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-cv-2221 (EGS).
February 5, 2004.

Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss

Respectfully submitted, Joseph D. Gebhardt, (D.C. Bar # 113894), Charles W. Day, Jr., (D.C. Bar # 459820), Gebhardt & Associates, LLP, 1101 17th Street, N.W., Suite 607, Washington, DC 20036-4718, (202) 496-0400. Nathaniel D. Johnson, (Federal Bar #Md14729), Nathaniel D. Johnson & Associates, L.L.C., 3475 Leonardtown Road, Suite 105, Waldorf, MD 20602, (301) 893-0807, Counsel for Plaintiffs.
Plaintiff Sharon Blackmon-Malloy, *et al.*, by and through undersigned counsel, hereby oppose Defendant's Motion to Dismiss, and in support of their Opposition state as follows:

1. Defendant's Motion is utterly without merit. Merely a tactical maneuver and not a normal 12(b)(6) motion, Defendant's Motion is a preemptive challenge to Plaintiffs' Motion for Class Certification and is, in reality, a *preliminary Opposition to the Motion for Class Certification.*[FN1] Because Defendant has chosen to bring the class action issues[FN2] to the fore now, Plaintiffs are simultaneously re-filing their Motion for Class Certification along with this Opposition and requesting that both Motions be considered and decided together. Plaintiffs' class action research and arguments, as set forth below, also apply to Plaintiffs' Re-filed Motion for Class Certification.

FN1. Defendant's Motion also can be seen as a request for an advisory opinion in violation of Section 2, Article III, of the U.S. Constitution.

FN2. Defendant's preemptive arguments against class certification in its “Motion to Dismiss” include the following:
1. “The CAA Does Not Provide for Class Actions in its Administrative Processes.” Motion to Dismiss at 9.
2. “Defendant asserts that such a class, if such treatment is available, cannot include plaintiffs who have not individually fully satisfied the jurisdictional prerequisites for bringing a CAA claim to federal court.” Motion to Dismiss at 9.
3. “Plaintiffs may not use their Rule 23 class allegations to revive individual plaintiffs' untimely claims.” *Id.* at 22.
4. “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.” *Id.* at 26.
5. “Class agent Regina Bolden-Whitaker and Eric Boggs failed to appear for scheduled mediations on

July 25." *Id.* at 28.

6. "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." *Id.* at 34.

7. "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 score's were re-adjusted downward after their initial report." *Id.* at 35.

8. " '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)" *Id.* at 50.

2. The 358 African American Police Officers named in the *Blackmon-Malloy* Joint Second Amended Class Complaint have brought this case in order to challenge broad-based, system-wide discrimination against African Americans by the United States Capitol Police. The Officers are challenging (A) a longstanding hostile work environment against African Americans on the force as well as other employees of Defendant associated with them; (B) race discrimination in such personnel decisions as promotions, other selections, work assignments, discipline, and termination; and (C) retaliation against African American Officers who oppose discrimination. *See* Joint Second Amended Class Action Complaint ¶ 2.[FN3] In bringing this case, Plaintiffs are seeking the same legal protection against discrimination enjoyed by employees in the private sector and in the Executive Branch of the federal government, protections which Congress guaranteed them when it passed the Congressional Accountability Act in 1995 ("CAA"). P.L. 104-1; 2 U.S.C. § 1301 *et seq.* It has long been recognized in Title VII jurisprudence that class actions are the most efficient means of addressing common claims of broad-based discrimination by a large group of Plaintiffs. *See* Advisory Committee Note to Rule 23(b)(2); 39 F.R.D. 69, 102 (1966); *see* paragraph 9 *infra.* In this case, the Federal Rules of Civil Procedure apply no less to the Congressional Accountability Act than they do to Title VII, and there is every reason for the Court to deal with this case using the well-established class action procedure employed by the federal courts in cases brought under Title VII.

FN3. As for retaliation, please also refer to: *Fields v. U.S. Capitol Police Board*, Civil Action No. 02-1346 (EGS); *Blackmon-Malloy v. U.S. Capitol Police Board*, Civil Action No. 02-1859 (EGS); *Ross v. U.S. Capitol Police Board*, Civil Action No. 02-2481 (EGS); *Fields v. U.S. Capitol Police Board*, Civil Action No. 03-1505 (EGS); *Bolden-Whitaker v. U.S. Capitol Police Board*, Civil Action No. 03-2644 (EGS).

3. In addition to challenging the procedure established by the Federal Rules, Defendant has brought myriad challenges to the individual claims of the class members on the grounds of timeliness, exhaustion of administrative remedies, and notice, all of which are fully addressed through the class action procedure. In addition, Defendant seeks to undermine the independent determinations on Plaintiffs' administrative claims rendered by the Office of Compliance, which is not a party to this lawsuit.[FN4] Defendant misrepresents the fact that Plaintiffs did everything required of them by the Office of Compliance from the inception of their case until the statutory time limit for administrative processing expired, at which point the Office of Compliance issued a Notice of End of Mediation to 266-270 Complaining Officers allowing them to take their case to U.S. District Court. *See* Declaration of Sharon Blackmon-Malloy, Exhibit 1, Attachment C. Defendant is equally in error when it asserts that Plaintiffs can only assert claims for non-promotion if they participated individually in the year 2000 promotion process and that Plaintiffs have not pleaded their claim for disparate impact with sufficient specificity.

FN4. The independent status of the Office of Compliance is strikingly clear in Defendant's complaints

that it cannot even obtain Office of Compliance records. *See* Motion to Dismiss at 21.

THE CAA ALLOWS EMPLOYMENT DISCRIMINATION CLASS ACTIONS

4. Congress enacted the Congressional Accountability Act ("CAA") to outlaw discrimination against Legislative Branch employees in the same fashion that it had previously outlawed discrimination against employees in the private sector and in the Executive Branch of the federal government. The CAA explicitly states, "The following laws shall apply ... to the legislative branch of the Federal Government. (2) Title VII of the Civil Rights Act of 1964 ..." 2 U.S.C. § 1311(a). Sec. 201(a) prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin, *within the meaning of the Civil Rights Act of 1964* ___" 2 U.S.C. § 1311 (emphasis added).

5. In statement after statement, Members of both the Senate and the House clearly stated that they wished to end special treatment for the Congress by fully applying to Congress the same antidiscrimination and other employment laws that Congress had applied to their constituents in the private sector. The intent of the law is clear in the speeches of Members of Congress from both sides of the aisle before passage of the CAA. Co-sponsor Senator Arlen Specter stated: "Basic fairness should mean that *every rule of law* applies equally to Members of the Senate and House as they do to every other American." 141 *Cong. Rec.* S474 (Jan. 17, 1995)(emphasis added). Co-sponsor Senator Joseph Lieberman stated:

[The CAA] will, as those who have spoken before me said, apply to Congress and its support offices all of the laws regarding civil rights ... that Congress has applied over the years to the executive branch of government and to the private sector as well.

141 *Cong. Rec.* S451 (Jan. 5, 1995). Senator Charles Grassley, who sponsored the legislation, echoed these sentiments: "The purpose of S. 2 [the CAA] is to fully apply antidiscrimination and employee protections laws to Congress." 141 *Cong. Rec.* S442 (Jan. 5, 1995).

6. The Members of the House of Representatives were equally clear in their statements that the legislation was intended to apply full coverage of the antidiscrimination laws to Congressional employees. As Representative William Goodling stated, "[W]here there is any doubt on the matter, the Office [of Compliance] and the courts should apply the law in question as it is applied to private sector employers .... [W]here the case law is divided in interpreting the relevant law, the Board and *the courts should apply to the Congress the most rigorous* interpretations, not the least rigorous." 141 *Cong. Rec.* H263-64 (Jan. 17, 1995)(emphasis added).

7. The Office of Compliance's manual echoes this clear statement of Congressional purpose: "Title VII establishes the basic terms of what is prohibited discrimination [E]mploying offices and covered employees may find it helpful to refer to court decisions interpreting Title VII, as well as the interpretations, opinions, and other materials issued by the [EEOC] ..." Office of Compliance Manual, Sec. 2, Summary, available at http://www.compliance.gov/manual/manual_sec2.html. At the same time that Congress explicitly extended the protections of Title VII of the Civil Rights Act of 1964 to Legislative Branch employees, it also applied the provisions of 10 other laws in a comprehensive effort to ensure that the same employment laws would apply to Congress as to the private sector and the Executive Branch. Significantly, the CAA statute makes no mention of limiting or restricting the rights of employees of the Legislative Branch, and, indeed, where Congress chose to depart from Title VII, as in the retaliation clause at 2 U.S.C. § 1317, it actually strengthened the provisions of Title VII. Nowhere does the CAA statute suggest that Congressional employees are entitled to less legal protection than other citizens, and the clear purpose of the separate enforcement mechanism is to protect the balance between the Legislative Branch of government and the Executive Branch.[FN5]

FN5. *See, e.g.*, the statement of co-sponsor Senator Spencer Abraham: "The [CAA] attempts to address the concerns about separation of powers by enacting a specific enforcement mechanism unique to this act." 141 *Cong. Rec.* S458 (January 5, 1995).

8. In light of the plain language of the CAA statute and the strong legislative history in support of rigorous enforcement of the Act's provisions, it is a travesty for the Capitol Police and the U.S. Attorney's Office to argue in this case that Congress intended only a limited waiver of immunity that encompassed no more than a bare minimum of protected rights for employees of Congress. *See* Motion to Dismiss at 24-25. Representative Robert Wise clearly summed up the sentiments of Congress when he stated, "What's good for the goose is good for the gander." 141 *Cong. Rec.* H271 (Jan. 17, 1995). The Congress that enacted the CAA clearly never dreamed that the Department of Justice would interpret it as a "limited waiver of sovereign immunity" that granted to Congressional employees only a subset of the rights all other employees in the United States enjoyed. *But see* Motion to Dismiss at 24-25. They never dreamed that they would not be able to tell their constituents with a straight face that Congress was bound by the same laws outlawing discrimination by which their constituents in the private sector were bound. And yet, Defendant would have this Court interpret the law so as to deprive Congressional employees of a very effective, rigorous procedural mechanism for remedying discrimination - *i.e.*, class certification, which is used frequently by employees in both the private sector and the Executive Branch. *See* Motion to Dismiss at 3. Not only is such an interpretation inconsistent with the broad remedial nature of the CAA, but also it flies in the face of the clear intent of Congress in enacting the law, as discussed above.

9. Defendant's unsupported argument that Congressional employees are forbidden from bringing class actions because the CAA statute does not explicitly allow class actions is a fundamental misunderstanding of the law and of the Federal Rules of Civil Procedure. After all, Title VII does not explicitly provide for class actions either, and yet class actions are a common - and favored - means of resolving lawsuits over discrimination against large employee groups belonging to a common protected class. When it amended Federal Rule of Civil Procedure 23(b) in 1966, the Advisory Committee noted: "Illustrative [of allowed class actions] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Note to Rule 23(b)(2), 39 F.R.D. 69, *102 (1966). Indeed, the original framing of Rule 23(b)(2) was so linked to civil rights litigation that the Committee felt compelled to add, "Subdivision (b)(2) is not limited to civil rights cases." *Id.* The Supreme Court has upheld this interpretation, in a decision applying Rule 23(a) requirements to Title VII class actions,[FN6] stating "racial discrimination is by definition class discrimination." *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 (1982). In *Falcon*, the Supreme Court acknowledged that Title VII class actions are permitted even though Title VII does not specifically authorize class actions. *See id.* at 156. Congress, when it amended Title VII in 1972, was aware of the widespread use of Title VII class actions and interested in seeing it continue. The Committee Report accompanying the Joint Conference Bill stated, "it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits in Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure .... [T]he leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints." 118 *Cong. Rec.* S3462 (Mar. 6, 1972); 118 *Cong. Rec.* H1863 (Mar. 3, 1972). In light of the silence of the CAA statute on the issue of class actions, the importance of class actions to enforcement of the civil rights laws, and the strong Congressional statement in the legislative history that the CAA was intended to *fully* extend the protections of Title VII to Legislative Branch employees, adjudicating this case as a class action is clearly allowed.

FN6. The proposed *Blackmon-Malloy* class action is clearly a good candidate for certification based on commonality, typicality, and adequacy of representation in light of the fact that all of the claims involve

employees (active and retired); all the class members are or were U.S. Capitol Police Officers (other classifications are not included); and all of them work in the same geographical location, the same complex, and the same line of command. *See* Lindemann & Grossman, *Employment Discrimination Law* 1588-1599 (1996 & 2002 Supp. 1091-94).

THE COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

10. A candid analysis shows that this Court clearly has jurisdiction over Plaintiffs' claims. This case is brought pursuant to the CAA, a federal law, so the Plaintiffs have satisfied the requirements for subject matter jurisdiction of 28 U.S.C. § 1331. Defendant argues, however, that the language of the CAA precludes certification of a class action including employees who have not participated in counseling and mediation[FN7] and that Rule 82 of the Federal Rules of Civil Procedure does not allow the Federal Rules of Civil Procedure to extend the jurisdictional requirements of a statute. Defendant begins with a misreading of the jurisdictional language of the CAA:

FN7. As argued below, the overwhelming majority of the 358 Plaintiffs in the Blackmon-Malloy class action complied with the mass counseling and mediation procedures of the Office of Compliance, which issued a single Notice of End of Mediation to most of them. *See infra* at ¶¶ 15 to 19.

(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). Defendant glosses this section by stating: "Significantly, each *individual* employee is required to complete counseling and mediation." Motion at 8. Nothing in the language quoted by Defendant limits the mediation and counseling requirement to an individual employee, or indicates that an individual class agent may not fulfill the counseling and mediation requirements regarding class-wide discrimination on behalf of a class of employees. It is merely Defendant's wishful thinking, not the statute, which would supposedly limit application of the jurisdictional requirements to an individual case and preclude application to a class agent. The Office of Compliance itself has taken no position on whether the Act allows for class actions. *See* Plaintiffs' Opposition to Defendant's Motion to Dismiss (August 30, 2002) at 12; Office of Compliance Manual at http://www.compliance.gov/manual/manual_secl.html.

11. Moreover, the well-settled law of class actions holds that so long as one named plaintiff has satisfied administrative requirements, other plaintiffs with the same claims may join the case as co-plaintiffs or members of a class without having satisfied the administrative requirements themselves. In *Foster v. Gueory*, the D.C. Circuit held that it is sufficient if at least one member of a plaintiff class has met the filing prerequisite. 655 F.2 1319, 1321 (D.C. Cir. 1981)[FN8] (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 n.1 (D.C. Cir. 1973); *Macklin v. Spector Freight Systems, Inc.* 478 F.2d 979, 985 n. 11 (D.C. Cir. 1973)). The *Foster* Court quoted the following rationale for this rule:

FN8. The appellants in *Foster* were three people who had attempted to intervene in the case and have it certified as a class action. The District Court denied the motion to intervene, and the D.C. Circuit reversed and remanded.

"It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful."

Id. at 1322 (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).[FN9] Approving this rationale, the D.C. Circuit stated:

> FN9. The difficulties of attempting to process the complaints of a large number of Plaintiffs belonging to the same class are apparent in the instant case, where the Office of Compliance tailored its counseling procedures to perform counseling for the large number of Plaintiffs in this case *en masse*, and where the Office of Compliance was unable to schedule counseling sessions with more than a small number of Plaintiffs within the statutory time limits. *See* Exhibit 2 hereto - Declaration of Duvall W. Phelps.

In class actions, this rationale is *invariably* applicable, for the very fact that the suit is a class action means that the plaintiffs' claims not only share common questions of law and fact, but those claims are such that representative plaintiffs will fairly and adequately protect the interests of all plaintiffs of the class.

Id. (emphasis added). Moreover, contrary to Defendant's arguments in the instant case, the Court explicitly found that this doctrine of "vicarious exhaustion" (or "single filer" rule) did *not* affect subject matter jurisdiction:

Appellees have argued that permitting intervention in this case expands the court's subject matter jurisdiction both horizontally, by adding plaintiffs, and vertically, by extending all plaintiffs' claims back in time based on the date of the original complaint. *This argument is without merit.* So long as the original plaintiffs remain in the action and none of the original pleadings have been struck, the subject matter to the suit is fixed, and neither the nature of the claims being litigated nor the time periods to which they apply are affected by the addition of appellants-intervenors as plaintiffs. *Id.* at 1325 n.4 (emphasis added). The D.C. Circuit has subsequently recognized the doctrine of vicarious exhaustion in *Hartman v. Duffey*, 88 F.3d 1232, 1235 (D.C. Cir. 1996). More recently, this Court has applied the doctrine of vicarious exhaustion in a proposed class action under the CAA in which the defendant sought to have two class members dismissed for failing to complete mediation. The Court found that "any failure to exhaust by Plaintiffs Rucker and Perry will be immaterial if the Court decides to certify such a class." *Harris v. Office of the Architect of the Capitol*, 16 F. Supp. 2d 8 (D.D.C. 1998).

12. The Federal Rules of Civil Procedure are dispositive on issues of Court procedure, and Rule 23 authorizing a class action is clearly controlling in this case.[FN10] The issue of whether a Rule 23 class action can be brought as a class action under the CAA is really a procedural issue, not a jurisdictional one, and is appropriately governed by the Federal Rules. In dealing with procedural questions, the Federal Rules of Civil Procedure are given great weight, so much so that they can override statutory law. *See* 28 U.S.C. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect"). The authority of the Federal Rules to prescribe the procedures used in federal courts has been recognized at least since 1942, when the Supreme Court issued its decision in *Sibbach v. Wilson* upholding the Court's right to require a medical examination under Rule 35 notwithstanding the appellant's claim that doing so would violate her right to be free of invasion of her person. 312 U.S. 1 (1941) *but see* 312 U.S. at 16 (Frankfurter, J. dissenting). The *Sibbach* decision's clear implication is that the Federal Rules of Civil Procedure override the doctor-patient privilege where the individual puts her health at issue in a lawsuit. Likewise, the *Sibbach* rationale would surely allow Federal Rule 23 class action treatment for the instant case brought under the CAA, which does not prohibit a class action. In sum, a Rule 23 class action is the appropriate procedure for hearing and deciding this case.

FN10. This is particularly so in the absence of any statutory language to the contrary, as here.

DEFENDANT HAS ADEQUATE NOTICE OF PLAINTIFFS' CLAIMS

13. Defendant's claim that it lacks adequate notice of the claims of the class is without merit both in light of the facts of the case and as a matter of law. The facts of the case are that 270 members of the class went through counseling at the Office of Compliance and were ready to be scheduled for mediation. *See* Motion to Dismiss, Defendant's Exhibit M. Of these, the Office of Compliance conducted mediation sessions with Defendant and six class members, including lead class agent Sharon Blackmon-Malloy, class agent Frank Adams, and named class member Robert Braswell. The administrative process gave Defendant ample notice of the identity of the Plaintiffs and the nature of their specific claims well before the original Class Complaint was filed on October 29, 2001, and the Joint Second Amended Class Complaint was filed on January 28, 2003. As a matter of law, if the class is certified, the claims of the class members will be the same as the claims of the named class agents and class representatives. *See Foster v. Gueory*, 655 F.2d at 1321; *Hartman v. Duffey*, 88 F.3d at 1235. In raising an objection alleging inadequate notice, Defendant is clearly anticipating Plaintiffs' Motion for Class Certification, and it is therefore appropriate for the Court to consider class certification at the same time it considers Defendant's Motion to Dismiss. *See* Motion for Class Certification.

14. As long as a class action is pending, the employer is on notice of the claims of all class members. *Andrews v. Orr*, 851 F.2d 146, 150 (6th Cir. 1988); *Zapata v. IBP, Inc.*, 1998 U.S. Dist. Lexis 21718, at *16-17 (D. Kan. 1998). *Cf. Laffey v. Northwest Airlines*, 576 F.2d 429, 472 (D.C. Cir. 1976) (finding that filing of EEOC charge by any class member provides sufficient notice to Defendant with respect to all class members). Here, Plaintiffs' Class Action Complaint alleges various discriminatory actions taken against the Plaintiff class, including the 54 individuals for which Defendant claims to have "no information," Jt. Sec. Am. Compl. ¶¶ 1-2, 20-21, 46, 48-59, as well as the individual allegations of the representative class members.[FN11] Jt. Sec. Am. Compl. ¶¶ 22-45. These allegations are more than enough to put Defendant on notice of the claims of all class members. Just as only the class agents are required to exhaust their administrative requirements, only the class agents must plead their individual claims with the specificity required by Rule 8's liberal notice pleading requirements. Indeed, it is difficult to imagine a class action - a procedure used to promote judicial economy - working in any other way. It is noteworthy that all four cases Defendant cites to support its notice arguments in Part XI of its Motion to Dismiss are individual suits, not class actions, and are thus useless to this Court in this context.[FN12]

FN11. If Defendant seeks to challenge the adequacy of the class agents' representation, it must do so in opposing a Motion for Class Certification; this challenge is inappropriate at this stage. As Defendant has raised issues that can only be appropriately addressed in the context of class certification, Plaintiffs have re-filed their Motion for Class Certification simultaneously with this Opposition, and urge the Court to consider both Motions together.

FN12. Plaintiffs concede that if class certification were to be denied in this case, any Plaintiffs seeking to pursue their claims would have to satisfy Rule 8's pleading requirements.

PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES

15. The Office of Compliance, an independent federal Agency that is not a party to this lawsuit, has determined that Plaintiffs went through counseling and mediation, and the Court should give deference to the Office of Compliance's determination that Plaintiffs have exhausted their administrative remedies. Despite the fact that, as noted above, only the class agent need have gone through counseling and mediation in order to satisfy the counseling requirements, the Plaintiffs in this lawsuit participated in three mass counseling sessions which the Office

of Compliance designed to accommodate the large number of Officers seeking counseling. At the end of the statutory 30-day counseling period, 266-270 Plaintiffs were waiting to be scheduled for mediation, and the Office of Compliance conducted a sampling of six mediation sessions.

16. In its *Report to Congress on the Use of the Office of Compliance by Covered Employees* from January 1, 2001 to December 31, 2001, the Office of Compliance reported that 395 employees made requests for counseling, 278 of whom were from the Capitol Police, by far the largest group (70%) of employee cases. *See Report to Congress* at 10 (copy attached as Exhibit 3). Overall, the 395 requests for counseling alleged 667 violations of Title VII, and 547 related to assignments, 548 to discipline, 565 to harassment, 545 to hiring, 557 to promotion, 562 to termination, and 552 to terms and conditions of employment. *See id.* at 11. With respect to mediation, the Office of Compliance reported that 368 cases closed during or after mediation. Since 70 percent of the requests for counseling filed during 2001 were from the Capitol Police, it is fair to conclude that the African American Officers represented a proportional share of the issues reported, which are the issues raised by the Officers in counseling and mediation and subsequently in this Court. In light of the comprehensive Report of the Office of Compliance, it is hard to see how the Capitol Police can claim not to have had notice of the issues of which the Officers were complaining, or how Defendant can suggest with a straight face that the Officers failed to complete counseling and mediation with the Report of the Office of Compliance clearly indicates that they did. *See* Exhibit 3.[FN13]

> FN13. Defendant's arguments are contradicted by their own Exhibits. Defendant's Exhibit J purports to show Officers who did not timely request mediation, but all but one of these Officers is listed as having requested mediation several weeks earlier in Defendant's Exhibit A. (David Nelson is listed in a separate document.)

17. In the instant case, the Plaintiffs cooperated fully with the Office of Compliance throughout the counseling and mediation process. *See* Declaration of Sgt. Sharon Blackmon-Malloy, copy attached as Exhibit 1. The Office of Compliance never told the lead class agent during the counseling and mediation process that she and the other complaining Officers were not being cooperative. *See id.* Plaintiffs were under no obligation to extend the statutory 30-day mediation period (*see* 2 U.S.C. § 1403(c)) and elected instead to receive their Notice of End of Mediation and proceed to U.S. District Court, as is their statutory right. *See* 2 U.S.C. § 1404. As the Ninth Circuit stated in *Jasch v. Potter*, requirements for exhaustion of administrative remedies were not meant to "erect a massive procedural roadblock to access to the courts, but rather to give the agency the opportunity to right any wrong it may have committed." 302 F.3d 1092, 1096 (9th Cir. 2002) (citing *McRae v. Librarian of Congress*, 843 F.2d 1494, 1496 (D.C. Cir. 1988)). The administrative process in this case parallels the regulations and common practice of the EEOC, in which Complainants whose cases are not investigated or settled within the mandated 180-day time period are issued a Notice of Right to Sue and allowed to take their cases to U.S. District Court. *See* 29 C.F.R. § 1601.28(a); *see also* Office of Compliance Manual, section 2, at http://www.compliance.gov/manual/_ sec2.html ("employing offices and covered employees may find it helpful to refer to court decisions interpreting Title VII, as well as the interpretations, opinions, and other materials issued by the Equal Employment Opportunity Commission (EEOC), which is responsible for implementing Title VII"). Employees must cooperate with the administrative agency for the statutory (or regulatory) time period, after which the employee has exhausted his administrative remedies and may proceed to Court. *See* 2 U.S.C. § 1404 (Election of Proceedings).

18. Moreover, it was clear by the end of the counseling and mediation process, in which Defendant failed to make an offer that the Plaintiffs could accept, that the case was not going to be settled in the administrative pro-

cess. As noted above, if the Office of Compliance mediation process was not successful with the first six Plaintiffs, including two class agents, there is little reason to think that it would have been successful with anyone else.[FN14] *See supra* ¶ 11.

FN14. The instant case, in a Court-ordered settlement process for much of 2003, again did not settle.

19. Finally, the Office of Compliance made a clear determination that 270 Plaintiffs had completed mediation when it issued the August 2, 2001 and August 8, 2000 Notices of End of Mediation to those Plaintiffs specifically authorizing them to take their case to U.S. District Court. *See* Declaration of Sharon Blackmon-Malloy, Exhibit 1. As an independent Agency, the Office of Compliance is entitled to substantial deference when it reasonably interprets its own procedures. *See, e.g. Lyng v. Payne,* 476 U.S. 926, 939 (1986); *see also Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984). In this case, once the Office of Compliance has determined that mediation has been completed and issued a Notice of End of Mediation authorizing Plaintiffs to go to U.S. District Court pursuant to 2 U.S.C. § 1404, the Office's determination should be dispositive with respect to whether mediation has been completed.

DEFENDANT'S DISCRIMINATORY PROMOTION SYSTEM

20. In this lawsuit, Plaintiffs seek to challenge Defendant's longstanding discriminatory promotion system, which has systematically resulted in a gross imbalance between the number of African Americans on the force (357 out of a total of 1,221 Officers or 29%) and the number of African Americans who hold supervisory or command positions (32 out of 240, or 13%). Defendant incorrectly argues that the only employees who can contest the Defendant's discriminatory policy and practices in promotions are those who participated in the formal year 2000 promotional process. *See* Motion to Dismiss at 33-35. The Supreme Court has held, in the seminal disparate treatment class action case, *Teamsters v. United States,* that applicants faced with a consistently enforced discriminatory policy may seek relief for non-promotions or non-selections even if they did not apply. 431 U.S. 324, 365 (1977). The Court stated:

Since consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to humiliation of explicit and certain rejection, a per se prohibition of relief to nonapplicants would be manifestly inconsistent with historic purpose of equity to secure complete justice and with duty of courts in civil rights cases to render decree which will so far as possible eliminate discriminatory effects of the past.

Id. The Court further explained that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a *futile gesture,* he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U.S. at 365-366 (emphasis added). Some members of the class, such as named Plaintiff Leonard Ross, had participated in the promotion process in vain for the preceding four promotion exams, and had not been promoted, despite being well qualified. Joint Second Amended Complaint ¶ 37. For Officer Ross, and others like him, to be denied any opportunity for relief because they finally realized that participation in Defendant's sham promotion process was no more than a "futile gesture" would be to condone the perpetuation of Defendant's discriminatory promotion system, in clear contravention of the mandate of the Supreme Court in *Teamsters.* The D.C. Circuit has applied the *Teamsters* theory of the "constructive applicant" in the case of *Milton v. Weinberger,* 64 F.2d 1075, 1078-79 (D.C. Cir. 1981). The District Court for D.C. has likewise applied this principle (also called "deterred non-applicant") in *Mayfield v. Meese,* 669 F. Supp. 1123, 1131-1132 (D.D.C. 1987) and in *Lockamy v. Truesdale,* 182 F. Supp. 2d 26, 35-36 (D.D.C. 2001). Indeed, it is the height of cynicism for Defendant to argue that only those Officers who particip-

ated in 2000, long after the biased nature of the system was clear, can possibly obtain relief for non-promotion. *See* Motion to Dismiss at 33-35.

DISPARATE IMPACT APPLIES IN THIS CASE

21. Defendant argues in its Motion to Dismiss that Plaintiffs have not identified the employment practices at issue with sufficient particularity to maintain a claim for disparate impact. Obviously, this is an issue more appropriately addressed in response to a Motion for Class Certification. Because Defendant in this case seems eager to preempt the Plaintiffs' Motion for Class Certification, Plaintiffs have re-filed their Motion, requesting that the Court consider it simultaneously with Defendant's Motion to Dismiss. Plaintiffs have defined their disparate impact claim as follows: "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." Joint Second Amended Complaint ¶ 2. Plaintiffs have pleaded a combination of anecdotal evidence based on the experiences of the class agents and named class representatives and statistical evidence showing a stark disparity between the proportion of the rank and file that is African American (29%) and the proportion of the higher ranks (13%) that is African American. Joint Second Amended Complaint ¶¶ 20-21. Lead class agent Sharon Blackmon-Malloy had one score reported at the test site - a qualifying score -, but was then given a lower, disqualifying score when the scores were posted for the 2000 Lieutenant's exam. *Id.* ¶ 22. Class Agent Frank Adams' experiences with the promotion process, in which he was consistently ranked low despite his strong objective qualifications, is another example of the many ways in which the subjective system for promotions at the U.S. Capitol Police, despite facial neutrality in many cases, acts to keep African American Officers from advancing. *See* Joint Second Amended Complaint ¶ 28. Officer Braswell, who scored high on the written test and low on the subjective oral exam, is another example. *Id.* ¶ 29. In Officer Haizlip's case, the Capitol Police on one occasion changed the cutoff score before and after the exam - another example of a subjective, facially neutral practice with a disparate impact on African American officer. *Id.* ¶ 30. The overall practice of allowing subjective assessments to govern the administration of the promotion practice works to the detriment of the Department's African American Officers. Moreover, the subjective system of assignments and discipline[FN15] undermines the African American Officers' chances for promotion. Joint Second Amended Complaint ¶ 2.

> FN15. See *also Fields v. U.S. Capitol Police Board,* Civil Action No. 02-1346 (EGS); *Blackmon-Malloy v. U.S. Capitol Police Board,* Civil Action No. 02-1859 (EGS); *Ross v. U.S. Capitol Police Board,* Civil Action No. 02-2481 (EGS); *Fields v. U.S. Capitol Police Board,* Civil Action No. 03-1505 (EGS); *Bolden-Whitaker v. U.S. Capitol Police Board,* Civil Action No. 03-2644 (EGS).

22. There is clear precedent for certifying a class based on theories of both disparate treatment and disparate impact challenging discriminatory subjective promotion practices. As recently as June 27, 2002, Judge Ellen Segal Huvelle of this Court certified the following class:
all African-Americans who are or were salaried employees of Sodexho [] at any time from March 9, 1998 to the present, and who have held or sought to obtain (1) an upper-level managerial, supervisory, or professional position (above-the-unit or comparable level of responsibility) or (2) a job that would lead to such a position, and who have been, continue to be, or may in the future be adversely impacted by Sodexho's racially discriminatory policies and practices affecting promotions or advancement.

McReynolds v. Sodexho Marriott Services, Inc., 208 F.R.D. 428, 433 (D.D.C. 2002). The Court proceeded to analyze the case under both disparate impact and disparate treatment prior to certifying the class under Rule

23(b)(2) for purposes of liability. *Id.* at 440. The Court found that Plaintiffs had made
a 'significant showing,' [citation omitted] that Sodexho's lack of any uniform promotion policy or guidelines has had a disparate impact on the promotion of African-American employees, and has enabled or even fostered an environment at the company in which officials intentionally discriminate against blacks by denying them promotions to upper-level managerial positions.

Id. at 441 (citing *Hartman*, 19 F.3d at 1472). The appropriate procedure for testing the viability of theories of disparate treatment and disparate impact is clearly a Motion for Class Certification. Because the Plaintiffs in the instant case have pleaded facts with sufficient specificity to match the claims of the class certified in *McReynolds*, it is appropriate to decide and grant Plaintiffs' Motion for Class Certification which is being re-filed with this Opposition.

DEFENDANT'S SPECIFIC ALLEGATIONS

23. Just as the premises of Defendant's Motion to Dismiss are fundamentally flawed, so are its specific arguments that Plaintiffs' Complaint must be dismissed.

Rule 12(b)(1)

24. Defendant's repeated mantra that the Court lacks subject matter jurisdiction in this case has been exhaustively discussed above. *See supra* at ¶¶ 12 to 16; Motion to Dismiss at 12. So long as the class agent satisfies the jurisdictional prerequisites of counseling and mediation, she can satisfy them on behalf of the class. *See supra* at ¶¶ 10-12. Moreover, the Office of Compliance has determined that at least 270 Plaintiffs completed counseling and mediation. *See* Exhibit 3.

Rule 12(b)(6)

25. Defendant suggests that some claims may have to dismissed for untimeliness in seeking counseling and mediation. Motion to Dismiss at 13-14. This issue is likewise addressed by the doctrine of vicarious exhaustion (*see supra* at 11) and will be moot if the class is certified. Any determination regarding timely participation in counseling and mediation in individual cases other than the class agents should be deferred until after a decision is rendered on class certification.[FN16] *See Harris v. Office of the Architect of the Capitol*, 16 F. Supp. 2d 8 (D.D.C. 1998). In the case of class agent Duvall Phelps, Defendant is simply mistaken in arguing that Mr. Phelps did not initiate counseling in a timely fashion, when in fact Mr. Phelps attended the Office of Compliance's group counseling session on April 28, 2001. *See* Declaration of Duvall W. Phelps, copy attached as Exhibit 2.

> FN16. Plaintiffs further note that timeliness in initiating counseling is not a jurisdictional issue under the CAA, and is subject to equitable tolling, waiver, and estoppel. *See* Thompson v. Capitol Police Board, 120 F. Supp. 2d 78, 82 (D.D.C. 2000).

Adverse Action Requirement

26. Defendant's reliance on *Brown v. Brody*, which dealt with an individual case of employment discrimination, is of limited value in analyzing the class allegations in the instant Complaint. 199 F.3d 446 (D.C. Cir. 1999). Defendant relies on *Brody* for the proposition that lateral transfers, undesirable assignments, disciplinary warnings, and poor performance evaluations do not constitute adverse actions. Motion to Dismiss at 14-17. With a bit of sleight of hand, Defendant discusses Plaintiffs' allegations of a hostile work environment without considering

that these actions - regardless of whether they are adverse actions in themselves - can certainly contribute to an overall hostile work environment. *See e.g. Faragher v. City of Boca Raton,* 524 U.S. 775, 786-87 (1998) (conduct must "alter the conditions of employment and create an abusive working environment"). Moreover, Plaintiffs have alleged in this case a discriminatory system that leads to non-promotions, discipline, and terminations, all of which are clearly adverse actions. *See, e.g.*, *Brody,* 199 F.3d at 457. The Plaintiffs have likewise alleged that the Department's systematic practice in issuing unfavorable transfers, undesirable assignments, disciplinary warnings, and poor performance evaluations form part of the subjective practices that cripple African American Officers' chances to advance in the Department, or serve as a predicate for forcing these Officers out of the Department. *See* Joint Second Amended Class Complaint ¶ 2. As such, they should certainly be considered part of the discriminatory system to which Plaintiffs are subjected.

Continuing Violations

27. Without specifically addressing which acts it believes to be excluded for timeliness reasons, Defendant recites the holding in *National Railroad Passenger Corp. v. Morgan* that one act contributing to a hostile work environment must take place within the period of limitations. Motion to Dismiss at 17-18 (citing 536 U.S. 101, 117 (2002)). Defendant takes pains to identify termination, failure to promote, denial of transfer, or refusal to hire as "discrete acts" that may not be made timely as part of a hostile work environment. Motion to Dismiss at 18 (citing *Morgan,* 536 U.S. at 114). The satisfaction of the requirements for counseling and mediation for these actions by the class agents through "vicarious exhaustion" is discussed above. *See supra* at ¶ 11.

Jurisdictional Prerequisites

28. Defendant again rehashes from pages 18-19 their reasons why this Court does not have jurisdiction over Plaintiffs' Complaint, which are answered above. *See supra* at ¶¶ 10 to 12.

Counseling and Mediation

29. Plaintiffs' Complaint pleads with specificity the issues over which the class agents and named class members sought counseling and mediation upon which they base their present Complaint. As stated above, this is sufficient to satisfy the jurisdictional and notice requirements for a class action. *See supra* at ¶¶ 10-13.

Officers Whose Employment Ended before Enactment of CAA

30. Defendant alleges that 17 Officers are not included in the class because their employment ended before enactment of the CAA. This is an issue more appropriately dealt with after sufficient discovery has taken place to verify these allegations.

Plaintiffs Who Did Not Request Counseling

31. Under the doctrine of vicarious exhaustion, so long as the class agents have been through Office of Compliance counseling and mediation, they satisfy the jurisdictional requirements for the other class members if the class is certified. *See supra* at 11.

32. Defendant also makes a false claim with respect to named class member Regina Bolden-Whitaker, who allegedly "failed to appear for scheduled mediation [] on July 25." *See* Motion to Dismiss at 28; Declaration of Toby R. Hyman, Government Exhibit K, at 2. As Defendant's attorney Frederick M. Herrera acknowledges, Officer Bolden-Whitaker was unable to attend her mediation because she was ill. *See* Declaration of Frederick M.

Herrera, Government Exhibit L at 2. In fact, Officer Bolden-Whitaker was out on approved sick leave recovering from major surgery to treat uterine fibroids. *See* Declaration of Regina Bolden-Whitaker, copy attached as Exhibit 4.

Class Allegations and Subject Matter Jurisdiction

33. Defendant again argues the question of subject matter jurisdiction over class complaints on pages 25 to 27 of its Motion, as if sheer repetition would render its argument more persuasive. As addressed above, Plaintiffs do not "ignore the doctrine of sovereign immunity and Fed. R. Civ. P. 82," they merely rely on the well-settled law of class actions. *See supra* at ¶¶ 10 to 12. As Defendant elsewhere acknowledges (Motion to Dismiss at 23), the time limits in the CAA are *not* jurisdictional, contrary to what Defendant implies on page 26 of its Motion to Dismiss. *See Thompson v. Capitol Police Board,* 120 F. Supp. 2d 78, 83 (D.D.C. 2000). Defendant's claim that Plaintiffs seek to expand the Court's jurisdiction through the Rules of Civil Procedure, in violation of Rule 82, is a complete red herring. Motion to Dismiss at 26. As stated above, Rule 23 provides a procedural mechanism for adjudicating disputes of which Plaintiffs are entitled to avail themselves if they meet the requirements of the Rule. Moreover, pursuant to *Sibbach v. Wilson,* Rule 23 clearly applies in this instance. 312 U.S. 1; *see supra* ¶ 12.

Alleged Failure to Exhaust

34. As argued above, the class agents are able to satisfy the requirements for exhaustion of administrative remedies on behalf of the class if the class is certified. *See supra* at 11. Moreover, the Office of Compliance sent Notice of End of Mediation to 270 Plaintiffs and reported in its annual report (copy attached as Exhibit 3) that 278 Capitol Police Officers engaged in counseling and mediation in the relevant year. The Court should give deference to the Office of Compliance's finding that these Plaintiffs had completed mediation. *See Declaration of Sharon Blackmon Malloy; see, e.g., Lyng v. Payne,* 476 U.S. 926, 939 (1986); *Chevron v. Natural Resources Defense* Council 467 U.S. 837 (1984). It is a blatant falsehood that Plaintiffs did not approach mediation in good faith or that they failed to cooperate with the Office of Compliance, and it is a particularly brazen falsehood from a Defendant that has not been able to resolve a single Officer's case. *See* Declaration of Sharon Blackmon-Malloy, Exhibit 1. Moreover, it is untrue that Sgt. Blackmon-Malloy presented her attorney with a "non-negotiable" list of demands at her mediation as stated by Defendant's attorney Jean Manning in her letter dated August 1, 2001, to the Office of Compliance, or that she did refused to discuss her case as alleged by Defendant's attorney Frederick M. Herrera in his Declaration. *See* id. *See also* Motion to Dismiss, Defendant's Exhibits L-M.

Year 2000 Promotion Process

35. Defendant simply misstates the law when it claims that only Plaintiffs who participated in the 2000 promotion process can bring non-promotion claims. *See Teamsters,* 431 U.S. 324, 365 (1977); *see also supra* ¶ 20.

Allegations of Class Agents and Named Class Members Sharon Blackmon-Malloy

36. Defendant argues that the U.S. Capitol Police should be absolved of responsibility for the mis-scoring of Sgt. Blackmon-Malloy's promotional exam because the administration of the test was performed through Defendant's agent, the Fields Consulting Group. Common law agency principles dictate that the U.S. Capitol Police cannot escape liability for the acts of their agent, under their exclusive control, doing the work it is employed to perform, within the time allotted, and in the service of the Capitol Police Board. *See* Restatement (Second) of

Agency § 228 (1957).

37. As for the repeated harassing disciplinary notes to which Sgt. Blackmon-Malloy has been subjected, not only are they part of a hostile work environment, but they exemplify the kind of subjective practices that Defendant uses to make African American Officers less eligible for promotion.

38. Defendant's witnesses also contradict themselves in their discussion of confidential mediation sessions with Sgt. Blackmon-Malloy. Toby R. Hyman admits that Sgt. Blackmon-Malloy engaged in mediation. Declaration of Toby R. Hyman, Government's Exhibit K, at 2. Attorney Frederick M. Herrera admits that Sgt. Blackmon-Malloy engaged in mediation but claims that she "did not want to discuss her case nor did she discuss her case." Declaration of Frederick M. Herrera, Government's Exhibit L, at 2. Senate Chief Counsel Jean Manning, in correspondence to the Office of Compliance, states that Sgt. Blackmon-Malloy presented the Department with a "non-negotiable" list of demands. Letter dated August 1, 2001, from Jean Manning to William W. Thompson, Government's Exhibit M, at 1.

Dale Veal

39. Contrary to Defendant's argument, the ongoing denial of assignments to Sgt. Veal is not a "discrete act" and should be subject to the continuing violation doctrine.

Vernier Riggs

40. Sgt. Riggs was present when the complaining Officers submitted their request for counseling to the Office of Compliance on April 12, 2001. The next day, she was subjected to retaliation when her supervisor interrogated her over the uniform she was wearing. Sgt. Riggs attended mass counseling on April 28, 2001, and thus her complaint is timely.

Luther Peterson

41. Defendant acknowledges that Officer Peterson states a disparate treatment claim. Moreover, the discipline he received over discharge of his firearm exemplifies the discriminatory discipline meted out to African American officers generally, and its application should not be limited to Officers accused of firearms violations. As for the CP-550 performance note, not only does this exemplify the kind of harassment to which African American Officers are subjected, but it also diminishes Officer Peterson's chances for future promotion.

Duvall Phelps

42. Contrary to Defendant's assertions, Plaintiff Phelps timely initiated counseling. *See* Declaration of Duvall W. Phelps, copy attached as Exhibit 2.

Larry Ikard

43. Officer Ikard took the 1999-2000 promotional exam and was on the list for 15 months. He timely attended counseling in April 2001 in response to Defendant's denial of promotion. Officer Ikard complained to USCP Chief James Varey about the unfairness of the promotion exam, and the Chief responded in February 2001.

Frank Adams

44. Lt. Adams' primary claim is for a hostile work environment, for which he timely filed a request for counseling on April 12, 2001. Conduct to which Lieutenant Adams was subjected included use of the word “huk” - a code word for “nigger” at the Police Department - in a Patrol Division's Incidental book in November 2000; the department's refusal to take action on Lt. Adams' attempt to discipline a white Officer for insubordination on November 11, 2000; a frivolous investigation of Lt. Adams for telling a white Officer to “have a nice day” on November 16, 2000; the removal of Lt. Adams without cause from an investigation of a white Officer accused of violating a citizen's rights; orders from a white supervisor to change documentation of insubordination and another incident in a white K-9 Officer's personnel jacket; the department's refusal to take action after Lt. Adams attempted to discipline a white Officer on January 7, 2001; the department's publication of a false report of an incident involving Lt. Adams and a white Officer on March 30, 2001, in an attempt to publicly humiliate Lt. Adams. Lt. Adams complained to USCP Chief James Varey about the racially hostile work environment on December 10, 2000, but Chief Varey did not take any corrective action.

Robert Braswell

45. Officer Braswell is still able to assert a non-promotion claim even though he declined to make a “futile gesture” by participating in the year 2000 promotion process. *See Teamsters,* 431 U.S. at 365.

Clarence Haizlip

46. Officer Haizlip is still able to assert a non-promotion claim even though he declined to make a “futile gesture” by participating in the year 2000 promotion process. *See Teamsters,* 431 U.S. at 365.

Dianne Willis

47. Officer Willis is still able to assert a non-promotion claim even though she declined to make a “futile gesture” by participating in the year 2000 promotion process. *See Teamsters,* 431 U.S. at 365.

McArthur Whitaker

48. Defendant is incorrect in its allegation that Officer Whitaker's request for counseling is untimely. Officer Whitaker received a final determination from the Chief on or about October 28, 2000, that there would be a permanent record of his conduct in continuing to rides his motorcycle, even though some other disciplinary measures were rescinded. Officer Whitaker timely sought counseling over the Chief's determination on April 12, 2001.

Arnold Fields

49. The case to which Defendant refers (Civil Action 02-1346) has been consolidated with this case, and Officer Fields' allegations should therefore not be dismissed. In addition, an unsatisfactory performance evaluation is among the devices that the Defendant systematically uses to deny African American Officers promotions.

Regina Bolden-Whitaker

50. Officer Bolden-Whitaker was unable to attend her mediation session with the Office of Compliance scheduled for July 23, 2001, because she was recovering from major surgery to treat her uterine fibroids. The U.S. Capitol Police knew that she was unable to attend mediation because they approved her sick leave from July 10, 2001 to July 29, 2001, and she had turned in her gun and other items to her supervisor. *See* Declaration of Re-

gina Bolden-Whitaker, Exhibit 4 hereto.

51. Subsequently, Officer Bolden-Whitaker timely requested counseling in September 2001 for a new retaliation complaint after the Capitol Police tried to require her to wear body armor even though she was unable to do so because of her medical condition, uterine fibroids. Her white supervisors had placed her on restricted duty in May 2001, unlike white Officers with similar duties, even though she was otherwise fully capable of performing her duties. These actions were taken in reprisal for her previous complaint in April 2001 over discriminatory denial of an assignment (bus driver) for which she had applied, plus other issues. This previous complaint was the one in which she was physically unable to attend mediation. *See id.*

Reginald Waters

52. Officer Waters is still able to assert a non-promotion claim even though he declined to make a "futile gesture" by participating in the year 2000 promotion process. *See Teamsters*, 431 U.S. at 365.

Willie Johnson

53. Officer Johnson's undesirable assignment to the parking lot in retaliation for voicing complaints of race discrimination exemplifies yet another way in which Defendant minimizes the promotional chance of its African American Officers and intimidates Officers for exercising their rights.

Leonard Ross

54. Officer Ross is still able to assert a non-promotion claim even though he declined to make a "futile gesture," like so many of his African American colleagues, by participating in the year 2000 promotion process. *See Teamsters*, 431 U.S. at 365.

Richard Webb

55. Officer Webb took the 1999-2000 promotion exam and he has a timely claim for non-promotion. The "bad assignments" and "nit-picking," if proven to be sufficiently severe and pervasive and to alter the conditions of his work, constitute actionable harassment. Officer Webb complained to USCP Chief James Varey about the unfairness of the promotion process, and received a response from the Chief in February 2001.

Gary Goines

56. Officer Goines took the 1999-2000 promotion exam and timely participated in counseling.

Robert Spratt

57. The lateral transfer to which Officer Spratt was subjected exemplifies the discriminatory and retaliatory system by which the Police Department attempts to intimidate its Officers and by which it damages African American Officers' chances for promotion.

Brent Mills

58. Officer Mills notified Deputy Chief Christopher McGaffin on December 15, 2000, that he had proof that he had been denied a promotion because the Department had changed Sgt. Allen's retirement date from September 28, 2000 to October 1, 2000. Officer Mills' realization that he had been discriminated against, after he investig-

ated the events by speaking with Sgt. Allen and Lowell in personnel, is clearly within 180 days of April 12, 2001.

Earl Allen

59. Sgt. Allen participated in counseling on April 28, 2001, after having learned in October 2000 that he and Officer Mills had been discriminated against. Sgt. Allen has grounds for equitable tolling if his counseling is not found to be timely, since he retired in order to care full-time for his gravely ill daughter, which prevented his pursuing his discrimination claim. *See* Declaration of Earl Allen, copy attached as Exhibit 5. Moreover, Officer Allen's requirement that he seek counseling is satisfied by the class agents under the doctrine of vicarious exhaustion. *See supra* at 13.

Derrick Macon

60. Officer Macon is still able to assert a non-promotion claim even though he declined to make a "futile gesture," like so many of his African American colleagues, by participating in the year 2000 promotion process. *See Teamsters*, 431 U.S. at 365.

Mary Jane Rhone

61. Officer Rhone's requirement that she seek counseling is satisfied by the class agents under the doctrine of vicarious exhaustion. *See supra* ¶ 13.

Thomas Spavone

62. Officer Spavone is still able to assert a non-promotion claim even though he declined to make a "futile gesture," like so many of his African American colleagues, by participating in the year 2000 promotion process. *See Teamsters*, 431 U.S. at 365. Officer Spavone's requirement that he seek counseling is satisfied by the class agents under the doctrine of vicarious exhaustion. *See supra* at 13.

UNNAMED PLAINTIFFS

63. The claims of the individuals about which Defendant contends to have no specific information will be represented by the class agents and named Plaintiffs once the class is certified. Moreover, since the class has been through counseling and mediation, Defendant is on notice of their complaints.

DISPARATE IMPACT CLAIMS

64. As discussed above at length (*see supra* at 29), Plaintiffs have properly pleaded a Complaint based on both disparate treatment and disparate impact, similar to other cases certified by this Court.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested.

CONCLUSION

For all these reasons, Defendants' Motion to Dismiss should be DENIED. An appropriate Order accompanies this Opposition.

February 5, 2004

Respectfully submitted,

/s/

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February 5, 2004

Sharon BLACKMON-MALLOY, et al., Plaintiffs, v. UNITED STATES CAPITOL POLICE BOARD, Defendant.
2004 WL 5489523 (D.D.C.) (Trial Motion, Memorandum and Affidavit)

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