).

reverse its decision dismissing this matter – its unexplained belated appearance, lack of any corroboration, and inconsistent and evolving nature call into question its veracity and it provides no basis for the Court to alter or amend the judgment dismissing this case.

2. Even If Ms. Hardy Had "Counseled" As She Asserts, She Cannot Show That She Timely Raised Any Claims of Discrimination.

Finally, even if Ms. Hardy could be taken at her word, she still has not presented evidence that she provided information regarding timely instances of discriminatory actions. Her current claim of exhaustion is based on her assertion that she informed the counselor that she had been discriminated against in her most recent performance evaluation in the fall of 1996, and that this affected her "ratings, advancements, bonuses and promotions," announced that December, and her pay adjustments made in January 1997. Pl. Supp. Br. at 2-3. But her performance evaluation – on which these further events were assertedly based – was issued on *November 9, 1996*.[11] As such, any counselor contact on January 14, 1997 would have been well beyond the 45-day limit permitted by applicable regulations, 12 C.F.R. § 268.104(a)(1); 29 C.F.R. § 1614.105, and Ms. Hardy's class complaint would have been dismissed as untimely if she had ever previously specified this event as the basis of her claim. See Naylor v. Potter, 2006 WL 3256325 (EEOC 2006) (dismissing class complaint for failure to contact counselor within 45 days of discriminatory action); Eaton v. Geren, 2007 WL 1108676 (EEOC 2007) (same); Horvath v. Winter, 2007 WL 1235006 (EEOC 2007) (same).

[11] Ms. Hardy's 1996 performance evaluation is attached as Exhibit 11. This document has not previously been filed in this case, because it was not until plaintiffs filed their Supp. Br. that it became clear that plaintiffs' timeliness argument was based on the document. Had Ms. Hardy actually provided the details regarding a white secretary, Kathy Winter, that she now claims to have provided, thereby allowing Ms. Nelson to conduct an inquiry, Ms. Nelson would have found that the two secretaries' performance evaluation ratings in 1996 were exactly the same. See 1996 performance evaluation of Kathy Winter attached hereto as Exhibit 12.

None of the other matters cited in Ms. Hardy's 2007 declarations as having been raised with the counselor was identified with any specificity as to time, and plaintiffs understandably do not rely on these other issues as a basis of their claim of timeliness.

Plaintiffs do not claim that Ms. Hardy's performance evaluation itself was timely raised. They argue, instead, that because the alleged *consequences* of that evaluation – Ms. Hardy's 1997 pay increase – became effective in January 1997, Ms. Hardy's counselor contact in mid-January was timely. Pl. Supp. Br. at 3. This position is completely inconsistent with a long line of Supreme Court cases starting with United Air Lines v. Evans, 431 U.S. 553 (1977) and culminating just last Term with Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007), which make clear that the time for bringing a charge under Title VII begins to run at the time of the discriminatory act itself, not at the time that some consequence of that act occurs. In Ledbetter, the Supreme Court expressly rejected the claim, advanced by plaintiffs here, that each new paycheck constitutes a discriminatory act if it is the result of an earlier discriminatory decision. 127 S. Ct. at 2169. Because plaintiffs claim that all of the instances of discrimination suffered by Ms. Hardy resulted from her allegedly discriminatory performance evaluation in November 1996, Pl. Supp. Br. at 2, all of her claims would have been untimely even if she had in fact raised them with a counselor at the January 15 meeting.

Plaintiffs ask this Court to reverse its well-reasoned decision dismissing this case, based solely on Ms. Hardy's recollections of events occurring over a decade ago. Plaintiffs' failure to explain the belated appearance of Ms. Hardy's account and the total lack of corroboration from any of the other participants of the January 15 meeting means there is no basis for plaintiffs' motion to alter or amend judgment, which should be denied.

DATED: March 26, 2008

Respectfully submitted,

/s/ Kenneth M. Willner
Kenneth M. Willner
(D.C. Bar No. 415906)
Paul Hastings Janofsky & Walker, LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1727

AND

John L. Kuray
Senior Counsel
Board of Governors of the
Federal Reserve System
20th & Constitution Avenue, N.W.
Washington, D.C. 20551
(202) 452-3789

Attorneys for Defendant
Ben S. Bernanke, Chairman of
the Board of Governors of
the Federal Reserve System