

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED *gfw*
01 JUL 27 PM 2:14
U.S. DISTRICT COURT
N.D. OF ALABAMA

_____)	
GEORGIA GRAY HAMPTON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	01-AR-1536-S
SECRETARY, DEPARTMENT OF)	
VETERANS AFFAIRS,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION TO DISMISS,
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Comes now the Defendant Secretary of the Department of Veterans Affairs, by and through Herbert H. Henry III, United States Attorney for the Northern District of Alabama, and pursuant to Rules 12 (b)(1) and (6), Fed.R.Civ.P., and moves this Honorable Court to dismiss this class action. Alternatively, the Defendant moves for summary judgment pursuant to Rule 56, Fed.R.Civ.P. As grounds in support hereof, the Defendant states as follows:

1. This is a putative class action brought by fifteen African-American employees employed by the Veterans Affairs Medical Center (“VAMC”) located in Birmingham, Alabama, alleging that they and the so-called similarly situated individuals that they represent “have been denied the opportunity for promotion, who [sic] have been subjected to a hostile work environment, and/or have been retaliated against because of the VAMC’s policy and practice of racial discrimination.”



3

(Complaint at ¶¶ 1, 2).

2. This complaint was initially filed in the United States District Court for the District of Columbia on December 1, 2000.

3. On March 15, 2001, the Honorable Henry H. Kennedy entered an order transferring this case to the Northern District of Alabama. In that order, Judge Kennedy also ordered that Defendant would have 30 days after the entry of that order within which to answer or to otherwise respond to the complaint. Upon receipt of the case, this Honorable Court entered an order amending Judge Kennedy's order by extending the time in which Defendant may answer or otherwise respond until July 29, 2001.

4. Under regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") applicable to federal sector cases, the agent or representative of a class must first seek pre-complaint counseling within forty-five days of the matter alleged to be discriminatory. 29 C.F.R. § 1614.204(b), incorporating 29 C.F.R. § 1614.105. At the first counseling session, a complainant is provided with notice of his or her right to pursue a class complaint of discrimination. 29 C.F.R. § 1614.105(b). "If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedure and the responsibilities of a class agent." *Id.*

5. None of the named Plaintiffs filed any formal administrative class complaint of discrimination with respect to any matter. While it appears that most of the individually named Plaintiffs filed individual complaints of discrimination at various points in time, none of them filed a formal administrative complaint on behalf of the class.

6. Exhaustion of an individual administrative claim is not sufficient to exhaust a class action

claim.

7. The Complaint should be dismissed for lack of subject matter jurisdiction, with prejudice as to the class claims. Rule 12(b)(1), Fed.R.Civ.P.

8. Alternatively, Plaintiffs fail to state a claim upon which relief can be granted as to the class claims. Rule 12(b)(6), Fed.R.Civ.P.

9. Alternatively, as to the crucial issue of exhaustion of class claims, there is no genuine issue of material fact, and the Defendant is entitled to judgment as a matter of law. Rule 56, Fed.R.Civ.P.

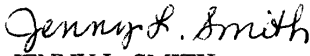
10. Because the Plaintiffs plead claims incorporating both unexhausted class claims and miscellaneous individual claims, Defendant moves the Court to dismiss the entire Complaint, with prejudice as to the class claims and to give leave to any Plaintiffs who may have timely exhausted their individual claims and timely filed suit to file an amended complaint asserting such claims.

11. Declarations and a memorandum of law in support of this motion are being filed simultaneously herewith.

WHEREFORE, Defendant respectfully prays that the action be dismissed with prejudice as to the class claims and with prejudice as to the individual claims that have not been properly exhausted. Defendant further prays that the Court give leave to the Plaintiffs who exhausted their individual claims to file an amended complaint asserting such claims as may be timely.

Respectfully submitted,

HERBERT H. HENRY III
United States Attorney


JENNY L. SMITH
Assistant United States Attorney

200 Vance Federal Building
1800 Fifth Avenue North
Birmingham, Alabama 35203-2189
(205) 244-2105
Fax (205) 244-2181
Attorney No. 5787

OF COUNSEL:

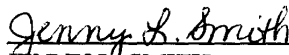
JOHN E. HAUGE
Assistant Regional Counsel
Department of Veterans Affairs
Alabama Area Office
345 Perry Hill Road
Montgomery, Alabama 36109
(334) 223-7026, Ext. 1
Fax (334) 223-7038

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by mailing a copy thereof by first class United States mail, postage prepaid, on this the 27th day of July, 2001:

Everald Fitzgerald Thompson, Esquire
4201 Connecticut Avenue, N.W.
Washington, D.C. 20008

Jimmy A. Bell, Esquire
9610 Marlboro Pike
Upper Marlboro, Maryland 20772



JENNY L. SMITH

Assistant United States Attorney