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

United States District Court, District of Columbia.
Sharon BLACKMON-MALLOY, et al., Plaintiffs,
v.
UNITED STATES CAPITOL POLICE BOARD, Defendant.
No. 1:01CV02221(EGS).
August 30, 2002.

Plaintiffs' Opposition to Defendant's Motion to Dismiss

Respectfully submitted, Joseph D. Gebhardt, (D.C. Bar #113894), Charles W. Day, Jr., (D.C. Bar #459820), Susan C. Lee, (D.C. Bar #370982), Gebhardt & Associates, LLP, 1101 17th Street, N.W., Suite 607, Washington, DC 20036, (202) 496-0400, Counsel for Plaintiffs.

1. Plaintiffs and Class Agents Sharon Blackmon-Malloy, Dale Veal, Vernier Riggs, Luther Peterson, and Duvall Phelps, by and through undersigned counsel, hereby oppose Defendant's Motion to Dismiss or Strike Complaints in this case of pervasive employment discrimination against the proposed class of 270 African American United States Capitol Police Officers.

*FACTUAL BACKGROUND*

2. We stand by the facts stated in the Blackmon-Malloy Plaintiffs' First Amended Complaint dated February 27, 2002, and we reiterate the importance of this case from our pending Motion for Class Certification, as follows:

3. The United States Capitol Police is entrusted with the responsibility of guarding and protecting the United States Capitol, the House and Senate buildings, adjacent grounds, surrounding areas, Members of Congress, their staffs, and the throngs of visitors to the Capitol area. The officers who make up the force have the responsibility of protecting the very fabric of our country, as is even more evident after the events of September 11, 2001. Two officers (one white and one African American) were killed in the line of duty just a few years ago. It thus stands in stark contrast to what all Americans expect of the United States Capitol Police that the force's African American officers are systematically discriminated against on the basis of their race in promotions, other selections, work assignments, discipline, termination, retaliation when complaints are advanced, and having a hostile work environment. African Americans make up nearly a third (29%) of the force, yet the number of African Americans in higher ranking, decision-making positions is extremely limited (13%). Although African American officers are often well qualified for promotions to Sergeant, Lieutenant, and Inspector, very few are promoted to the upper echelon because of the force's long established discriminatory practices. African American officers, on average, score very well on the written portion of the force's promotion examinations. Yet, sometimes cut-off scores for promotions are changed in mid-stream. However, their overall scores and rankings often drop drastically after the oral portion of the examination, which is almost always conducted by an all-white board.

4. African American officers, although qualified for various assignments, are denied work assignments solely on

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the basis of their race. African American officers are subjected to unwarranted discipline and are more severely disciplined than their white counterparts for similar infractions. African American officers have been wrongfully terminated, forced into early retirement, or forced to resign in lieu of being terminated, while their white counterparts who have also violated the same or similar general order(s) remain on the force.

5. Usually, when an African American officer files a complaint against a white officer, or files a complaint of discrimination, or advocates against the discriminatory practices of the United States Capitol Police, the officers are subjected to retaliation in the form of changed assignments, discipline, unsatisfactory performance evaluations and/or a hostile work environment.

6. African American officers have been subjected to a number of racial comments and called derogatory names by white officers and supervisors, creating a hostile work environment.

*ARGUMENT*

*Procedural Posture of the Case*

7. At the outset of its defense, Defendant has chosen to avoid the class's allegations of discrimination as set forth in the Blackmon-Malloy First Amended Complaint. Rather, Defendant is attempting an unconventional backdoor maneuver, a motion entitled "Motion to Dismiss or Strike Complaints" ("Motion") seeking to dismiss all four Complaints on file. In this Motion, Defendant in essence is asking the Court for summary judgment without having to answer the Blackmon-Malloy First Amended Complaint or respond to the Blackmon-Malloy Motion for Class Certification. This transparent maneuver is premature and, if allowed to succeed, would be grossly unfair to the 270 African American officers who have turned to this Court to seek redress and freedom from the pervasive race discrimination they must currently endure in their jobs.

8. The Blackmon-Malloy Plaintiffs, therefore, request that the Court treat Defendant's Motion strictly as a Motion to Dismiss or Strike (as Defendant has labeled it), and not as a Motion for Summary Judgment either in whole or in part. It would be premature and procedurally improper under Fed.R.Civ.P. 23 to decide a proposed class action on summary judgment at the very outset of the case. While there are clearly genuine disputes over such material facts as which of Plaintiff officers completed the administrative process of counseling and mediation, the proposed class has not yet had access through discovery to Defendant's extensive records documenting the facts of this case. Hence, it would therefore be grossly unfair to the 270 Plaintiff officers to grant summary judgment before the record has been developed sufficiently for the class to have a fair opportunity to prove that there are disputed issues of material fact. The pending Motion should be decided on the pleadings alone, and any additional documentary evidence submitted by the parties should not be relied upon.

9. Considering that this is a class action involving 270 Plaintiff officers, the 33-page Blackmon-Malloy First Amended Complaint fully meets Fed.R.Civ.P. 8. It contains a short, plain statement of the case and allegations sufficient to confer jurisdiction upon the Court, and it furthermore gives proper notice to the correct Defendant. Defendant's Motion (on pages 4-5) accurately summarizes the Blackmon-Malloy First Amended Complaint, in particular, the definition of the proposed class and the type of discrimination claims that the class is bringing to the Court for relief. Defendant's summary, on pages 4-5 of the Motion, actually demonstrates that the Blackmon-Malloy First Amended Complaint meets Rule 8 requirements.

10. The Blackmon-Malloy First Amended Complaint amends and supercedes the original Class Action Complaint filed by Plaintiffs' first attorney, Charles Jerome Ware. To eliminate any confusion, the Blackmon-Malloy

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Plaintiffs through undersigned counsel hereby represent that during this litigation they will not pursue any claims in their original Complaint that are inconsistent with or broader than those stated in the Blackmon-Malloy First Amended Complaint. Since it would be burdensome and unnecessary for Defendant to have to answer the second sentence of paragraph 3 of the First Amended Complaint or, for that matter, the entire original Complaint filed by Mr. Ware, no such answers are required or expected by Plaintiffs. Since the original Complaint has been superceded, there is no reason to dismiss or strike the original Complaint, which is needed to establish that the Plaintiffs here met the applicable statute of limitations and possibly other requirements.[FN1] Defendant continually labels the original Complaint as "flawed", but labeling it so does not make it so. It seems clear that the original Complaint gave proper notice of the class's allegations of discrimination to the correct Defendant. *See* Fed.R.Civ.P.15. While we do not agree that it was "flawed", the Court should recognize that the Blackmon-Malloy Plaintiffs have amended their original Complaint through undersigned counsel.

> FN1. The original Complaint filed by Mr. Ware, for example, listed all the Plaintiffs' names in this class action.

11. The Blackmon-Malloy Plaintiffs represented by undersigned counsel take no position on Defendant's request to dismiss or strike the two so-called Ikard complaints filed by Nathaniel D. Johnson. *See* Motion at 5-6. These issues are best left to the Court, Mr. Johnson, and Defendant.

12. The pending Blackmon-Malloy Motion for Class Certification is the appropriate vehicle for the Court to decide all issues relating to class certification. Defendant's back-door maneuver to kill this class action through a "Motion to Dismiss or Strike Complaints" without having to answer the Complaint or respond to the Motion for Class Certification should not be countenanced. Defendant's bizarre procedural maneuver reflects the bizarre nature of its argument that this is a class that cannot be certified. At the appropriate time, the Blackmon-Malloy First Amended Complaint (and accompanying Motion for Class Certification) will demonstrate that class certification is appropriate and necessary under the Federal Rules of Civil Procedure, the plain meaning of the Congressional Accountability Act ("CAA"), the legislative history of the statute, and the courts' policy in favor of judicial economy. The class will also address any issues related to class certification such as exhaustion of administrative remedies by the class agents and other class members. Moreover, a determination of which employees fall within the class is best addressed once the issue of class definition and certification has been decided.

*No Basis to Dismiss the Blackmon-Malloy First Amended Complaint*

13. Defendant cannot meet the standard for showing that the Blackmon-Malloy First Amended Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6). Defendant's Motion to Dismiss was brought, in part, under Rule 12(b)(6) on the ground that Plaintiffs have purportedly failed to state claims upon which relief may be granted. A Rule 12(b)(6) motion tests the legal sufficiency of a complaint: Dismissal is inappropriate unless the "plaintiff can prove no set of facts in support of his claim which would entitle him them to relief." *Conley v. Gibson,* 335 U.S. 41, 45-46 (1957).[FN2] For a number of reasons, Defendant's Motion has failed to demonstrate that Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. All of Defendant's disputes with the Blackmon-Malloy Plaintiffs' factual assertions, for example, regarding the discrimination against Class Agents and named class members, the Plaintiff officers' exhaustion of the administrative procedures below, and their working in a hostile environment must fail at this juncture.

> FN2. "In considering the claims dismissed pursuant to Rule 12(b)(6), we must treat the complaint's factual allegations as true, must grant plaintiff the benefit of all reasonable inferences from the facts al-

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leged, and may uphold the dismissal only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Sparrow v. United Air Lines, Inc.,* 342 U.S. App. D.C. 268; 216 F.3d 1111, 1114 (D.C. Cir. 2000) (quoting Conley v. Gibson, (1957)); see 216 F.3d at 1113." *Gilvin v. Fire,* 259 F.3d 749 (D.C. Cir. 2001).

14. At the Rule 12(b)(6) stage, the Court is precluded from assessing "the truth of what is asserted or determin[ing] whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found. of S. Cal. V. Barr,* 952 F.2d 457, 467 (D.C. Cir. 1991). For this reason, Rule 12(b)(6) precludes a movant, such as Defendant here, from presenting evidence, including documents, that is outside of Plaintiffs' Complaint. In disregard of this well-established restriction, Defendant has improperly presented a large number of documents in support of its 12(b)(6) dismissal arguments that are clearly outside of the Blackmon-Malloy First Amended Complaint.

15. The Court may and should disregard these documents under Rule 12(b)(6). However, if the Court elects to consider the documents Defendant has improperly submitted in support of its motion, Rule 12(b)(6) requires that Defendant's motion be treated as a motion for summary judgment. Under the standard for summary judgment set forth in Fed. R. Civ. P. 56, Defendant is not entitled to summary judgment because there are genuine issues of material fact in dispute that preclude judgment as a matter of law.

16. The Blackmon-Malloy First Amended Complaint satisfies the standard for pleadings under Fed.R.Civ.P. 8. The U.S. Supreme Court recently addressed the issue of the standard for pleadings as required by Rule 8, holding "simply [that Rule 8 requires] ... 'the defendant [have] fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002). The 33-page Blackmon-Malloy First Amended Complaint more than meets this standard.

17. The Federal Rules of Civil Procedures allow for class actions (especially in employment discrimination litigation), and the CAA does not forbid class actions. Title VII class actions are allowed and governed by Fed.R.Civ.P. 23, and the Blackmon-Malloy Motion for Class Certification discusses in detail how this proposed class action fully meets the requirements of Rule 23. Defendant's waiver of sovereign immunity argument is a classic red-herring. Indeed, the Office of Compliance has admitted that it does not currently have a policy on class actions. However, Defendant disingenuously argues that the Office of Compliance has previously taken the position "that a class action could not be maintained under the CAA." Defendant's Motion at 9. However, the Office of Compliance has not taken an official position regarding the propriety of class complaints. Defendant has simply misrepresented the current position of the Office of Compliance regarding class complaints under the CAA. As of July 15, 2002, the date on which the official website of the Office of Compliance was most recently updated, it is clear that the Office of Compliance has not taken any official position regarding the propriety of class actions pursuant to the CAA. The Office of Compliance's website contains the following response regarding its position with respect to class actions:[FN3]

FN3. The official position of the Office of Compliance regarding the maintenance of class complaints under the CAA stemmed from the inquiry of an interested person who was participating in the mandatory Rule-making process.

*Class Actions*

Summary of Comments

One commenter questioned whether the proposed rules were intended to prohibit class actions and requested that the rules specifically set forth procedures governing class actions.

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[Office of Compliance] Response

The Procedural rules that have been adopted do not purport to address whether and in what circumstances, if any, employees may pursue class claims. *The issue is one that involves substantive legal questions that are not appropriately addressed in these procedural rules.*

Office of Compliance Manual (visited August 30, 2002) *<http:// www.compliance.gov/publications/ocpro.html>*. Copy attached as Exhibit A.

18. Clearly, the Office of Compliance is not presently interpreting the CAA as precluding class complaints.

19. Defendant argues incorrectly that the CAA's provisions are more limited than Title VII's. Defendant misleadingly suggests that because the CAA does not incorporate the reprisal provisions of 42 U.S.C. § 2000e-3, Congress intended its provisions to be more limited than Title VII's. In fact, in the CAA, the Congress added provisions against reprisal that are stronger than Title VII's. *See* 24 U.S.C. § 1317; *cf.* 42 U.S.C. § 2000e-3.[FN4] The anti-reprisal provisions contained in the CAA provide as follows:

FN4. 42 U.S.C. § 2000e-3 also has a provision banning discriminatory notices.

It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

24 U.S.C. § 1317. By comparison, Title VII's anti-reprisal provisions proscribe *only* discriminatory, but not intimidating and generally retaliatory, conduct against an employee who has either opposed discrimination or participated in a proceeding brought pursuant to Title VII. To argue on the basis of this provision that the CAA provides more limited relief than Title VII is an absurdity.

20. The broad remedial purpose of the CAA, legislative history, and equitable considerations all militate in favor of class actions. The legislative history of Title VII and equitable principles authorize the Court to permit Plaintiffs to maintain their judicial class complaint.[FN5] The CAA is a relatively new legislative scheme; it became effective on January 23, 1996. When Title VII was first made applicable to Federal sector employees, it too was devoid of procedures that would govern the maintenance of a class complaint. "Dissatisfaction with complaint procedures of the Civil Service Commission prior to [the 1972 Amendments to Title VII] and uncertainty about the requirement of exhaustion of administrative remedies were among the factors leading Congress to make judicial relief available to Federal employees under Title VII." *Williams v. Tennessee Valley Authority,* 552 F.2d 691, 693 (6th Cir. 1977). Just as in the case of the inaugural CAA scheme, "a critical defect of the Federal equal employment program [i.e., Title VII prior to the 1972 Amendments] ha[d] been the failure of the complaint process. That process ha[d] impeded rather than advanced the goal of the elimination of discrimination in Federal employment." Williams at 693-694, *citing* H.R. Rep. No. 238, 92 nd Cong., 2nd Sess. 23-24, U.S. Code Cong. & Admin. News, 1972, pp. 2237, 2158; Legislative History of the Equal Employment Opportunity Act of 1972, 92nd Cong., 2nd Sess. 83-83 (Comm. Print 1972). As is noted in the *Williams* case, during the floor discussion of the 1972 Amendments to Title VII one Senator astutely noted:

FN5. The Legislative history supports the broad remedial purpose of the CAA Act. In 1994, during floor debate about the Congressional Accountability Act of 1995, then Congressman James A. Trafic-

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ant, Jr. foreshadowed the need for Plaintiffs' present class action when he stated:

I am pleased that H.R. 4822 [the Congressional Accountability Act] extends coverage to the brave and dedicated men and women of the U.S. Capitol Police.

Mr. Chairman, I have spoken with a number of officers about the force. Without question, there is a serious morale problem. *The rank and file feel they have no rights, that they are treated like children. I have found instances of age, sex and racial discrimination. I have found that in all too many instances management is petty, unsympathetic and incompetent.* The bill we have before us today will go a long way in addressing these serious problems.

Legislative History of the Congressional Accountability Act of 1995, 103rd Cong., Vol. I, Floor Comments of U.S. Representative James A. Traficant, Jr., 140 Cong. Rec. (1994)(debate on H.R. 4822), p. 748.

[T]he courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any major action under [Title VII] involves considerations beyond those raised by the individual claimant .. *[A]ccordingly it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief.*

*Id.* at 696-97. The legislative history of the 1972 Amendments to Title VII are consistent with the “strong Federal policy encouraging class action litigation in situations of pervasive discrimination.” *Williams* at 697.

21. As such, until the original Title VII scheme was amended to expressly allow for administrative class complaints in Federal sector cases, Federal district courts routinely found that federal sector employees were permitted to maintain a class complaint without each class member having to exhaust administrative remedies. In *Beeman v. Middendorf,* 425 F. Supp. 713 (D.D.C. 1977), the U.S. Custom Service/U.S. Navy moved to dismiss and opposed certification of a class comprised of female custom inspectors, in part, based upon the “failure of any member of the proposed class other than [the Class Representative] to exhaust her administrative remedies.” *Id.* at 716. This Court rejected the Navy's argument holding that:

[T]he legislative history of Title VII and the 1972 amendments thereto, and the systematic nature of discrimination itself, indicate that *class actions both in the private and Federal sectors* were indeed envisioned within the scheme of the Act and its amendments ... [and] *could be maintained after one prospective named plaintiff exhausted his or her administrative remedies.*

*Beeman* at 716,[FN6] *relying* upon *Barrett v. United States Civil Service Commission,* 69 F.R.D. 544, 552 (D.D.C. 1975)(wherein Judge Richey issued a declaratory judgment that the Civil Service Commission “must accept, process and resolve complaints of class and systemic discrimination which are advanced through individual complaints of discrimination filed pursuant to , and that the [CSC] must provide class relief, if warranted, in such circumstances.”) Consistent with this Court's holdings in both *Beeman* and *Barrett,* the 6th Cir. likewise found that “there [was] no requirement that each member of the potential class demonstrate exhaustion of administrative remedies.” *Williams* at 697.

FN6. In *Beeman,* this Court found additional support for its holding that only one plaintiff need exhaust administrative remedies on behalf of the class in *Hackley v. Roudenbush,* 520 F.2d. 108, 151-52 (D.C. Cir. 1975), *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1995), *Chandler v. Roudenbush,* 425 U.S. 840 (1976), and “the decisions of other district courts which have reached the same result.” *Beeman* at 716; *see also Predmore v. Allen,* 407 F. Supp. 1053, 1065-1067 (D. Md. 1975) (permitting class com-

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plaint to proceed based upon exhaustion by lead class member).

22. As was the case during the historical development of Title VII, plaintiffs bringing suit under the CAA should be required *only* to exhaust administrative remedies on behalf of a class when class administrative complaint procedures are promulgated as it relates to the CAA. "In 1997, in response to judicial criticism that no administrative mechanism existed through which an individual could assert class claims [under Title VII], the CSC promulgated specific class administrative remedies."[FN7] *Gulley v. Orr,* F.2d 1383 (10th Cir. 1990). In the context of Title VII's development, only when a "distinct administrative mechanism [had been] created specifically to address class claims of discrimination" did "the weight of authority hold that exhaustion of individual administrative remedies was insufficient to commence a class action in the federal court." *Gulley* at 1385 (10th Cir. 1990).

FN7. "These class administrative remedies were originally promulgated as 5 C.F.R. §§ 713.601-.643, but are now codified as 29 C.F.R. § 1614.204, as a result of the transfer of authority to enforce equal employment opportunity in the federal government from the Civil Service Commission to the Equal Employment Opportunity Commission." *Gulley* at 1384-85, n.2 (citation omitted).

23. In the absence of clear procedures governing class complaints brought pursuant to the CAA, as was the case during the formative years of Title VII, both Fed.R.Civ.P. 23 and equitable principles authorize the Court to permit Plaintiffs' class complaint. The Office of Compliance concedes that "[s]ection 303 of the CAA directs the Executive Director of the Office of Compliance to adopt rules governing the procedures of the Office of Compliance." *See* Office of Compliance website, Summary of Procedural Rules. In fact, secs. 1302(b)(1) and (b)(2) require the Board of Directors of the Office of Compliance to review the provisions of both Title VII and 29 C.F.R. § 1613, relating to the administrative maintenance of class complaints, and to report on whether and/or to what degree the aforementioned provisions are applicable to members of the U.S. Capitol Police or should be made applicable. *See* 24 U.S.C. § 1302(b)(1) and (b)(2). The Board has not yet done so and thus has not proscribed administrative class complaints under the CAA.

24. Clearly, there is no authority within any federal regulations, rules, and/or procedures of the Office of Compliance, or statutory construction of the CAA, for Defendant's contention that a class action cannot be maintained under the CAA.

25. As stated in the Blackmon-Malloy First Amended Complaint, paragraph 7, the Plaintiff Class Agents have exhausted their administrative remedies by completing counseling and mediation with the Office of Compliance as required. In a Motion to Dismiss proceeding, this fact must be accepted by the Court as true. But here it *is* true. In fact, 270 Plaintiff Officers went through the counseling and mediation process with the representation of the class's first attorney, Charles Jerome Ware. An August 8, 2001 letter from Office of Compliance Executive Director William W. Thompson, II to Mr. Ware and Defendant's Senate and House counsel, admits that hundreds of Plaintiff African American officers had completed counseling and mediation. *See* Exhibit B hereto. A full page of officers (45 officers to be exact) were inadvertently omitted from Mr. Thompson's letter (Exhibit B). The omitted officers are listed in a June 5, 2001 letter from Mr. Ware to Mr Thompson; *see* Exhibit C attached.

26. Furthermore, Plaintiffs believe that they timely and properly engaged in counseling and mediation at the Office of Compliance, thereby meeting the CAA's requirements. Defendant's argument to the contrary, that the officers went to counseling untimely, raises questions of fact that need to be flushed out in discovery following class certification. Furthermore, this argument certainly does not apply to the class members who have experi-

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enced a hostile work environment. *National Railroad* Passengers Corporation v. Morgan, 122 S. Ct. 206 (2002). The discriminatory assignments, transfers, and some verbal reprimands alleged in the Blackmon-Malloy First Amended Complaint are indicative of the hostile environment that Plaintiffs work in. These would not rise to the level of discreet employment actions or "adverse employment actions", but would form a continuous part of a hostile work environment.

*CONCLUSION*

27. For all the above reasons, Defendant's Motion to Dismiss or Strike Complaints should be denied, with a timetable set for Defendant to answer the Blackmon-Malloy First Amended Complaint and respond to the Blackmon-Malloy Motion for Class Certification. An appropriate Order accompanies this Opposition.

28. Plaintiffs request Oral Argument on the pending Motion to Dismiss and this Opposition.

August 30, 2002

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2002 WL 34359740 (D.D.C. ) (Trial Motion, Memorandum and Affidavit )

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