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. 01-02221 (EGS).
December 22, 2003.

Memorandum in Support of Motion to Dismiss or Strike Joint Second Amended Class Action Complaint

Respectfully submitted, Roscoe C. Howard, Jr., D.C. Bar #246470, United States Attorney.Mark E. Nagle, D.C. Bar #416364, Chief, Civil Division.Laurie Weinstein, DC Bar #389511, Assistant United States Attorney, Tenth Floor, 555 4th Street, Nw, Washington, DC 20530, (202) 514-7133.William F. Allen, D.C. Bar #454656, Associate Counsel, Office of House Employment Counsel, 1036 Longworth House Office Building, Washington, DC 20515.

Defendant, the United States Capitol Police Board (the "Board"), by and through undersigned counsel, respectfully submits this Memorandum in support of its motion to dismiss plaintiffs' joint second amended complaint ("Jt. Cmplt."), pursuant to Fed. R. Civ. P. Rules 8, 12(b)(1) and 12(b)(6).

I. Introduction And Summary Of Argument

This case, filed under the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1301-1438, is a putative class action relating to employment discrimination allegedly experienced by minority United States Capitol Police (USCP) officers. The Original Complaint listed 259 individuals in the case caption. In their current complaint, plaintiffs identify seven "class agents," seventeen "named class members," and 93 other individuals (in paragraph 46) with unspecified "provable claims of discrimination,"[FN1] as well as an indeterminate number (in paragraph 47) of "other named Plaintiffs in the Original complaint" with unspecified discrimination claims. In addition, plaintiffs seek compensatory damages and injunctive relief on behalf of all African-American officers employed by the Board at any time from November 4, 1998 to the date of a Court Order granting such relief. Jt. Cmplt. ¶ 1. For the reasons summarized below and stated more fully herein, the current complaint should be dismissed in its entirety, with prejudice.

FN1. While the current complaint identifies 95 such names, Howard Whitehurst and Bernard Jackson are included twice.

First, plaintiffs have failed to carry their burden of establishing this Court's subject matter jurisdiction. *See* Fed. R. Civ. P. 8(a)(1) (requiring a "short plain statement of the grounds upon which the court's jurisdiction depends"). While it is unclear from the face of the complaint how many plaintiffs are actually involved in the current complaint, plaintiffs have not sufficiently alleged that they have completed counseling and mediation regarding the claims raised in the complaint. Because this is a court of limited jurisdiction and plaintiffs must affirmatively plead facts showing the existence of jurisdiction, plaintiffs' allegations must be dismissed for lack of

subject matter jurisdiction.

Second, the Court cannot exercise subject matter jurisdiction over plaintiffs whose employment ended prior to January 23, 1996, the effective date of the CAA, or who never filed a request for counseling at all. As a result, at least 38 individuals must be dismissed from this action. *See* Exhibits F, H.

Third, under the CAA, Congress has only waived its sovereign immunity and consented to be sued in federal district court after a plaintiff has *timely* completed counseling and mediation through the Office of Compliance on the violations for which redress is sought. 2 U.S.C. §§ 1402, 1403, 1408(a); *see* Section VI.A, *infra*. Plaintiffs cannot use the Rule 23 class action mechanism to give this Court subject matter jurisdiction over the claims of individuals who have failed to exhaust their administrative remedies in a timely fashion. Congress has not waived its sovereign immunity to be sued by employees on behalf of a class of employees. In fact, the CAA makes clear that this Court may only grant relief to an employee who has *individually* undertaken and completed counseling and mediation within the time limits specified in sections 402 and 403 of the Act. 2 U.S.C. § 1361(e) . Finally, it is well-established that the Federal Rules of Civil Procedure do not provide an independent ground for subject matter jurisdiction where there is no other basis for jurisdiction, and "shall not be construed to extend ... the jurisdiction of the United States district court." Fed. R. Civ. P. 82.

Fourth, 33 purported plaintiffs, including class agent Phelps and named class member Allen, who either failed to request counseling within 180 days from their termination date or who failed to request mediation within 15 days of receiving notice of the end of counseling, must be dismissed for failing to exhaust their administrative remedies within the time limits specified in sections 402 and 403 of the CAA. 2 U.S.C. §§ 1402, 1403; *see* Exhibits I, J.

Fifth, only six plaintiffs identified in paragraph 46 participated at all in the mediation process required by the CAA. Plaintiffs cannot satisfy their administrative exhaustion requirement by merely requesting mediation. Plaintiffs' calculated decision to withhold their participation in the statutory mediation process and proceed directly to this Court is inconsistent with their obligation to participate in good faith in the administrative process. In such circumstances, dismissal for failure to exhaust administrative remedies is warranted. *See Wilson v. Pena,* 79 F.3d 154, 165 (D.C. Cir. 1996).

Sixth, due to the timeliness requirements in the CAA, only those individuals who participated in the 2000 promotion process have a potentially viable promotion claim.[FN2] The vast majority of plaintiffs listed in paragraph 46 were either ineligible to participate in the 2000 promotion process or elected not to participate. Such individuals may not bring a "failure to promote" claim. Indeed, only 14 officers in paragraph 46 actually participated in the process, and 3 of them were promoted.

FN2. Because defendant has yet to obtain plaintiffs' requests for counseling, it is unable to ascertain which plaintiffs, if any, actually raised the fairness of the 2000 promotion process in their request for counseling.

Seventh, to the extent that the 24 class agents and named class members have alleged specific instances of discrimination or retaliation in the joint complaint, the claims of all but class agents Veal (in part) and Peterson (in part) must be dismissed for the various reasons stated in Section X, *infra*, including failure to exhaust administrative remedies, timeliness, lack of adverse action, and failure to participate in the promotion process.[FN3]

FN3. Although part of the individual allegations of Sgt. Veal and Officer Peterson would ordinarily sur-

vive a motion to dismiss under Rule 12(b)(6), because neither Sgt. Veal nor Officer Peterson participated in the CAA-mandated mediation process, their entire claims must be dismissed for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies. *See* Section VIII, *infra.*

Eighth, at least 54 plaintiffs identified in paragraph 46 have failed to provide fair notice of their claims, as is required by Fed. R. Civ. P. 8. While ordinarily a motion for more definite statement may be appropriate, in this case plaintiffs were on notice through defendant's first motion to dismiss of defendant's position regarding these individuals prior to filing their joint second amended complaint, yet failed to provide the required fair notice in the current pleading.

Ninth, plaintiffs' disparate impact claims must be dismissed for failure to state a claim. Although in challenging the promotion process plaintiffs allege statistical disparities between the percentage of African-Americans in the upper ranks of the department and the overall force, they fail to identify the "specific or particular employment practice" that has created the alleged disparate impact. Plaintiffs also provide only conclusory allegations regarding other selections, work assignments, discipline and terminations, without any statistical support or specificity. Such allegations are insufficient to maintain a disparate impact claim.

II. Procedural Status

On October 29, 2001, through original counsel Charles Ware, plaintiffs filed a complaint in this Court which alleged employment discrimination with regard to a class described as "African American/black male or female U.S. Capitol Police officer or recruit, past or present, active or retired, whose employment rights have been violated by Defendant." *See* Civ. No. 01-02221 (EGS), Dkt. #1, at ¶ 115 ("Original Complaint").

On February 27, 2002, after Mr. Ware had been replaced, new counsel Gebhardt & Associates, LLP ("Gebhardt firm") filed Plaintiffs' Motion for Class Certification and a First Amended Complaint. *See* Dkt. #9-10. On March 1 and March 12, 2002, counsel Nathaniel D. Johnson & Associates, LLC ("Johnson firm") filed an Amended Complaint *(Ikard I)* and Plaintiffs' Second Amended Complaint *(Ikard II)*, on behalf of plaintiff Larry Ikard *et al. See* Dkt. #12-13.

On July 10, 2002, defendant filed its Motion to Stay Briefing on Issue of Class Certification and Motion to Dismiss or Strike Complaints. *See* Dkt. #19-20. On August 30, the Gebhardt firm filed its opposition brief to defendant's motions ("Gebhardt Opp."). *See* Dkt. #28. On September 3, the Johnson firm filed its opposition brief ("Johnson Opp."). *See* Dkt. #29. On September 16, 2002, the Court issued an Order in which it, *inter alia*, (1) denied plaintiffs' motion for class certification, (2) deferred consideration of the motion for class certification until it had resolved issues raised in defendant's motion to dismiss, and (3) ordered the Johnson firm to show cause why the second amended complaint should not be stricken for failing to comply with Fed. R. Civ. P. 15(a) and this Court's January 23, 2002 Order. *See* Dkt. #31. On October 2, 2002, defendant filed its reply brief in support of its motion. *See* Dkt. #36.

Following a status conference on January 8, 2003, the Court, *inter alia*, (1) ordered the Gebhardt and Johnson firms to file a joint second amended complaint; (2) dismissed defendant's motion to dismiss without prejudice; and (3) referred the case to Magistrate Judge Facciola for settlement discussions. *See* Dkt. # 44, 48.

On January 29, 2003, the Gebhardt and Johnson firms filed their Joint Second Amended Class Action Complaint. *See* Dkt. # 49. Count I of the current complaint alleges disparate treatment based on race (a) in personnel decisions such as promotions, other selections, work assignments, discipline, and termination; (b) by creation of

a hostile work environment; and (c) through harassment and retaliation against African-American officers who oppose discrimination. Count II alleges that the USCP has maintained a system of promotions, other selections, work assignments, discipline, and termination that has had a disparate impact on African-American employees. Count III alleges that plaintiffs Mary Jane Rhone, a civilian USCP employee, and Thomas Spavone, a Hispanic Officer, have been subjected to a hostile work environment based on their known association with African-American officers.[FN4]

FN4. As a result of the filing of the Second Joint Amended Complaint, plaintiffs have abandoned counts in *Ikard I* involving (1) Disparate Treatment in Hiring and Training (Count II); (2) Sex/Gender Discrimination (Count VII); (3) Disparate Treatment in Assignments based on Sex (Count VIII); and (4) Intentional Infliction of Emotional Distress (Count X). In addition, plaintiffs have abandoned the following counts in the Original Complaint: (1) Sex/Gender Discrimination (Count II); (2) Abusive Discharge (Count III); (3) Civil Conspiracy (Count IV); (4) Intentional Infliction of Emotional and/or Mental Distress or Anguish (Count V); (4) Sexual Harassment (Count VII); (5) Discrimination in Hiring Based on Race and Color (Count X); (6) Discrimination in Assignments Based on Sex (Count XI); and (7) Discrimination in Hiring Based on Sex (Count XIII). As such, defendant does not address these counts in its motion to dismiss.

III. The Congressional Accountability Act

This case is being brought under the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1301-1438. The CAA provides the *exclusive* procedure by which current or former legislative branch employees can commence a judicial proceeding seeking to remedy alleged unlawful employment discrimination. This section of the memorandum provides an overview of the CAA, identifies the administrative exhaustion requirements in the statute, and discusses the unavailability of “class complaints” under the CAA's administrative procedures.

A. Overview of the CAA

Title VII itself does not extend coverage to legislative branch employees. *See* 42 U.S.C. § 2000e-16(a). However, effective January 23, 1996, the CAA extended the rights and protections of eleven federal laws covering various labor, civil rights and workplace matters to employees in the legislative branch of the federal government. *See* 2 U.S.C. §§ 1302, 1311. Of particular relevance here, Congress waived its sovereign immunity and extended some of the rights and protections of Title VII and other employment statutes to the employing offices of Congress. *See* 2 U.S.C. § 1302(a); *Moore v. Capitol Guide Bd.*, 982 F. Supp. 35 (D.D.C. 1997).

The portions of the civil rights statutes that apply in the legislative branch are set forth in 2 U.S.C. § 1311. This section of the CAA specifically applies the rights and protections of 42 U.S.C. § 2000e-2 (identifying specific employer practices which are unlawful), but does *not* apply 42 U.S.C. § 2000e-3 (identifying other unlawful employment practices) in either this section or in the CAA's specific prohibition of reprisal, 2 U.S.C. § 1317. *See* 2 U.S.C. § 1311 (a)(1). Thus, the CAA does not simply incorporate by reference the civil rights or other statutes in their entirety. Clearly, not all of Title VII's procedures and provisions govern the CAA. *See* 2 U.S.C. § 1302. Where appropriate, however, law developed under the applicable provisions of Title VII should be applied to cases under the CAA. *See* 2 U.S.C. § 1405(h).

B. Exhaustion Of Administrative Requirements

Under the CAA, Congress has waived its sovereign immunity and consented to be sued in federal court for conduct covered explicitly by the CAA, but *only* after a plaintiff has exhausted enumerated jurisdictional prerequis-

ites to obtaining a federal judicial forum. Section 408(a) of the CAA provides:

(a) Jurisdiction

The district 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. A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.*

2 U.S.C. § 1408(a) (emphasis added). Significantly, each *individual* employee is required to complete counseling and mediation.

In addition, Section 402 of the CAA provides that such counseling must be requested and completed within a specific limitations period measured from the date of the alleged violation:

To commence a proceeding, a covered employee alleging a violation of a law made applicable under part A of subchapter II of this chapter shall request counseling by the Office [of Compliance]. The Office shall provide the employee with all relevant information with respect to the rights of the employee. *A request for counseling shall be made not later than 180 days after the date of the alleged violation.*

2 U.S.C. § 1402(a) (emphasis added). Section 403 of the CAA requires an employee to file a request for mediation within 15 days of receipt of notice of the end of the counseling period. 2 U.S.C. § 1403(a). A plaintiff cannot file a civil action until after completing counseling and mediation, and may only seek redress for issues raised in the request for counseling. 2 U.S.C. §§ 1403, 1408.

C. The CAA Does Not Provide For Class Actions In Its Administrative Processes

In stark contrast to regulations under Title VII, neither the CAA nor its regulations (Procedural Rules, Office of Compliance, July 1997, as amended February 12, 1998)[FN5] provide any basis for the administrative processing of a "class complaint" in the counseling and mediation periods. Indeed, in contrast to the EEOC's regulations concerning class complaints, the CAA requires that each covered employee must participate in the mediation and counseling processes. *Compare* 29 C.F.R. § 1614.204(b) ("[a]n employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with Sec. 1614.105.") *with* 2 U.S.C. § 1408(a) (no reference to class complaints). There are no provisions in either the CAA or the procedural regulations that permit this requirement to be circumvented by the use of a "class complaint" mechanism.[FN6]

FN5. The Procedural Rules promulgated by the Office of Compliance are available at www.compliance.gov/procedures/rulesofprocedure.html.

FN6. Defendant does not take the position that, as a matter of law, this Court cannot certify a Rule 23 class to resolve claims under the CAA. Rather, defendant asserts that such a class, if such treatment is available, cannot include plaintiffs who have not individually fully satisfied the jurisdictional prerequisites and administrative exhaustion requirements for bringing a CAA claim to federal court. Whether a Rule 23 class could ever be maintained which included only individual plaintiffs who have satisfied the jurisdictional requirements is not an issue presented for decision by defendant's motion and has not been briefed by defendant.

In this case, the Office of Compliance has consistently taken the position that plaintiffs cannot proceed under a "class complaint" mechanism during the counseling and mediation periods. According to plaintiffs, in March 2001, the Office refused to accept a class complaint on behalf of plaintiffs because such a complaint was not

cognizable. *See* Johnson Opp. at 12. Rather, the Office treated each plaintiff individually, with each complainant assigned a different case number. *See* June 12, 2001 Letter from W. Thompson to C. Ware, *et al.* (attached hereto as Exhibit A). Furthermore, plaintiffs fully understood that they were required by the Office to mediate on an individual case-by-case basis and that they were each required to file a request for mediation. *See* July 26, 2001 Letter from S. Blackmon-Malloy to C. Ware (attached hereto as Exhibit B); Exhibit A (June 12, 2001 Letter from W. Thompson to C. Ware, *et al.)* ("I appoint the following individuals to mediate *each and every one* of the attached cases.") (emphasis added); Gephardt Opp., Exhibit C. Finally, on August 3, 2001, the Office reiterated to plaintiffs' original counsel that "each employee's case remains technically a separate proceeding before this Office," and made clear that a class action was not available before the Office of Compliance. *See* Aug. 3, 2001 Letter from W. Thompson to C. Ware, *et al.* (attached hereto as Exhibit C).[FN7]

FN7. To defendant's knowledge, the only previous CAA case styled as a putative class action, *Harris, et al. v. Office of the Architect of the Capitol,* Civil Action No. 97-1658 (EGS), was settled in 2001. The Office of Compliance took the position in that case, as they have here, that a class action could not be maintained under the CAA. *See* Apr. 20, 2001 Letter from William Thompson, Executive Director, Office of Compliance (attached hereto as Exhibit D). In recognition of the Office of Compliance's position, the Settlement Agreement in *Harris* specifically required that *each* class member, including those identified after the execution of the Agreement, exhaust the counseling and mediation procedures of the CAA in order to be eligible for the relief provided in the Settlement Agreement.

IV. Legal Standards For Defendant's Motion To Dismiss

A. Fed. R. Civ. P. 12(b)(1)

On a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Thompson v. Capitol Police Bd.,* 120 F. Supp. 2d 78, 81 (D.D.C. 2000). This Court has noted that "[b]ecause subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Uberoi v. EEOC,* 180 F. Supp. 2d 42, 44 (D.D.C. 2001) (citing 5AWright & Miller, FED. PRAC.& PROC. CIV. 2D § 1350). Accordingly, " 'the plaintiff's 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." *Uberoi,* 180 F. Supp. 2d at 44 (quoting 5A Wright & Miller at § 1350).

The Court may look to matters outside the pleadings to determine if plaintiffs have carried their burden in showing that the Court has subject matter jurisdiction over their complaint. *See, e.g., Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197-98 (D.C. Cir. 1992); *In Re Swine Flu Immunization Prods. Liab. Litig.,* 880 F.2d 1439, 1442 (D.C. Cir. 1989); *Hasse v. Sessions,* 835 F.2d 902, 906 (D.C. Cir. 1987); *Harris v. Fed. Aviation Admin.,* No. 01-0503 (RMU), 2002 WL 2005459, *2 (D.D.C. Aug. 29, 2002); *Uberoi,* 180 F. Supp. 2d at 44; *Thompson,* 120 F. Supp. 2d at 81-82. In deciding the Rule 12(b)(1) motion, " 'the court may consider the complaint supplemented by undisputed facts evidenced in the record ... plus the court's resolution of disputed facts.' " *McCants v. Glickman,* 180 F. Supp. 2d 35, 39 (D.D.C. 2001) (quoting *Herbert,* 974 F.2d at 197).

The D.C. Circuit has held that where the motion to dismiss "present[s] a dispute over the factual basis of the court's subject matter jurisdiction," the Court:

may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant. Instead the court must go beyond the pleadings and resolve any disputed issues of fact

the resolution of which is necessary to a ruling upon the motion to dismiss.

Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000). Where the parties' briefs present a "full airing" of the jurisdictional facts, the Court may resolve the factual disputes without discovery. *See Tax Analysts v. United States Dep't of Justice,* 913 F. Supp. 599, 606 (D.D.C. 1996).

In this case, the Board is submitting documentary evidence that demonstrates that certain plaintiffs have failed to meet the jurisdictional requirements of sections 402 and 408 of the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1402, 1408. These submissions are appropriate and should be considered by the Court in determining whether subject matter jurisdiction exists over plaintiffs' various claims.

Where a plaintiff fails to follow the administrative requirements prior to filing suit in federal district court, dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction is appropriate. *See, e.g., Martin v. U.S. E.P.A.,* 271 F. Supp. 2d 38, 42-47 (D.D.C. 2002) (dismissal for failure to follow administrative requirements of Civil Service Reform Act); *Judicial Watch, Inc. v. F.B.I.,* 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (dismissal for failure to follow administrative requirements of Freedom of Information Act); *Fowler v. District of Columbia,* 122 F. Supp. 2d 37, 39 (D.D.C. 2000) (federal court lacks subject matter jurisdiction over Title VII claim if plaintiff fails to exhaust administrative remedies). Completion of counseling and mediation are jurisdictional prerequisites to filing suit in district court under the CAA, and failure to engage in these procedures deprives the court of subject matter jurisdiction. *Halcomb v. Office of the Senate Sergeant-At-Arms of the United States Senate,* 209 F. Supp. 2d 175, 178-79 (D.D.C. 2002) (dismissing CAA claim under Fed. R. Civ. P. 12(b)(1)); *see* Sections V, VI.A, *infra.*

B. Fed. R. Civ. P. 12(b)(6)

Fed. R. Civ. P. 12(b)(6) allows for the dismissal of a complaint if it fails to state a claim upon which relief can be granted. Such dismissal is appropriate when, "taking all the material allegations of the complaint as admitted and construing them in plaintiff's favor, [the court] find[s] that [the plaintiff] has failed to allege each of the material elements of his cause of action." *Razzoli v. Federal Bureau of Investigation,* 230 F.3d 371, 374 (D.C. Cir. 2000); *see Taylor v. Federal Deposit Ins. Corp.,* 132 F.3d 753, 761 (D.C. Cir. 1997) (internal citations omitted). A court may dismiss a complaint for failure to state a claim if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Judicial Watch,* 190 F. Supp. 2d at 32.

In deciding a motion to dismiss under Fed. R. Civ. P. 12 (b)(6), the Court must accept as true "all *well-pled* factual allegations and draw all *reasonable* inferences." *Lockamy v. Truesdale,* 182 F. Supp. 2d 26, 30 (D.D.C. 2001) (emphasis supplied); *see also Papasan v. Allain,* 478 U.S. 265, 283 (1986); *Henthorn v. Dep't of Navy,* 29 F.3d 682, 684 (D.C. Cir. 1994). The court need not accept unsupported factual inferences drawn by the plaintiff, nor must the court "accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Papasan,* 478 U.S. at 286); *see also Ward v. Caldera,* 138 F. Supp. 2d 1, 5 (D.D.C. 2001) ("legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness").

A defendant may raise the affirmative defense of a statute of limitations via a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted when the facts giving rise to the defense are apparent on the face of the complaint. *U.S. ex rel. Purcell v. MWI Corp.,* 254 F. Supp. 2d 69, 73 (D.D.C. 2003). "If 'no reasonable person could disagree on the date' on which the cause of action accrued, the court may dismiss a claim on statute of limitations grounds." *Id.* (quoting *Smith v. Brown & Williamson Tobacco Corp.,* 3 F. Supp. 2d 1473, 1475

(D.D.C. 1998)). Where the Court cannot resolve a factual dispute regarding the timeliness of a claim, it may convert defendant's Rule 12(b)(6) motion to a motion for summary judgment under Rule 56, provided it gives plaintiff a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982) (quoting Fed. R. Civ. P. 12(b)(6)). As the D.C. Circuit noted in *Gordon*, the purpose of this rule is to permit the Court to consider factual material at the motion to dismiss stage while avoiding taking the plaintiff by surprise. *Gordon*, 675 F.2d at 360 (citing Notes of Advisory Committee on 1946 Amendment to Rules, 28 U.S.C. app. at 409-410 (1976)).

C. Adverse Action Requirement

In *Brown v. Brody*, 199 F.3d 446, 453 (D.C. Cir. 1999), the D.C. Circuit held that a "common element for discrimination and retaliation claims against federal employers, and private employers, is ... some form of legally cognizable adverse action by the employer." The Court rejected the contention that "*any* sort of personnel action undertaken for discriminatory reasons suffices." *See* id. at 453. (emphasis added). Instead, a plaintiff must demonstrate that she has suffered "materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm." *Id.* at 457. Specifically, to meet the "adverse personnel action" requirement, the plaintiff must make a clear showing of a material adverse employment action that involves *tangible economic effect* on plaintiff's employment, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 456 (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)) (other citations omitted); *see also Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001) (quoting *Ellerth*, 524 U.S. at 761).

The D.C. Circuit has adopted an " 'objectively tangible harm' requirement, which guards against both 'judicial micromanagement of business practices,' and frivolous suits over insignificant slights." *Russell*, 257 F.3d at 818 (citation omitted); *see also Brown*, 199 F.3d at 457. Under this objective approach, the plaintiffs' subjective views or "mere idiosyncracies of personal preference are not sufficient to state an injury." *Brown*, 199 F.3d at 457; *Stewart v. Ashcroft*, 211 F. Supp.2d 166, 174-75 (D.D.C. 2002); *Forkkio v. Tanoue*, 131 F. Supp.2d 36, 38-40 (D.D.C. 2001).

In this case, in support of their disparate treatment claims, plaintiffs have alleged a variety of personnel actions, including lateral transfers, undesirable assignments, disciplinary notes, and evaluations. *See* Jt. Cmplt. ¶¶ 22 (Blackmon-Malloy), 25 (Peterson), 29 (Braswell), 31 (Willis), 33 (Fields), 36 (Johnson), 38 (Webb), 40 (Spratt). However, these plaintiffs fail to allege any "objectively tangible harm," such as loss of pay, denial of a promotion, or change in benefits. *Id.* Accordingly, their claims must be dismissed under Rule 12(b)(6) for failure to state a claim.

1. Lateral Transfers

In *Brown*, the Court held "a plaintiff who is made to undertake or who is denied a lateral transfer -- that is, one in which she suffers no diminution in pay or benefits -- does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities." *Brown*, 199 F.3d at 457.

2. Undesirable Assignments

Courts have held that an undesirable assignment, without any effect on salary, benefits, or grade, is similar to

claims regarding lateral transfers, and thus does not constitute an adverse action under the same kind of analysis performed in *Brown. See also Crenshaw v. Georgetown Univ.,* 23 F. Supp.2d 11, 18 (D.D.C. 1998), *aff'd.,* No. 98-7194 (D.C. Cir. Aug. 13, 1999) (holding, prior to *Brown,* that change in duties without corresponding reduction in pay is not an adverse action); *Johnson v. DiMario,* 14 F. Supp.2d 107, 111 (D.D.C. 1998) (same). These types of complaints in fact concern the day-to-day workplace frustrations that are so common-place and minor that to adjudicate them risks the very "judicial micromanagement of business practices" that the D.C. Circuit warned against in *Brown. See Brown,* 199 F.3d at 452 (*quoting Mungin v. Katten, Mungin & Zavis,* 116 F.3d 1549, 1556-57 (D.C. Cir. 1997)).

3. Disciplinary Warnings

In *Brown,* the Court found that a letter of admonishment did not constitute an adverse action. 199 F.3d at 458. In *Stewart v. Evans,* 275 F.3d 1126, 1136 (D.C. Cir. 2002), the Court specifically recognized that "formal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary or other benefits do not constitute adverse employment actions." *See also Milburn v. West,* 854 F. Supp. 1, 14 (D.D.C.1994) (memorandum "for the record" that recounted employee misconduct and requested more formal discipline against employee deemed not actionable even though it was placed in employee's permanent file), *summ. aff'd. sub nom., Walker v. West,* No. 94-5228, 1995 WL 117983 (D.C. Cir. 1995) (per curiam). Furthermore, a "reprimand that amounts to a mere scolding, without any disciplinary action which follows, does not rise to the level of adverse action." *Brodetski v. Duffey,* 199 F.R.D. 14, 21 (D.D.C. 2001) (quoting *Childers v. Slater,* 44 F. Supp. 2d 8, 20 (D.D.C. 1999)).

4. Performance Evaluations

In *Brown,* the Court held that a "fully satisfactory" performance evaluation did not rise to the level of an adverse personnel action. 199 F.3d at 458. More importantly, in *Russell,* the D.C. Circuit required a showing that a poor performance evaluation had an actual consequence on an employee's pay or benefits. 257 F.3d at 818-19.

D. Continuing Violations Doctrine

In *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002), the Supreme Court provided guidance on the availability of the continuing violations doctrine in Title VII cases. The Court held that for "discrete" acts of discrimination or retaliation, a party must file an administrative charge within the limitations period, as measured from the date the act occurred. *Id.* at 113. Furthermore, the Supreme Court ruled that "related" discrete acts cannot be combined into a single unlawful "practice" for the purposes of timely filing. *Id.* Thus, "discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* The non-exhaustive list of discrete acts identified by the Supreme Court include "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* at 114. Thus, under the CAA, a plaintiff must seek counseling regarding a discrete act of discrimination or retaliation within180 days of the date the act occurred.

In *Morgan,* the Supreme Court distinguished "hostile work environment" claims from discrete acts. *Id.* at 115. In contrast to a discrete act, a hostile work environment "cannot be said to occur on any particular day." *Id.* Thus, "[p]rovided that an act contributing to the [hostile work environment] claim occurs within the filing period, the entire time period of the hostile work environment may be considered by a court for the purposes of determining liability." *Id.* at 117. Thus, with respect to a hostile work environment claim brought under the CAA, a plaintiff must seek counseling on the claim within statutory 180-day time limit of an act by defendant which contributed to the hostile work environment. *See* 2 U.S.C. § 1402(a).

Thus, under the rubric established by *Morgan*, a plaintiff cannot cobble together a conglomeration of discrete acts, at least one of which occurred within the limitations period, under the guise of a "hostile work environment" claim to breathe life into the otherwise time-barred claims.

V. Plaintiffs Who Have Failed To Allege The Jurisdictional Prerequisites Required By The CAA Must Be Dismissed For Lack Of Subject Matter Jurisdiction

As the D.C. Circuit has noted, "it is a principle of first importance that a federal court possesses only limited jurisdiction." *Commodity Futures Trading Com'n v. Nahas,* 738 F.2d 487, 491-92 (D.C. Cir. 1984). The Supreme Court has observed:

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause of action lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkenen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (internal citations omitted); *see also Cardinal Chem. Co. v. Morton International, Inc.,* 508 U.S. 83, 98 (1993) (initial burden of establishing trial court's jurisdiction rests on party invoking jurisdiction); *Natural Resources Defense Council v. Pena,* 147 F.3d 1012, 1020 (D.C. Cir. 1998) (party invoking federal jurisdiction bears burden of establishing existence of standing). Under Fed. R. Civ. P. 12(b)(1), the Court may dismiss an action for lack of subject matter jurisdiction.

Because the federal courts are courts of limited jurisdiction, "a party must ... affirmatively allege in his pleadings the facts showing the existence of jurisdiction and the court must scrupulously observe the precise jurisdictional limits prescribed by Congress." *Nahas,* 738 F.2d at 492 n.9; *see also* Fed. R. Civ. P. 8(a)(1) (requiring "a short plain statement of the grounds upon which the court's jurisdiction depends."). Jurisdiction is established by allegations of operative facts bringing the controversy within the scope of the statute conferring jurisdiction, not merely by recitation of the statute in the complaint. In the current complaint, as discussed more fully below, plaintiffs repeatedly fail to allege the operative facts that establish the exhaustion of their administrative claims or that any such exhaustion was timely completed. Accordingly, these allegations should be dismissed, either under Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and/or 12(b)(6) (failure to state a claim upon which relief may be granted).

A. The Complaint Fails To Alleges That Plaintiffs Are Seeking Redress For Violations For Which They Have Completed Counseling And Mediation

The joint second amended complaint identifies seven "class agents," and seventeen "named plaintiff class members." Jt. Cmplt. ¶ 8. In addition, the current complaint identifies an additional 93 plaintiffs with "provable claims of discrimination with respect to matters alleged in [the] Complaint" and references, without specific identification or enumeration, "other named Plaintiffs in the original Complaint" who "indicate they have been discriminated against with respect to matters alleged in the Complaint." *Id.* ¶¶ 46-47. While the original Complaint identified 259 named plaintiffs, it is impossible to determine how many of these plaintiffs fall within the "other named Plaintiffs" category described in paragraph 47 of the current complaint.

Regardless of the exact number of plaintiffs in this case, plaintiffs have not alleged that each plaintiff sought counseling regarding all of the issues included in the current complaint. Fed. R. Civ. P. 8(a)(2) requires that a complaint contains a "short and plain statement of the claims showing that the pleader is entitled to relief." The CAA mandates that plaintiffs commence a civil action "only to seek redress for a violation for which the employee has completed counseling and mediation." 2 U.S.C. § 1408(a). Plaintiffs' bare and conclusory allegations

that they have "completed counseling and mediation with the Office of Compliance as required," or "went through the required counseling and mediation process at the Office of Compliance" are insufficient to establish this Court's subject matter jurisdiction because they fail to identify the issues and claims for which counseling was sought. Jt. Cmplt. ¶¶ 7, 11. As noted above, the CAA clearly limits any action in federal court and plaintiffs "must therefore affirmatively allege in their pleading the facts showing the existence of jurisdiction." *Nahas,* 738 F.2d at 492 n.9.

In its opposition to defendant's first motion to dismiss, the Johnson firm argued, without any supporting authority, that this Court "may reasonably infer" that their claims were raised in the administrative process. *See* Johnson Opp. at 14. This position ignores plaintiffs' burden of establishing subject matter jurisdiction and, in essence, shifts the burden to defendant to refute subject matter jurisdiction. *See Thompson,* 120 F. Supp. 2d at 81. Such a result is particularly unfair in this case, where defendant is at a distinct information disadvantage vis-a-vis plaintiffs. Defendant has attempted to obtain plaintiffs' requests for counseling directly from the Office of Compliance, but the Office of Compliance has objected to defendant's June 28, 2002 subpoena for "all requests for counseling" filed by plaintiffs and refused to provide relevant documents.[FN8] *See* July 3, 2002 Gary Green Letter to Laurie Weinstein (attached hereto as Exhibit E). Furthermore, as discussed in Section VIII, *infra,* virtually all plaintiffs failed to participate in good faith in mediation, depriving defendant of an opportunity to learn about the issues on which each plaintiff sought counseling. Because plaintiffs have failed to carry their burden of establishing sufficient facts to establish this Court's jurisdiction, the entire complaint should be dismissed.

FN8. On December 5, 2003, the Court agreed to issue a protective order compelling production of the documents but defendant has been working to arrange the terms of the protective order with the Office of Compliance and has not yet completed the process. Defendant reserves the right to supplement its pleading when the documents are produced by the Office of Compliance.

B. The Court Cannot Have Subject Matter Jurisdiction Over Plaintiffs Whose Employment Ended Prior To The Effective Date Of The CAA

In its first motion to dismiss, defendant identified 17 purported plaintiffs who ended their employment with the Capitol Police prior to January 26, 1996, the effective date of the CAA with respect to Title VII claims. *See* Exhibit F.[FN9] The joint second amended complaint acknowledges that plaintiffs only seek to represent African-American officers employed by defendant at any time after November 4, 1998. Jt. Cmplt. ¶ 1. Thus, the allegations relating to individuals identified in Exhibit F should be dismissed for lack of subject matter jurisdiction.[FN10]

FN9. In its first motion to dismiss, defendant offered as Exhibit S the declaration of Anne L. Lyles to authenticate and lay the foundation for some of defendant's exhibits. The Lyles declaration, attached hereto as Exhibit G, contains references to Exhibits B, C, E, F, G, and M from the first motion to dismiss. Exhibit G, ¶¶ 4-5. The corresponding exhibits for this motion are Exhibits F and I (B), P (C), U (E), H (F), J (G), and O (M).

FN10. Of the individuals listed in Exhibit F, only Monte Curtis, Dingle, James Powell, and Sturdivant remain specifically identified in paragraph 46 of the current complaint. Jt. Cmplt. ¶ 46; Exhibit F.

C. The Court Cannot Have Jurisdiction Over The Purported Plaintiffs Who Never Requested Counseling

In its first motion to dismiss, defendant identified 29 individuals for whom there is no evidence of a request for counseling nor any allegation that a request for counseling was made.[FN11] *See* Exhibit H. Any allegations re-

lated to the individuals identified in Exhibit H should be dismissed for lack of subject matter jurisdiction and failure to exhaust administrative remedies.

FN11. One of these individuals, James Powell, also was not employed by defendant after the effective date of the CAA. *See* Section V.B, *supra.*

VI. Plaintiffs Who Have Failed To Exhaust Their Administrative Remedies In A Timely Fashion Should Be Dismissed For Lack Of Subject Matter Jurisdiction

As discussed below, plaintiffs who have failed to exhaust their administrative remedies in a timely fashion should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. Furthermore, Plaintiffs may not use their Rule 23 class allegations to revive individual plaintiffs' untimely claims.

A. Plaintiffs May Only Invoke This Court's Jurisdiction After Timely Exhaustion Of Their Administrative Remedies

Under the CAA, Congress has waived its sovereign immunity and consented to be sued in federal district court only *after* a plaintiff has exhausted certain jurisdictional prerequisites. Section 408(a) of the CAA provides:

The district 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. A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.*

2 U.S.C. § 1408(a) (emphasis added). Thus, under the CAA, the court only has subject matter jurisdiction over an individual plaintiff's claim if that plaintiff has alleged in the complaint that counseling and mediation regarding the alleged violations of law have been completed *within the time limits* specified by sections 402 and 403 of the Act. *Id.*

Defendant recognizes that the Supreme Court has held that Title VII's timeliness requirements are "requirement[s] that, like a statute of limitations, [are] subject to waiver, estoppel and equitable tolling." *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982). In addition, defendant is aware that one court in this district, relying upon the reasoning in *Zipes,* has held that the CAA's timeliness requirements are not jurisdictional, but rather are subject to equitable tolling. *Thompson v. Capitol Police Bd.,* 120 F. Supp. 2d 78, 83 (D.D.C. 2000). Defendant respectfully submits that the reasoning by the court in *Thompson* was flawed and should not be followed.[FN12]

FN12. In *Halcomb v. Office of the Senate Sergeant-at-Arms of the United States Senate,* 209 F. Supp. 2d 175, 178-79 (D.D.C. 2002), the Court discussed the *Thompson* holding but did not adopt or reject it because plaintiff had failed to participate at all in counseling. However, in *dicta,* the Court distinguished between the statutory structure of the CAA and Title VII. *Id.* at 179. As discussed *infra,* this distinction is the critical element in determining whether Congress intended the time limits in the CAA to be jurisdictional prerequisites to filing a claim in district court.

In addressing this issue in *Zipes,* the Supreme Court gave great weight to the language of the jurisdictional statute:

The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. *It contains no reference to the timely-filing requirement.* The provision specifying the time for filing charges with the EEOC appears as an

entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-94 (footnotes omitted) (emphasis added). Under Title VII, section 2000e-5(e) contains the timely filing requirements while section 2000e-5(f)(3) gives the federal district courts jurisdiction over Title VII actions. *Id.* at 393-94 nn.9-10. Section 2000e-5(f)(3) makes no reference, implicit or explicit, to the timeliness requirements of section 2000e-5(e). *See* 42 U.S.C. §§ 2000e-5(e), 2000e-5(f)(3).

In stark contrast to Title VII, the CAA does, in fact, specifically limit the Court's jurisdiction to cases in which the plaintiff has timely exhausted the administrative remedies. *See* 2 U.S.C. § 1408(a). By *explicitly* referencing sections 402 and 403, Congress intended to incorporate the timeliness requirements into its jurisdictional grant to the district courts. Indeed, the first subsection of both sections includes a timeliness requirement. By using the phrases "under Section 1402" and "under Section 1403," Congress incorporated the entire sections for purposes of establishing jurisdiction.

Furthermore, unlike the Supreme Court in *Zipes*, this Court must interpret the statutory language in the context of the doctrine of sovereign immunity, which applies to the legislative branch of the United States Government. *See Keener v. The Congress of the United States,* 467 F.2d 952, 953 (5th Cir. 1972). The United States, as sovereign, is "immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court defines the court's jurisdiction to entertain the suit." *United States v. Dalim,* 494 U.S. 596, 608 (1990). Accordingly, a waiver of sovereign immunity must be "unequivocally expressed," and its conditions must be "strictly observed and *exceptions thereto are not to be implied."* *Lehman v. Nakshian,* 453 U.S. 156, 160-61 (1981) (emphasis added). In this case, it cannot be said that Congress "unequivocally expressed" its intent to be sued by plaintiffs who have not timely exhausted their administrative remedies, and such a waiver of sovereign immunity should not be so implied. Accordingly, the individuals identified in greater detail in Sections VII and X, *infra,* who have failed to exhaust their administrative remedies in a timely fashion must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

B. The Complaint's Purported Class Allegations Do Not Confer This Court With Subject Matter Jurisdiction Over Plaintiffs Who Have Not Been Alleged To Have Met Individually The Jurisdictional Prerequisites Of The CAA

In response to defendant's first motion to dismiss, plaintiffs argued that this Court could hear all plaintiffs' claims as a class action regardless of the administrative requirements of the CAA because at least one named plaintiff had timely exhausted his individual administrative remedies. Johnson Opp. at 15-16; Gebhardt Opp. at 16-18. The Gebhardt firm specifically suggested that "both Fed. R. Civ. P. 23 and equitable principles authorize the Court to permit Plaintiffs' class complaint." Gebhardt Opp. at 18. However, plaintiffs ignore the doctrine of sovereign immunity and Fed. R. Civ. P. 82.

As previously noted, the doctrine of sovereign immunity requires that Congress' consent to be sued be "unequivocally expressed." *Lehman,* 453 U.S. at 160 (internal quotations and citations omitted). There is no mention in the jurisdictional provisions or any other section of the CAA that an individual may seek counseling on behalf of a class of complainants, and thereby release putative class members from their obligations to exhaust the CAA's administrative requirements. Because the conditions of a waiver of sovereign immunity must be "strictly observed and exceptions thereto are not to be implied," each individual plaintiff in this action must have individually sought counseling and completed mediation in order to invoke this Court's jurisdiction. *Id.* at 161

(internal quotations and citations omitted).

In fact, the CAA makes clear that the Court may only grant a remedy for a violation of the incorporated provisions of Title VII and the CAA retaliation provisions to "a covered employee who has undertaken and completed the procedures described in sections 1402 and 1403." 2 U.S.C. § 1361(e). The "procedures" in sections 1402 and 1403 *specifically include* the time limits contained therein. *Id.* §§ 1402(a), 1403(a). Because the statute on its face bars *any* relief for those individuals who have failed to *timely* exhaust the administrative requirements of the CAA, the Court cannot allow untimely plaintiffs or putative class members to "piggyback" on the timely claims of others, as is permitted in certain circumstances under Title VII.

Finally, it is well-established that the Federal Rules of Civil Procedure "do not provide an independent ground for subject matter jurisdiction where there is no other basis for jurisdiction." *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 70 (2d Cir. 1990); *see also Pineville Real Estate Operation Corp.v. Michael,* 32 F.3d 88, 90 (4th Cir. 1994) and cases cited therein. Indeed, Fed. R. Civ. P. 82 expressly provides that the Rules of Civil Procedure "shall not be construed to extend ... the jurisdiction of the United States district courts or the venue of actions therein."

To permit individual plaintiffs to maintain CAA claims under the guise of Rule 23 when this Court would otherwise have no subject matter jurisdiction would violate the well-established doctrine of sovereign immunity, eviscerate the jurisdictional requirements and scope of remedy provisions contained in the CAA, ignore the plain language of Rule 82, and contradict the Supreme Court's admonition in *Kokkenen* that federal courts are courts of limited jurisdiction that are not to be expanded by judicial decree.

VII. Plaintiffs Who Failed To Exhaust Their Administrative Remedies In A Timely Fashion Should Be Dismissed For Failure To State A Claim Upon Which Relief May Be Granted

Even if the Court finds that timely exhaustion is not a jurisdictional requirement, these plaintiffs should still be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.[FN13]

FN13. The timeliness of claims by the class agents and named class members is discussed individually in Section X, *infra*.

A. Twenty Two Plaintiffs Failed To Seek Counseling Within 180 Days Of Their Separation Date

In its first motion to dismiss, defendant identified 22 purported plaintiffs who failed to request counseling within 180 days of their separation from the Capitol Police. *See* Exhibit I. Any allegations related to the individuals identified in Exhibit I should be dismissed for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies in a timely fashion. In addition, plaintiff James Griffin must also be dismissed because he was not employed by defendant after November 4, 1998, the cutoff date for plaintiffs' proposed class. *See* Jt. Cmplt. ¶¶ 1, 13, 46; Exhibit I.

B. Twelve Plaintiffs Failed To Request Mediation Within 15 Days Following Receipt Of Notice Of End Of Counseling

In its first motion to dismiss, defendant identified 12 purported plaintiffs who failed to request mediation within 15 days of receiving notice of end of counseling from the Office of Compliance. *See* Exhibit J. Any allegations related to the individuals identified in Exhibit J should be dismissed for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies.

VIII. Plaintiffs Who Failed To Participate In Mediation Should Be Dismissed

A. Most Plaintiffs Did Not Participate In Mediation

While most plaintiffs did timely request mediation, only six plaintiffs named in the current complaint actually *participated* in the mediation process before the end of mediation notice was issued. More specifically, mediation sessions were held with Damon Adams, class agent Frank Adams, and Shafton Adams on July 23, 2001, and with class agent Sharon Blackmon-Malloy, Clinton Bradford, Teresa Bradby, and named class member Robert Braswell on July 25, 2001. *See* Declaration of Toby R. Hyman, ¶¶ 3-6 (attached hereto as Ex. K); Declaration of Frederick M. Herrera, ¶¶ 3-6 (attached hereto as Ex. L). Named class member Earl Allen appeared at but refused to participate in mediation on July 23. *See* Hyman Decl., ¶ 4. Class agent Regina Bolden-Whitaker and Eric Boggs failed to appear for scheduled mediations on July 25. *Id.* ¶ 5. Defendant requested to extend mediation until August 31, 2001 but plaintiffs refused to extend mediation beyond August 1, 2001. *See* Hyman Decl., ¶¶ 7-8; Aug. 1, 2001 Letter From Senate Chief Counsel for Employment Jean Manning to William W. Thompson II, Executive Director, Office of Compliance (attached hereto as Ex. M). All plaintiffs except class agent Frank Adams, Shafton Adams, class agent Blackmon-Malloy, Bradford, Bradby, and named class member Braswell should thus be dismissed for failing to "complete" mediation, as required by the CAA, and thereby failing to exhaust administrative remedies.[FN14] *See* 2 U.S.C. § 1402(a).

FN14. Two of the individuals who did complete mediation, Damon Adams and Eric Boggs, are no longer specifically identified in the current complaint as having claims in this action. *See* Jt. Cmplt. ¶¶ 46-47.

B. Plaintiffs Must Participate In Mediation To Satisfy The Exhaustion Requirement

In opposition to defendant's first motion to dismiss, the Johnson firm argued that the CAA "requires only that a request for mediation is made," and mediation need not actually occur. *See* Johnson Opp. at 7-9 (emphasis in original). However, plaintiffs' position conflicts with the language and purpose of the CAA, as well as the regulations promulgated by the Office of Compliance. Merely requesting mediation is insufficient to meet the exhaustion requirement of the CAA. Rather, plaintiffs must also actually participate in good faith in the mediation process. Because all but the six plaintiffs identified by name in the current complaint and listed in subsection A above failed to participate in good faith in mediation, their claims should be dismissed in their entirety for failure to exhaust administrative remedies.

As stated earlier, Section 408(a) of the CAA grants this Court jurisdiction over actions brought by "a covered employee who has *completed* counseling under section 1402 of this title and *mediation* under section 1403 of this title." 2 U.S.C. § 1408(a) (emphasis added). Of course, Section 408 cannot be read in isolation from Section 403(b), which defines the process of mediation as one which "*shall* involve *meetings with the parties* separately or jointly for the purpose of resolving the dispute between the covered employee and the employing office." *Id.* § 1403(b)(2)(emphasis added); *see Lexecon Inv. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,' ... normally creates an obligation impervious to judicial discretion."). The Office of Compliance has issued a regulation which describes mediation as follows:

Mediation is a *process* in which *employees, employing offices and their representatives,* if any, *meet* separately and/or jointly with a neutral trained to assist them in resolving disputes. As parties to the mediation, employees, employing offices, and their representatives discuss alternatives to continuing their dispute, including the possibility of reaching a voluntary, mutually satisfactory resolution.

OC Rule 2.04(a) (emphasis added) (cited in Johnson Opp. at 8 n.4). Thus, from the statutory language and regulations, it is clear that mediation is a process that requires, at the very least, meetings involving the parties and a neutral, in order to be "completed" as that term is used in Section 408(a). It is also a process that requires an employee's presence. *See* OC Rule 2.04(a); 2 U.S.C. § 1403(b)(2). In this case, it is undisputed that only 6 of the current plaintiffs actually satisfied this meeting requirement prior to the end of the mediation period. *See* Hyman Decl., ¶¶ 3-6; Herrera Decl., ¶¶ 3-6. Because the remainder of the plaintiffs have failed to participate in the mediation process at all, their claims must all be dismissed.

To hold otherwise would permit a covered employee to evade the statutorily-required mediation process entirely by simply refusing even to meet with the neutral or the employing office's representative, or refusing to provide to the employing office through the neutral any information about his or her claim. In the Title VII and ADEA contexts, courts have widely found that a plaintiff must show good faith participation in the administrative process before proceeding in court against a government agency. *See, e.g.*, *Jasch v. Potter*, 2002 WL 31027967, *1 (9th Cir. Sept. 12, 2002); *Briley v. Carlin*, 172 F.3d 567, 571 (8th Cir. 1999); *Wrenn v. Secretary, Dep't of Vet. Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990); *Munoz v. Aldridge*, 894 F.2d 1489, 1492 (5th Cir. 1990).

In *Wrenn*, the Second Circuit observed that "[t]he purpose of the good faith participation requirement is to give the administrative process an opportunity to work and to enhance the chances of administrative resolution." 918 F.2d at 1078; *see also Francis v. Brown*, 58 F.3d 191, 192-93 (5th Cir. 1995). Similarly, the D.C. Circuit has noted that the purpose of the administrative exhaustion doctrine is "to afford the agency an opportunity to resolve the matter internally and to avoid unnecessarily burdening the courts," and that failure to participate in good faith in the administrative process may invoke the exhaustion doctrine. *See Wilson v. Pena*, 79 F.3d 154, 165 (D.C. Cir. 1996); *cf.* OC Rule 2.04(a) (describing purpose of mediation as discussion of "alternatives to continuing their dispute, including the possibility of reaching a voluntary, mutually satisfactory resolution") and OC Rule 2.03(d) (describing purpose of counseling to include assisting "employee to achieve[] an early resolution of the matter, if possible").

This Court has also suggested that it would consider a plaintiffs failure to participate in, or obstruction of, an administrative proceeding in determining whether administrative remedies have been exhausted. *Broom v. Caldera*, 129 F. Supp.2d 25, 31 & n.1 (D.D.C. 2001) (citing, *inter alia*, *Powell v. Reno*, No. 98-2299(TFH) (D.D.C. Nov. 12, 1999)). Thus, for instance, an employee covered under the CAA should not be permitted to "complete mediation" for purposes of establishing this Court's jurisdiction by merely requesting mediation and then refusing to participate at all in the mediation process within the 30-day mediation period. To permit such behavior would thwart Congressional intent by eviscerating the mediation requirement established by Congress. *See Vinieratos v. United States, Dep't of Air Force*, 939 F.2d 762, 772 (9th Cir. 1991) ("an administrative exhaustion rule is meaningless if claimants may impede and abandon the administrative process and yet still be heard in the federal courts."). Indeed, the Office of Compliance has recognized a good faith requirement by incorporating a good faith clause in the mediation agreement referenced in OC Rule 2.04(f)(2). *See* Standard Mediation Agreement (attached hereto as Exhibit N). The Office's interpretation of the statute should be accorded deference under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

This requirement to participate in mediation was not met in this situation. The initial 30-day mediation period began on June 5, 2001 and was, at the joint request of the parties, extended until August 1, 2001. Beginning on July 25, 2001, defendant expressed its willingness to further extend the mediation period and to proceed with several mediation sessions at the same time, so that all individual officers could participate in mediation. *See* Exhibit M (Aug. 1, 2001 Manning letter) at 2. At the time of defendant's offer, only 6 currently identified

plaintiffs had participated in mediation sessions. *See* Exhibit K (Hyman Decl.), ¶¶ 3-6; Exhibit L (Herrera Decl.), ¶¶ 3-6. Subsequently, all plaintiffs refused to participate further in the mediation process. *See* Exhibit K, ¶ 7.

This refusal to participate in mediation was part of an effort by plaintiffs to avoid the statutory mediation process and proceed directly to this Court. *See* Exhibit B (July 26, 2001 letter from S. Blackmon-Malloy to C. Ware). In a July 26 letter to Ware, class agent and lead named plaintiff Sharon Blackmon-Malloy, President of the United States Capitol Black Police Association, and that association's Executive Council, announced their determination that their "resources will better serve [them] in U.S. District Court" rather than continuing in the mediation process. *Id.* Thus, the Black Police Association was determined to bring suit in this Court without permitting most of its member officers or the defendant to engage in mediation. This decision was further manifested on July 27, a day after receiving marching instructions from the Black Police Association, when plaintiffs' counsel Ware failed to attend a pre-arranged conference call between the parties and a neutral and failed to return messages left by the neutral.[FN15] *See* Exhibit K (Aug. 1, 2001 Manning letter) at 2. As a result of plaintiffs' failure to participate in the mediation process in any meaningful way, defendant was unable to learn the specific allegations relating to most plaintiffs before the mediation period expired. Consequently, the statutory purpose of the mediation period was frustrated by plaintiffs' actions. This Court should not permit such evasion of the statutory mediation process, but instead should dismiss the claims of all the non-mediating plaintiffs for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies.

FN15. Mr. Ware, who was a recipient of Manning's August 1 letter, never contested the facts asserted therein, nor did the Gebhardt or Johnson firms in their opposition briefs to defendant's first motion to dismiss.

IX. Only Plaintiffs Who Participated In The 2000 Promotion Process Have Potentially Viable Promotion Claims

As the Supreme Court recognized in *Morgan,* an alleged "failure to promote" is a discrete act which must be pursued within the limitations period, and untimely claims may not be revived by the continuing violation doctrine. 536 U.S. at 113-14. In this case, the only promotion process that could possibly be the subject of a timely request for counseling is the process that resulted in the 2000 promotion list.[FN16]

FN16. The 2000 promotion list was effective until September 30, 2002. *See* Jan Jones Declaration (attached hereto as Exhibit Q), ¶ 5. Defendant notes that any promotion claim would not have ripened until the list expired and no more promotions could be made, and reserves the right to challenge the ripeness of plaintiffs' claims in a subsequent motion for summary judgment.

Any plaintiffs with claims related to the 1998 promotion list that expired on September 30, 2000, including the claim of named class member Brent Mills, must have sought counseling on such claims by March 29, 2001. *See* Jt. Cmplt. ¶ 41. The earliest request for counseling recorded by the Office of Compliance was April 12, 2001. *See* Exhibit O (complete list of possible plaintiffs and counseling dates).

It is well-established that plaintiffs may not complain about a failure to promote when they did not seek to be considered for promotion. *Cones v. Shalala,* 199 F.3d 512, 516-17 (D.C. Cir. 2000) (in order to state a *prima facie* case for failure to promote, plaintiff generally must demonstrate that she applied for and was qualified for the available position); *Bundy v. Jackson,* 641 F.2d 934, 951 (D.C. Cir. 1981) (same). In this case, at least 149 individuals identified as potential class members, including 64 individuals listed in paragraph 46, elected not to participate in the 2000 promotion process. *See* Exhibit P. In addition, a number of additional potential class members are only privates or privates with training and were not eligible to participate in the 2000 promotion

process. In fact, of the 117 individuals listed in paragraph 46, only 11 officers participated in the Sergeant's exam process and only three officers participated in the Lieutentant's exam.[FN17] Accordingly, no other individuals may state a claim for failure to promote and all other such claims must be dismissed for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies in a timely fashion.

FN17. Plaintiffs Roy Anderson, Kim Ewings, John Johnson, Conrad Smith, Frank Wilkes, Kevin Bull, Gary Goines, Clifford Green, Larry Ikard, Dwayne Inabinet, and Brent Mills participated in the 2000 Sergeant's exam, with Ewings and Green receiving promotions. Plaintiffs Sharon Blackmon-Malloy, Frank Adams, and Daniel Malloy participated in the 2000 Lieutenant's exam, with Adams receiving a promotion. *See* Exhibit Q (Jones Decl.), ¶¶ 3-4.

X. Most Of The Allegations By “Class Agents” And “Named Plaintiff Class Members” Should Be Dismissed

In the current complaint, plaintiffs provide somewhat detailed allegations regarding the seven class agents and 17 named class members. As more fully described below, only the allegations of class agents Veal (in part) and Peterson (in part) state a claim upon which relief may be granted. The remaining allegations should be dismissed in their entirety.

Sharon Blackmon-Malloy, Class Agent

Sgt. Blackmon-Malloy alleges that her score on the 2000 Lieutenant's promotion examination was downgraded because of her race.[FN18] Jt. Cmplt. ¶ 22. As shown in exhibits attached by plaintiffs to the original complaint, the 2000 promotion process was developed and administered by Fields Consulting Group (FCG), an outside contractor which specializes in promotional exams.[FN19] *See* Original Cmplt., Ex. 21. These exhibits demonstrate that Sgt. Blackmon-Malloy was provided an inaccurate on-site test score of 75 *by an employee of FCG* and that FCG took responsibility and apologized for its error. *See* Nov. 27, 2000 Letter from Cassi L. Fields to Sharon Blackmon-Malloy (attached as Exhibit 21 to Original Complaint). Sgt. Blackmon-Malloy was given an opportunity to review her answer sheet and confirmed the correct scoring of her examination as a 69, instead of the 75 she was given on-site. *See* Feb. 22, 2001 Statement by Sgt. Blackmon-Malloy (attached as Exhibit 21 to Original Complaint).

FN18. It should be noted that class agent Blackmon-Malloy's ability to represent a class regarding the 2000 Lieutenant's promotion process is also suspect under these circumstances since there is no allegation that any other individual's scores were re-adjusted downward after their initial report. Under 28 U.S.C. § 2000e-2(k), plaintiffs in a disparate impact case must specifically identify the particular practice or procedure that leads to the disparate impact. In class agent Blackmon-Malloy's case, her allegation is that the re-scoring is what caused her to not obtain a promotion, not that the test itself was improper.

FN19. Because this correspondence was included with the complaint in this matter, the Court need not look beyond the pleadings to determine if plaintiff Blackmon-Malloy has stated a claim for relief. If the Court does consider information outside the pleadings, it may convert this motion to one for summary judgment under Rule 56 by providing plaintiff an opportunity to respond. Fed. R. Civ. P. Rule 12 (b)(6) .

A careful reading of the current complaint reveals that Sgt. Blackmon-Malloy fails to allege that the *USCP* took any adverse action, such as a orchestrating the deliberate mis-scoring of her exam, or that her exam was treated differently than others taking the exam. In fact, the documents submitted in support of this allegation establish

that the allegedly discriminatory action was taken by an outside contractor, *without any involvement by* the USCP, and that the USCP properly investigated the concern raised by Sgt. Blackmon-Malloy. *See* Original Cmplt., Ex. 21. Sgt. Blackmon-Malloy also fails to allege that the reason for the mis-scoring offered by FCG is pretextual. Because class agent Blackmon-Malloy cannot establish a *prima facie* case of discrimination with regard to the scoring of her 2000-2002 exam, these allegations must be dismissed for failure to state a claim upon which relief may be granted.

To the extent that Sgt. Blackmon-Malloy is complaining about disciplinary notes in her files, such notes are not adverse actions under the law unless they have a tangible objective effect on the conditions of employment of plaintiff. *See* Section IV.E.3, *supra.* Such disciplinary notes, much like the letter of admonishment described in *Brown,* 199 F. 3d at 459-460, do not by themselves rise to the level of adverse actions. In fact, the current complaint does not even allege that the CP-550 Personnel Performance Notes and the CP-534 Command Disciplinary Report had *any* effect on her conditions of employment.[FN20] *See* Jt. Cmplt. ¶ 22. Because these allegations fail to state a claim upon which relief may be granted, her allegations of disparate treatment and retaliation must be dismissed under Fed. R. Civ. P. 12(b)(6).

FN20. A CP-550 is a "Personnel Performance Note" which consists of a "one-sided form to be used in recording notes concerning an employee's performance or conduct during a performance rating period." General Order 2201 (attached hereto as Exhibit R). These notes can be positive, corrective, or even neutral. *Id.* CP-550s are specifically described as "temporary documents" and may be retained for only two rating periods. *Id.* at 4. Under the terms of the collective bargaining agreement, however, a personnel note must be purged from an individual's file within one year. *See* Collective Bargaining Agreement, § 27 (attached hereto as Exhibit S).

Dale Veal, Class Agent

Sgt. Veal claims that he was denied overtime assignments based on his race in 1999 and 2000. Jt. Cmplt. ¶ 23. However, Sgt. Veal only requested counseling on April 12, 2001. Because the denial of overtime pay is a "discrete act," any allegations related to assignments prior to October 12, 2000 should be dismissed because they relate to events outside the 180-day limitations period.[FN21] *Morgan,* 536 U.S. at 113-114.

FN21. Sgt. Veal's remaining disparate treatment claim regarding overtime assignments must still be dismissed because he failed to participate in mediation in any meaningful way. *See* Section VIII, *supra.*

Vernier Riggs, Class Agent

Sgt. Riggs claims she was retaliated against for filing a complaint with the Office of Compliance on April 12, 2001. Jt. Cmplt. ¶ 24. Sgt. Riggs did not seek counseling regarding her retaliation complaint within 180 days of the incidents described, and thus cannot maintain this allegation in this or any other complaint.

With regard to her other allegations, none of the allegations provide any time frame from which it may be determined whether her April 12, 2001 request for counseling is timely.[FN22] Because Sgt. Riggs has failed to allege or establish that her request for counseling was timely, her allegations should be dismissed for lack of subject matter jurisdiction and/or failure to exhaust administrative remedies in a timely fashion.

FN22. Upon reasonable information and belief, defendant asserts that the alleged denial of an opportunity to interview for a Dignitary Protection Division position occurred in 1993 and her alleged conversation with Inspector Jarboe took place in 1997, both well outside the limitations period. If Sgt. Riggs does not dispute these assertions, the Court should dismiss her claim for lack of subject matter jurisdic-

tion.

Luther Peterson, Class Agent

Officer Peterson alleges that he was unfairly disciplined following a September 5, 2000 incident in which he discharged his weapon in his home while off-duty. Jt. Cmplt. ¶ 25. Officer Peterson further alleges that a white officer received no discipline for a similar incident on an unspecified date.[FN23] While this allegation may possibly state a disparate treatment claim,[FN24] it does not support a claim of disparate impact and does not fairly represent the totality of the putative class members' complaints, since very few officers of any race are involved in disciplinary actions for discharging weapons.

FN23. Upon information and belief, defendant states that the allegedly comparable incident involving the white officer occurred in 1980 and resulted in the arrest and conviction of two individuals who had assaulted the officer while off-duty.

FN24. Officer Peterson's disparate treatment claim must still be dismissed because he failed to mediate in good faith. *See* Section VIII, *supra.* In addition, Officer Peterson has not established that his allegations in paragraph 25 were included in his request for counseling. *See* Section V.A, *supra.*

Officer Peterson also alleges that he received a CP-550 performance note for not responding to calls from a superior officer about his case. As described above regarding Sgt. Blackmon-Malloy's allegations, this performance note does not rise to the level of an adverse action under *Brown,* 199 F. 3d at 459-460. Accordingly, this allegation must be dismissed for failure to state a claim upon which relief may be granted.

Duvall Phelps, Class Agent

Officer Phelps claims that he was constructively discharged and forced into early retirement on October 31, 2000, on the basis of his race. Jt. Cmplt. ¶ 26. Officer Phelps filed his request for counseling on May 9, 2001, more than 180 days after his retirement date. For the reasons stated in Section VII.A, *supra,* Officers Phelps' allegations must be dismissed in their entirety for failure to exhaust administrative remedies in a timely fashion.

Larry Ikard, Class Agent

Officer Ikard alleges that he was discriminated against during the competitive selection process for new K-9 officers in November 1999. Under *Morgan,* the K-9 unit selection process is a discrete act for which a complaint must be filed within the CAA's 180-day limitation period. However, Officer Ikard, requested counseling on April 12, 2001, more than a year after he was denied assignment to the K-9 unit. Accordingly, Officer Ikard's allegations regarding the K-9 selection process must be dismissed for lack of subject matter jurisdiction and failure to exhaust administrative remedies in a timely fashion.

With regard to Officer Ikard's remaining allegations, the current complaint fails to allege a single incident that occurred within the 180 days prior to his request for counseling. Jt. Cmplt. ¶ 27. As such, plaintiffs have failed to establish this Court's jurisdiction over Officer Ikard's disparate treatment, hostile work environment and retaliation claims. Accordingly, these claims must be dismissed in their entirety.

Frank Adams, Class Agent

Lt. Adams alleges that he was denied an opportunity to sit for the 1994 Sergeant's promotion exam due to the "discriminatory ranking procedures of the USCP management." Jt. Cmplt. ¶ 28. Because the alleged denial of a

promotion in the 1994 promotion process constitutes a discrete act under *Morgan* that occurred more than 180 days prior to Lt. Adams' April 12, 2001 request for counseling, this allegation must be dismissed for lack of subject matter jurisdiction and failure to exhaust administrative remedies in a timely fashion.

With regard to Lt. Adams' allegation that his ranking was discriminatorily dropped in the 2001 Lieutenant's promotion process, this allegation must be dismissed because no adverse action was taken against Lt. Adams and he suffered no harm for which relief may be granted. As the complaint admits, Lt. Adams was in fact promoted to the rank of Lieutenant, notwithstanding any allegedly discriminatory conduct by defendant. Accordingly, the allegation concerning the 2001 promotion process must be dismissed for failure to state a claim upon which relief may be granted.

With regard to the remaining allegations involving Lt. Adams, the current complaint fails to allege a single incident that occurred within the 180 days prior to his request for counseling. Jt. Cmplt. ¶ 28. As such, plaintiffs have failed to establish this Court's jurisdiction over Lt. Adams' disparate treatment, hostile work environment and retaliation claims. Accordingly, these claims must be dismissed in their entirety.

Robert Braswell, Named Class Member

Officer Braswell claims he was discriminated against on the basis of his race during the administration of a promotion exam because he received a low score on the oral part of the exam. Jt. Cmplt. ¶ 29. While the complaint fails to identify when this alleged discriminatory act occurred, it is undisputed that Officer Braswell elected not to participate in the 2000 promotion process, the only one which he could have challenged in his April 12, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

With regard to Officer Braswell's allegation of unfair discipline for missing a radio call, defendant asserted in its first motion to dismiss, without contradiction by plaintiffs, that the incident occurred in 1993, well before the CAA was enacted. *See* Dec. 15, 1993 Braswell Memorandum (attached hereto as Exhibit T). In addition, a CP-550 does not constitute an adverse action because it did not materially affect the terms and conditions of his employment. *See Brown,* 199 F.3d at 458.

Clarence Haizlip, Named Class Member

Officer Haizlip claims that he was discriminated against on the basis of his race during the administration of a promotion exam because the passing curve was raised after the exam. Jt. Cmplt. ¶ 30. The complaint fails to identify when this alleged discriminatory act occurred. However, it is undisputed that Officer Haizlip elected not to participate in the 2000 promotion process, the only one which he could have challenged in his April 12, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

Officer Haizlip also alleges that he was denied a bus driver position on the basis of his race. Officer Haizlip applied for the position on April 20, 2000, but did not seek counseling until April 12, 2001, more than 180 days after he was denied the position. Accordingly, Officer Haizlip's allegations should be dismissed for failure to exhaust administrative remedies in a timely fashion.

Dianne Willis, Named Class Member

Officer Willis claims that she was discriminated against on the basis of her race during the administration of several promotion exams because the passing curve was raised after the exam. Jt. Cmplt. ¶ 31. The complaint fails to identify when these alleged discriminatory acts occurred. However, it is undisputed that Officer Willis elected not to participate in the 2000 promotion process, the only one which she could have challenged in her April 12, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

Officer Willis' undated allegations concerning changes in her shift and denial of assignments do not constitute adverse actions and thus should also be dismissed. *See* Brown, 199 F.3d at 457; *Crenshaw,* 23 F. Supp.2d at 18.

McArthur Whitaker, Named Class Member

Officer Whitaker claims that he was removed from his motorcycle detail on September 25, 2000, and that he was unfairly disciplined for continuing his shift on the motorcycle that day. Jt. Cmplt. ¶ 32. Officer Whitaker did not request counseling until April 12, 2001, more than 180 days after he was disciplined. Thus, this claim should be dismissed for failure to exhaust his administrative remedies in a timely fashion.

Arnold Fields, Named Class Member

Officer Fields initially sought counseling with the Office of Compliance on April 12, 2001. The allegations in the complaint refer to incidents that occurred after this request for counseling, and thus could not have been covered in the April 12 request. Jt. Cmplt. ¶ 33. Officer Fields did seek counseling regarding the incidents alleged in the complaint on January 17, 2002, completed mediation on March 25, 2002, and then filed a complaint in this Court on July 2, 2002. *See Fields v. United States Capitol Police Bd.,* No. 1:02CV01346 (EGS). Because that individual retaliation complaint covers the individual allegations in the joint second amended complaint, the allegations here should be dismissed in their entirety. In addition, because an unsatisfactory performance evaluation does not constitute an adverse action, the allegations should be dismissed for this additional reason. *See Russell,* 257 F.3d at 818-19; *Brown,* 199 F.3d at 458.

Regina Bolden Whitaker, Named Class Member

Officer Bolden Whitaker claims she was retaliated against for complaining about race discrimination when she was placed on restricted duty for not wearing her protective body armor while other white officers were not treated similarly. Jt. Cmplt. ¶ 34. Because the complaint fails to state when this retaliatory action was taken, plaintiff has failed to establish that her request for counseling on April 12, 2001 was timely and thus her allegations must be dismissed in their entirety.[FN25]

FN25. Upon information and belief, Officer Bolden Whitaker was placed on restricted duty in May 2001, after she filed her request for counseling. Officer Bolden Whitaker failed to seek counseling regarding this alleged retaliation and thus her claim must be dismissed for this additional reason. *See Halcomb,* 209 F. Supp. 2d at 178-79.

Reginald Waters, Named Class Member

Officer Waters claims he was discriminated against on the basis of his race during two administrations of the sergeant's promotion exam because he received low scores on the oral part of the exams and because his picture was placed on the outside of his application jacket. Jt. Cmplt. ¶ 35. The complaint fails to identify when these alleged discriminatory acts occurred. However, it is undisputed that Officer Waters elected not to participate in

the 2000 promotion process, the only one which he could have challenged in his April 12, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

Willie Johnson, Named Class Member

Officer Johnson claims he was retaliated against for voicing complaints of race discrimination when he was assigned to the power plant parking lot. Jt. Cmplt. ¶ 36. In its first motion to dismiss, defendant asserted, without contradiction, that Officer Johnson retired on January 3, 2000. Because Officer Johnson did not file a request for counseling until May 9, 2001, more than one year after he retired, his claims must be dismissed in their entirety for failure to exhaust his administrative remedies in a timely fashion. In addition, because an undesirable assignment does not constitute an adverse action, Officer Johnson's claim must be dismissed for this additional reason. *See Brown,* 199 F.3d at 457; *Crenshaw,* 23 F. Supp.2d at 18.

Leonard Ross, Named Class Member

Officer Ross claims he was discriminated against on the basis of his race during the administration of four promotion exams, including the 1992 exam, because he received low scores on the oral part of the exams. Jt. Cmplt. ¶ 37. Officer Ross's claim with regard to the 1992 exam must be dismissed because the alleged act occurred prior to enactment of the CAA. The complaint fails to identify when the other alleged discriminatory acts occurred. However, it is undisputed that Officer Ross elected not to participate in the 2000 promotion process, the only one which he could have challenged in his April 12, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

Richard Webb, Named Class Member

Officer Webb claims that he has been retaliated against since the filing of this lawsuit by receiving “bad assignments” and by “nit-picking” of his performance. Jt. Cmplt. ¶ 38. Because Officer Webb never sought counseling regarding his retaliation claim, this claim must be dismissed. *See Halcomb,* 209 F. Supp. 2d at 178-79. In addition, these allegations do not rise to the level of an adverse action and thus Officer Webb's allegations must be dismissed for this additional reason. *See Russell,* 257 F.3d at 818-19; *Brown,* 199 F.3d at 457-58; *Crenshaw,* 23 F. Supp.2d at 18.

With regard to Officer Webb's allegations regarding the K-9 exam, the complaint fails to identify when Officer Webb was denied a K-9 position and thus the Court cannot determine whether his April 12, 2001 request for counseling is timely. Because plaintiff has failed to establish that his request for counseling was timely, these allegations should also be dismissed.

Gary Goines, Named Class Member

Officer Goines claims he was discriminated against on the basis of his race during the administration of “at least” six promotion exams, because he received low scores on the oral board part of the exams. Jt. Cmplt. ¶ 39. The complaint fails to identify when these other alleged discriminatory acts occurred. Because plaintiff has failed to establish that his request for counseling was timely, the promotion allegations should be dismissed. [FN26]

FN26. Upon information and belief, defendant asserts that Officer Goines' allegations do not refer to the

2000 promotion process, the only one that could have been the timely subject of his April 12, 2001 request for counseling.

With regard to Officer Goines' hostile work environment claim, the only incidents alleged relate to events that occurred during a detail assignment in Illinois. According to Exhibit 16 of the Original Complaint, these incidents occurred in March 1999. Because Goines did not seek counseling until April 12, 2001, his hostile work environment claim must be dismissed for failure to exhaust administrative remedies in a timely fashion.

Robert Spratt, Named Class Member

Officer Spratt alleges that he was treated differently than a white supervisor while in the Training Division and then was transferred out of the division in retaliation for disciplining a white instructor for making a racial comment. Jt. Cmplt. ¶ 40. Because the complaint fails to allege any dates when these alleged actions took place, the Court cannot determine whether his April 12, 2001 request for counseling is timely.[FN27] Because plaintiff has failed to establish that his request for counseling was timely, these allegations should also be dismissed. These allegations should be dismissed for the additional reason that a lateral assignment or change in shift do not qualify as adverse actions. *See Brown,* 199 F.3d at 457-58; *Crenshaw,* 23 F. Supp.2d at 18.

FN27. Upon information and belief, defendant asserts that the allegedly retaliatory transfer took place after April 12, 2001. If plaintiffs do not dispute this assertion, Officer Spratt's claim must be dismissed in its entirety because he did not seek counseling regarding this allegation. *See Halcomb,* 209 F. Supp. 2d at 178-79.

Brent Mills, Named Class Member

Officer Mills claims he was discriminated against on the basis of race when he was denied a promotion on September 28, 2000. Jt. Cmplt. ¶ 41. Because Officer Mills did not request counseling until April 12, 2001, more than 180 days after he was allegedly denied the promotion, his claim must be dismissed for failing to exhaust administrative remedies in a timely fashion.

Earl Allen, Named Class Member

Sgt. Allen claims that he was subjected to a hostile work environment during his tenure with the Capitol Police. Jt. Cmplt. ¶ 42. Sgt. Allen retired on October 1, 2000, more than 180 days prior to his May 9, 2001 request for counseling. For the reasons stated in Section VII.A, *supra,* Sgt. Allen's allegations must be dismissed in their entirety for failure to exhaust administrative remedies in a timely fashion.

Derrick Macon, Named Class Member

Officer Macon alleges that he was discriminated against on the basis of race in the taking of the 1990 promotion exam and in relation to investigation of a 1992 citizen's complaint filed against him. Jt. Cmplt. ¶ 43. Because these allegations pre-date the enactment of the CAA, they must be dismissed in their entirety for lack of subject matter jurisdiction.

Mary Jane Rhone, Named Class Member

Ms. Rhone claims that she was discriminated against on the basis of her race when she was denied a promotion to a position that she had previously performed. Jt. Cmplt. ¶ 44. The latest date mentioned in her allegations is June 1999. Ms. Rhone did not request counseling until May 11, 2001, almost two years later. Accordingly, her

allegations must be dismissed for failing to exhaust her administrative remedies in a timely fashion.

Thomas Spavone, Named Class Member

Officer Spavone alleges to have been discriminated against in the promotional exam process on the basis of national origin and for associating with African-American officers. Jt. Cmplt. ¶ 45. The complaint fails to identify when these alleged discriminatory acts occurred. However, it is undisputed that Officer Spavone elected not to participate in the 2000 promotion process, the only one which he could have challenged in his May 9, 2001 request for counseling. *See Morgan,* 536 U.S. at 113-14. Thus, this Court lacks subject matter jurisdiction over any promotion claim.

With regard to his allegation that he was denied an assignment in Protective Services after September 11, 2001, Office Spavone has not sought counseling on this request and thus this allegation must be dismissed for lack of subject matter jurisdiction and failure to exhaust administrative remedies.

XI. The Court Should Dismiss The Claims Of The Purported Plaintiffs In Paragraph 46 For Whom Defendant Has No Information Regarding Their Allegations

In its first motion to dismiss, defendant identified 198 individuals for which it had no information on their specific allegations. *See* Exhibit U. Of these individuals, 54 remain specifically identified in the current complaint as having "provable claims of discrimination with respect to matters alleged in this Complaint." Jt. Cmplt. ¶ 46; *see* Exhibit U. This pleading is insufficient to meet even the minimal standards of Fed. R. Civ. P. 8(a)(2), as set forth by the Supreme Court in *Swierkewicz v. Sorema,* 514 U.S. 506, 514 (2002). *Swierkewicz* requires plaintiffs to "give defendant fair notice of what [plaintiffs'] claims are and the grounds upon which they rest." As this Court has observed, "the guiding purpose of Rule 8(a) is to ensure that the adverse party has fair notice of the pleader's claims so as to provide the adverse party an opportunity to file a responsive answer and to prepare an adequate defense." *Hilska v. Jones,* 217 F.R.D. 16, 20 (D.D.C. 2003) (citing *Swierkewicz,* 514 U.S. at 512). In Hilska, this Court observed:

A complaint that contains only vague and conclusory claims with no specific facts supporting the allegations may not give defendant fair notice of the claims against [it] and thus would not allow the defendant to devise a competent defense. Thus, a complaint is subject to dismissal pursuant to Rule 8(a) where the complaint fails to provide the defendant with notice of the plaintiffs claims.

Hilska, 217 F.R.D. at 20 (citations omitted).

In this case, defendant has no ability to provide a responsive answer or prepare an adequate defense to the "vague and conclusory" allegations by these individuals because it has no idea what specific alleged acts are being challenged as discriminatory or retaliatory. While ordinarily a motion for more definite statement may be appropriate, in this case plaintiffs were on notice of defendant's position regarding these individuals prior to filing their joint second amended complaint, yet failed to provide the required fair notice in the current pleading. Accordingly, the purported plaintiffs in Exhibit U should be dismissed. *See, e.g., Kato v. Ishihara,* 239 F. Supp. 2d 359, 365 (S.D.N.Y. 2002); *Johnson v. City Univ. of N.Y.,* No. 00 CIV 4964, 2002 WL 1750841, * 4 (S.D.N.Y. July 24, 2002).

XII. The Court Should Dismiss Plaintiffs' Disparate Impact Claims

In the joint second amended complaint, plaintiffs allege only that the Board "has established and maintained a

racially discriminatory system which discriminates against its African American officers in promotions, other selections, work assignments, discipline, and termination in a way that is excessively subjective and which has had a disparate impact on African American employees." Jt. Cmplt. ¶ 53. In support of their disparate impact claim, plaintiffs allege that 29 percent of the USCP force is African-American, while only 13 percent of the upper ranks (Sergeant and above) are African-American. *Id.* ¶¶ 20-21. Plaintiffs provide no statistical data regarding other selections, work assignments, discipline, or termination.

These generalized allegations are insufficient to withstand a motion to dismiss. Under Title VII, disparate impact as unlawful discrimination may only be found when the
complaining party demonstrates that a respondent used a *particular* employment practice that causes a disparate impact on the basis of race, ..., and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

28 U.S.C. § 2000e-2(k) (emphasis added). "A Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force." *Ward's Cove Packing Co. v. Atonio,* 490 U.S. 642, 657 (1989). Rather, plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.' " *Id.* (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 992 (1988)).

In analyzing the sufficiency of the complaint, the Court need accept as true only plaintiffs' well-pleaded factual contentions, and not their conclusory allegations. *See Dunn v. White,* 880 F.2d 1188, 1190 (10th Cir. 1989) (quoting *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984)). In this case, plaintiffs make only the most broad and nebulous claims here and fail to identify a particular or specific element of any USCP process that creates a disparate impact. Accordingly, the Court should reject their contentions and dismiss the complaint with prejudice. *See Adams v. Bethlehem Steel Corp.,* 736 F.2d 992, 994 (4th Cir. 1984) (plaintiffs had no basis for redress where complaint broadly identified thirty-seven general practices by which employer allegedly discriminated against black employees, without offering specific instances of harm); *TV Communications Network, Inc. v. ESPN, Inc.,* 767 F. Supp. 1062, 1070 (D. Colo. 1991) (conclusory allegations that merely recited relevant antitrust principles and were not grounded in well-pleaded facts were insufficient to survive motion to dismiss), *aff'd,* 964 F.2d 1022 (10th Cir. 1992).

XIII. Conclusion

For the reasons stated herein, the Court should dismiss plaintiffs' joint second amended complaint in its entirety, with prejudice.

Respectfully submitted,

/s/

ROSCOE C. HOWARD, JR., D.C. BAR #246470

United States Attorney

/s/

MARK E. NAGLE, D.C. BAR #416364

Chief, Civil Division

/s/

LAURIE WEINSTEIN, DC BAR #389511

Assistant United States Attorney

Tenth Floor

555 4th Street, NW

Washington, DC 20530

(202) 514-7133

WILLIAM F. ALLEN, D.C. BAR #454656

Associate Counsel

Office of House Employment Counsel

1036 Longworth House Office Building

Washington, DC 20515

OF COUNSEL:

PEGGY TYLER

Architect of the Capitol

SHARON BLACKMON-MALLOY, et al., Plaintiffs, v. UNITED STATES CAPITOL POLICE BOARD, Defendant.
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