UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHARON BLACKMON-MALLOY, et al.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1-2221 (EGS)
UNITED STATES CAPITOL POLICE BOARD,	)	
Defendant.	)	

MEMORANDUM OPINION

The plaintiffs in this case allege that they suffered discrimination and retaliation in violation of the Congressional Accountability Act, 2 U.S.C. § 1301, *et seq.* Pending before the Court are: (1) the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation, which suggests that this Court should grant the defendant's motion to dismiss most of the plaintiffs and claims in this case; and (2) the plaintiffs' motion for leave to file a Fifth Amended Complaint. Upon consideration of the motion for leave to file an amended complaint, the response and reply thereto, the applicable law, and the entire record, the Court will **DENY** the motion. The Court therefore proceeds to consider defendant's motion to dismiss, the response and reply thereto, the Magistrate Judge's Reports and Recommendations, and the objections and replies thereto. Upon consideration of these materials, as well as the applicable

law and the entire record, the Court will **ADOPT IN PART AND REJECT IN PART** Magistrate Judge Facciola's Reports and Recommendations and **GRANT IN PART AND DENY IN PART** defendant's motion to dismiss. With regard to Officer Macon, who is proceeding *pro se* in this matter, the Court will **ADOPT** Magistrate Judge Facciola's Supplemental Report and Recommendation and **GRANT** defendant's motion to dismiss his claims. As explained below, the Court will also **STAY** the effectiveness of this ruling and **WITHHOLD** issuance of any Final Order regarding these pending motions and objections, until such time as the various attorney-representation issues that are pending in this case have been resolved.

I. Background

A. Plaintiffs Pursue Administrative Proceedings With the Capitol Police Board.

The Court of Appeals for the District of Columbia Circuit has summarized the administrative proceedings that took place in this matter:

> [B]etween April 12 and May 15, 2001, officers from the United States Capitol Black Police Association delivered materials to the Office[of Compliance], on behalf of "approximately 200 individual Capitol Police officers, former officers, and former recruits" (collectively "officers"), asserting that the Police Board and others had violated 2 U.S.C. § 1311, which made applicable protections under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and Title I of the Americans with Disabilities Act of 1990. The materials identified Charles Jerome Ware, Esq., as their attorney.

By letter of April 13, the Executive Director of the Office informed the Association and Attorney Ware of the [Congressional Accountability Act's] counseling and mediation requirements and advised that he had accepted the materials submitted as "requests for counseling by each and every individual named in the material." Ltr. from William W. Thompson II to Charles Jerome Ware at 2 (Apr. 13, 2001). Counseling was conducted in three mass counseling sessions that took place on April 28, April 30, and May 5, 2001. The Office issued to the complainants written "Notifications of End of Counseling Period" on May 16 and June 15, 2001, based on the date counseling was requested.

On June 5, 2001, Attorney Ware requested mediation "on behalf of all the employees he represent[s]." Ltr. From Charles Jerome Ware to William W. Thompson II at 1. On June 12, the Office appointed Herbert Fishgold and Marvin Johnson as mediators for the cases. Additional officers requested mediation on June 27, 2001. On June 28, the parties jointly requested extension of the mediation period to October 1, 2001, but the Executive Director extended the period only to August 1, explaining that "[i]f the parties are engaged in serious mediation efforts, further extensions will be reviewed favorably." Notice of Extension of Mediation (June 29, 2001). In mid-July, Attorney Ware provided further information about approximately 76 of his clients. Upon agreement of the parties to proceed in alphabetical order, multiple mediation sessions were conducted on July 23 and 25, 2001. Attorney Ware's records show various telephone calls and meetings with the mediators in June and July, and by sworn declaration he stated that prior to August 2, 2001, he had spoken on behalf of all his clients with Office representatives, the mediators, and counsel for the Police Board and had represented selected officers in joint mediation sessions conducted by the Office. Ware Decl. May 21, 2004.

On August 2, 2001, the Office sent Attorney Ware and the Police Board a "NOTICE OF END OF MEDIATION" advising them of the dates of mediation and that the matters underlying the requests for mediation were not resolved. The notice also advised that the officers had to make an election pursuant to section 1404 to proceed under sections 1405 or 1408 "not later than 90 days, but no

> sooner than 30 days, after [they] ha[d] received this notice." The notice provided further details about proceedings under section 1405. Attached to the notice was a five-page single-spaced listing of the names and case numbers of the officers to whose claims the notice applied. On October 2, 2001, the Office certified, through its custodian of records, the dates of the requests for counseling and mediation, the dates the notices of the ends of those periods were mailed, and the dates receipt of the notices was acknowledged.

Blackmon-Malloy v. U.S. Capitol Police Bd., 575 F.3d 699, 703–04 (D.C. Cir. 2009).

B. Plaintiffs File a Putative Class Action Against the Capitol Police Board and Quickly Encounter Representational Difficulty.

On October 29, 2001, Mr. Ware — apparently serving as counsel for all plaintiffs — filed this lawsuit. *See* Compl., ECF No. 1. The Complaint named over 250 individuals — current and former officers of the Capitol Police — as plaintiffs who intended to pursue a variety of claims under the Congressional Accountability Act, 2 U.S.C. § 1301, *et seq. See id.* at 1–7, 9. Those claims included allegations of racial discrimination in hiring, promotions, training opportunities, and termination of employment; disparate treatment/hostile work environment; gender discrimination in hiring and promotions, training opportunities, assignments, discipline, and work assignments; sexual harassment; "abusive discharge"; and intentional infliction of emotional distress. *See id.* at 20–40.

Soon after the case was filed, Mr. Ware withdrew as counsel for the plaintiffs. *See* Notice of Withdrawal, ECF No. 7 at 1. At this point, some confusion ensued about who was representing the plaintiffs. Attorneys from the law firm of Gebhardt & Associates, LLP filed a motion for class certification and a First Amended Complaint on behalf of the plaintiffs. *See* First Am. Compl., ECF No. 9; Mot. to Certify Class, ECF No. 10. Around the same time, Nathaniel Johnson filed two "Amended Complaints," seemingly on behalf of the same putative class. *See* Am. Compl., ECF No. 12; Second Am. Compl., ECF No. 13. On June 28, 2002, the Gebhardt Attorneys sought to disqualify Nathaniel Johnson from acting as class counsel, on the grounds that Mr. Johnson had allegedly failed to comply with certain filing deadlines and otherwise "fail[ed] to demonstrate the experience and qualifications necessary to serve as a class counsel." Mot. to Disqualify Johnson, ECF No. 18 at 1. Mr. Johnson responded that he had in fact adequately represented the plaintiffs through the filing of amended complaints. *See* Opp'n to Mot. to Disqualify, ECF No. 22.

On July 10, 2002, the Capitol Police Board filed its first motion to dismiss the various complaints. *See* First Mot. to Dismiss, ECF No. 20. The Capitol Police argued, *inter alia*, that the plaintiffs had largely failed to exhaust their administrative remedies and otherwise failed adequately to

describe their claims. *See id*. That same day, the Capitol Police moved to stay briefing of the plaintiffs' motion for class certification pending resolution of the motion to dismiss. *See* Mot. to Stay, ECF No. 19. Due to the ongoing representational issue, both the Gebhardt Attorneys and Mr. Johnson filed oppositions to the motion to dismiss. *See* Gebhardt Opp'n, ECF No. 28; Johnson Opp'n, ECF No. 29.

On September 16, 2002, the Court entered an Order addressing various pending issues. *See* Order, ECF No. 31. First, the Court denied without prejudice the pending motion for class certification, in light of the need to resolve first the pending motion to dismiss. *Id.* at 1. The Court then denied the motion to preclude Mr. Johnson from serving as Class Counsel because no class had yet been certified. *See id.* at 2. In an effort to clarify the representational conflict, the Court directed Mr. Johnson to explain precisely "the parameters of his current representation" and to "identif[y] the individual plaintiffs whom he represents and provide[] evidence of those plaintiffs' consent to his representation of them in this lawsuit." *Id.* The Court further ordered Mr. Johnson to show cause why the amended complaint he had filed should not be stricken for failure to comply with Federal Rule of Civil Procedure 15(a). *See id.* The Court later referred the plaintiffs to mediation before

Magistrate Judge John M. Facciola for resolution of the representational dispute. *See* Order, ECF No. 38 at 1.

On January 14, 2003, the plaintiffs submitted a notice that they had resolved their representational dispute, that "[t]he Plaintiffs in this action are those named in the original Class Action Complaint filed on October 29, 2001, and that "[a]ttorney Gebhardt is the lead counsel for all Plaintiffs, and attorney Johnson is the co-lead counsel for all Plaintiffs." Notice, ECF No. 46 at 2. The Court then denied without prejudice the Capitol Police Board's first motion to dismiss, in light of the need for the plaintiffs to submit an amended complaint. *See* Order, ECF No. 48 at 1.

C. The Plaintiffs File a Second Amended Complaint.

The plaintiffs — jointly represented by the Gebhardt Attorneys and Mr. Johnson — filed a Second Amended Complaint on January 29, 2003. *See* Second Am. Compl., ECF No. 51. The Second Amended Complaint — unlike the original complaint — did not name all 250 plaintiffs, but instead named seven apparent class representatives, arguing that they would represent "all African-American Officers employed by the United States Capitol Police Board (including the named plaintiffs in the original complaint), at any time from November 4, 1998 to the date of the Court's order granting relief . . . in this action." *Id.* ¶ 1. The Second Amended Complaint continued to allege racial

discrimination "in such personnel decisions as promotions, other selections, work assignments, discipline, and termination," as well as "retaliat[ion] against African-American Officers who oppose discrimination." *Id.* ¶ 2. The Second Amended Complaint ceased to mention many of the other claims for relief that had been raised in the initial complaint, however. *See id*. The Second Amended Complaint also contained a blanket assertion that "[t]he Plaintiff Class Agents have exhausted their administrative remedies by completing counseling and mediation with the Office of Compliance as required. Pursuant to 2 U.S.C. §§ 1402, 1403, and 1404(2), the original Complaint was filed in this case on October 29, 2001, within 90 days of the end of mediation, which had occurred on August 2, 2001." *Id.* ¶ 7.[1]

The case spent much of 2003 in settlement discussions. On December 5, 2003, the Court held a status hearing, after which the case was returned to the Court's active calendar and the Court set a schedule for the briefing of a renewed motion to

[1] Soon after the Second Amended Complaint was filed, the Court granted the parties' request to consolidate three separate cases involving individual claims into this case. *See* Order, ECF No. 52; Order, ECF No. 53. Those cases each alleged retaliation in response to the plaintiff's participation in the underlying putative class action: *Arnold Fields v. Capitol Police Board*, No. 2-1346 (D.D.C. filed July 2, 2002); *Sharon Blackmon-Malloy v. Capitol Police Board*, No. 2-1859 (D.D.C. filed Sept. 20, 2002); *Leonard Ross v. Capitol Police Board*, No. 2-2481 (D.D.C. filed Dec. 17, 2002).

dismiss. *See* Minute Order of December 5, 2003. On December 22, 2003, the Capitol Police Board moved to dismiss the Second Amended Complaint, renewing the argument that the plaintiffs had failed to exhaust their administrative remedies. *See* Second Mot. to Dismiss, ECF No. 64.

D. The Court Grants the Second Motion to Dismiss.

On September 30, 2004, the Court granted the Capitol Police Board's motion to dismiss. *See Blackmon-Malloy v. U.S. Capitol Police Bd.*, 338 F. Supp. 2d 97 (D.D.C. 2004)(*"Blackmon-Malloy I")*. The Court first held that the administrative-exhaustion requirements of the Congressional Accountability Act were jurisdictional in nature and therefore the failure to comply with those requirements could not be excused based upon doctrines such as equitable tolling or vicarious exhaustion. *See id.* at 101–06. Relatedly, the Court held that these jurisdictional limitations constituted conditions to the United States's waiver of sovereign immunity: "[T]he timeliness requirement is a condition of waiver of sovereign immunity—failure to comply is fatal." *Id.* at 104 (internal citation omitted). The Court discussed in detail the requirements for demonstrating a plaintiff's compliance with these jurisdictional requirements. *See id.* at 107–09. To begin, because the plaintiffs bear the burden of establishing subject-matter jurisdiction, the Court held that "[p]laintiffs' bare

allegations that they have 'completed counseling and mediation with the Office of Compliance as required' are insufficient to establish subject matter jurisdiction in the face of a challenge." *Id.* at 107 (quoting Second Am. Compl., ECF No. 51 ¶¶ 7, 11).

The Court next found that both the counseling and mediation requirements of the Congressional Accountability Act required that each plaintiff appear in-person for the counseling and mediation sessions. *See id.* at 107–08. Finally, the Court concluded that the notices issued by the Congressional Office of Compliance regarding the end of counseling and mediation did not necessarily mean that mediation or counseling were complete for purposes of calculating the applicable deadlines. *See id.* at 107-108.

The Court also decided a number of other issues raised in the defendant's motion to dismiss:

- *First*, the Court briefly analyzed the adverse-employment-action requirement applicable to claims under the Congressional Accountability Act. *See id.* at 106–07. This analysis revealed three deficiencies in the claims of certain plaintiffs: (1) "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 terms, conditions, or privileges of her employment or her future employment opportunities"; (2) "a claim of an undesirable assignment, without any effect on salary, benefits, or grade, is similar to claims regarding lateral transfers, and thus does not constitute adverse action"; and (3) "formal criticisms or reprimands, without additional disciplinary action

such as a change in grade, salary, or other benefits do not constitute adverse employment actions." *Id.* at 106 (internal citation omitted). The Court declined to opine on whether such events could form part of a hostile-work-environment claim. *See id.* at 107.

- *Second*, the Court held that it "cannot exercise jurisdiction over plaintiffs whose employment ended prior to the effective date of the CAA—January 26, 1996." *Id.* at 110. Although the plaintiffs had argued that discovery may be required to "verify" allegations that certain individuals listed in the Second Amended Complaint were terminated prior to January 26, 1996, the Court rejected this argument: "Because plaintiffs bear the burden of persuasion to establish subject matter jurisdiction in the face of a Federal Rule of Civil Procedure 12(b)(1) challenge and plaintiffs have offered no justification for why these dates are not undisputed and easily discernable, these plaintiffs' claims shall be dismissed." *Id.*

- *Third*, the Court held that "[o]nly plaintiffs who participated in the 2000 Promotion Process have potentially viable promotion claims." *Id.* This was so due to the 180-day deadline for seeking counseling after the occurrence of a discrete act of discrimination: "[W]hile a plaintiff can seek counseling for a hostile work environment claim under the CAA within 180 days of an act by defendant that contributed to the hostile environment, a plaintiff must seek counseling regarding a discrete act of discrimination or retaliation within 180 days of the date the act actually occurred." *Id.* A failure-to-promote challenge to the 2000 Promotion Process "would accrue at the time plaintiffs 'finally realized' that participation in the 2000 process was a futile gesture," which, in this case would have been August 1, 2000—"the participation opt-in date for both the Sergeant's and Lieutenant's exam." *Id.* at 111, 112. This came more than 180 days prior to any of the plaintiffs' counseling sessions, so "only those officers who participated in the 2000 promotion process"—and therefore had claims that would accrue later, upon their nonselection—"may challenge the process." *Id.* at 112.

- *Fourth*, the Court dismissed plaintiffs' "[n]on-timely disparate impact claims." *Id.* Plaintiffs had alleged that the defendant "'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.'" *Id.* (quoting Second Am. Compl., ECF No. 51 ¶ 53). The plaintiffs, however, did "not allege[] that the 'excessively subjective' system had a disparate impact on African Americans within 180 days of the first request for counseling"—"[w]ithout a timely request for counseling and mediation, these claims also fail." *Id.*

The Court concluded its Opinion by noting that "[a]t this time, it is unclear which, if any, of plaintiffs' claims remain viable." *Id.* at 113. Accordingly, the Court granted the motion to dismiss, but permitted the plaintiffs to move for reconsideration to address "those plaintiffs' claims that conform to the timely counseling and mediation requests as explained in this Memorandum Opinion." *Id.* The Court directed that any such motion "shall clearly state (and provide appropriate documentation for) the allegedly discriminatory act, the date the act occurred, the date counseling was requested, the date the claimant attended counseling, the date mediation was requested, and the date a mediation session was attended." *Id.* The Court further directed plaintiffs in the consolidated cases to file a similar pleading. *See id.*

E. Plaintiffs Move for Reconsideration; Magistrate Judge Facciola Recommends Denying the Motion and the Court Agrees.

On January 14, 2005, the plaintiffs filed a motion for reconsideration, in accordance with the Court's direction. *See*

Mot. to Reconsider, ECF No. 96. The plaintiffs argued that "at least 19 Officers timely complained of adverse actions . . . and 19 Officers timely complained of hostile work environments in which one or more adverse actions or hostile incidents occurred within 180 days of their request for counseling at the Office of Compliance," that plaintiffs "made timely claims challenging the year 2000 promotion process, and that they have made timely complaints and properly exhausted administrative remedies." *Id.* at 3.[2] On August 4, 2005, the Court referred the motion for reconsideration to Magistrate Judge Facciola for preparation of a Report and Recommendation. *See* Minute Order of August 4, 2005.[3]

On March 19, 2007, Magistrate Judge Facciola issued a Report and Recommendation. *See Blackmon-Malloy v. U.S. Capitol Police Bd.* ("*Blackmon-Malloy II*"), No. 1-2221, 2007 WL 841019 (D.D.C.

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[2] At this time, the Court, *sua sponte*, consolidated six additional separate cases involving individual claims into this case. *See* Order, ECF No. 108. Those cases were: *Arnold Fields v. Capitol Police Board*, No. 3-1505 (D.D.C. filed July 10, 2003); *Derrick Macon v. Capitol Police Board*, No. 3-1592 (D.D.C. filed July 25, 2003); *Bolden-Whitaker v. Capitol Police Board*, No. 3-2644 (D.D.C. filed Dec. 29, 2003); *Kendrick Young v. Capitol Police Board*, No. 4-320 (D.D.C. filed Feb. 26, 2004); *Frank Adams v. Capitol Police Board*, No. 4-943 (D.D.C. filed June 9, 2004); *Frank Adams v. Capitol Police Board*, No. 5-491 (D.D.C. filed Mar. 10, 2005).

[3] While proceedings were underway before Magistrate Judge Facciola, the Court, *sua sponte*, consolidated another case into this one, *Frank Adams v. Capitol Police Board*, No. 6-653 (D.D.C. filed Apr. 10, 2006). *See* Order, ECF No. 142.

Mar. 19, 2007). Judge Facciola summarized his findings as follows:

> Parties were instructed to work together to complete two charts provided by this Court, *Chart A* and *Chart B* . . . and detail, for each Plaintiff and each claim, the exact cause of action and pertinent information regarding their exhaustion of administrative remedies. The Court has received and reviewed the charts and now finds that the majority of the claims must be dismissed for failure to exhaust administrative remedies or failure to provide required support, while a small group of claims satisfies the requirements [of administrative exhaustion].

Id. at *1. Magistrate Judge Facciola found that "only fourteen Plaintiffs . . . exhausted the administrative requirements for either all or some of their claims," as set forth in a chart attached to his Opinion. *Id.* at *4. After considering the parties' objections to Magistrate Judge Facciola's reports and recommendations, the Court entered an Order adopting those recommendations in full. *See* Order, ECF No. 180.

On September 12, 2007, the plaintiffs filed a notice of appeal raising the following issues: (1) this Court's decision not to consider the Office of Compliance's end-of-mediation notices as automatically signifying the close of the mediation period for deadline purposes; (2) this Court's decision that mediation and counseling must be attended in-person for an individual to exhaust her administrative remedies; and (3) this Court's denial of the plaintiffs' motion for class certification, pending resolution of the defendant's motion to dismiss. *See* Notice of

Appeal, ECF No. 181. The appeal was filed on behalf of "Plaintiffs Regina Bolden-Whitaker, Ave Maria Harris, and the other Plaintiffs listed in Attachment 1." *Id.* at 1. Attachment 1 to the Notice listed 306 names. *See* List of Plaintiffs/Appellants, ECF No. 181-1. On September 14, 2007, Derrick Macon and Frank Adams, each proceeding *pro se*, filed their own individual notices of appeal. *See* Macon Notice of Appeal, ECF No. 185; Adams Notice of Appeal, ECF No. 186.

F. The Court of Appeals for the District of Columbia Circuit Affirms in Part, Reverses in Part, and Remands for Further Proceedings.

The Court of Appeals issued its decision on July 31, 2009. *See Blackmon-Malloy v. U.S. Capitol Police Bd.* ("*Blackmon-Malloy III*"), 575 F.3d 699 (D.C. Cir. 2009). The Court of Appeals affirmed in part and reversed in part this Court's decision in *Blackmon-Malloy I* and the related adoption of Magistrate Judge Facciola's Report and Recommendation in *Blackmon-Malloy II*. *See id.* at 714. The decision addressed three legal issues:

First, the Court of Appeals affirmed this Court's conclusion that the administrative-exhaustion requirements of the Congressional Accountability Act were jurisdictional and that failure to comply with them therefore could not be excused under the various equitable doctrines pressed by the plaintiffs. *See id.* at 704–07. Therefore, the Circuit held, "the district court correctly ruled that it was not empowered to apply the equitable

doctrine of vicarious exhaustion to excuse compliance." *Id.* at 706. The Circuit also rejected the plaintiffs' complaint regarding this Court's decision to address the defendant's jurisdictional motion to dismiss before ruling on the plaintiffs' request for class certification, "as jurisdiction is a threshold question." *Id.*

Second, the Circuit reversed this Court's conclusion that an employee must attend counseling and mediation sessions in person. *See id.* at 707–10.

Third, the Circuit reversed this Court's conclusion regarding the effect of the Office of Compliance's end-of-mediation notices. *See id.* at 710–13. It held, instead, that "the reference in section 1408(a) to 'completed counseling . . . and mediation' means no more than that the employee timely requested counseling and mediation, that the employee did not thwart mediation by failing to give notice of his or her claim to the employing office upon request, that the mandated time periods have expired, and that the employee received end of counseling and mediation notices from the Office." *Id.* at 713.

In view of these rulings, the Circuit remanded the case to this Court, with the following instruction: "On remand, the district court shall determine which officers made timely requests under sections 1402 and 1403 and provided notices of their claims upon request, and which officers received end of mediation notices

and made timely elections pursuant to section 1404." *Id.* at 714 n.5.

G. The Court Resolves Pending Motions and Sets a Schedule for Addressing the Jurisdictional Issues on Remand.

Soon after the case was remanded, the Capitol Police Board filed a motion seeking to: (1) clarify which plaintiffs had actually appealed this Court's prior Orders and which had not; and (2) discern precisely which individuals were represented by the various attorneys in this case. *See* Mot. to Strike, ECF No. 262-1. The Capitol Police Board argued that the notice of appeal appeared to indicate that the lawyers did not actually represent many of the individuals on whose behalf the notice was purportedly filed. *See id.* at 4–5. On March 8, 2010, the Court denied the Capitol Police Board's motion, finding the notice "sufficient to qualify as an appeal of class-wide claims in this proposed class action proceeding" and "that regardless of whether plaintiffs' counsel represented all the individual plaintiffs at different times throughout the litigation, plaintiffs' counsel has at all times served as counsel for the proposed class." Order, ECF No. 271 at 2-3.

That same Order set forth a schedule for resolution of the jurisdictional issues on remand from the Court of Appeals. *See id.* at 2. First, the Court ordered the parties to file:

> [A] joint pleading with the Court containing the following information: (a) A list of plaintiffs that the

> parties agree have exhausted their remedies as set forth by the Circuit; (b) A list of individuals that were once involved in the lawsuit but that the parties agree have not exhausted, and are thus not within the court's jurisdiction; (c) A list of individuals as to whom exhaustion is disputed; (d) A certification by the Plaintiffs that, so far as they are aware, this list constitutes a complete list of possible class members.

Id. at 2. Next, the plaintiffs were to:

> [F]ile a new complaint pleading subject matter jurisdiction as set forth in the D.C. Circuit's decision for individual and class claims. With the complaint, plaintiffs shall file a comprehensive list of plaintiffs/class members, which must be the same as that set forth in (1)(a) and (c) above.

Id. The Court also permitted the plaintiffs to take limited jurisdictional discovery "with regard to defendant's factual attacks on plaintiffs' exhaustion claims only." *Id.*

On April 8, 2010, the parties submitted a joint pleading setting forth their positions regarding the status of various plaintiffs. *See* Joint Report, ECF No. 275. As for the list of plaintiffs whom the parties agree properly exhausted their administrative remedies, the parties submitted seventeen names. *See id.* at 1–2.[4] The defendant noted, however, that it agreed that these individuals had exhausted their administrative

[4] These plaintiffs are: Sharon Blackmon-Malloy; Frank Adams; Regina Bolden-Whittaker; Tyrone Brooks; Sandra Brown-James; Arnold Fields; Gary D. Goines; Tammie D. Green; John N. Johnson; Governor Latson; Brent A. Mills; Leonard Ross; Conrad Smith; Reginald W. Waters; Richard Webb; Frank Wilkes; and Kendrick Young.

remedies regarding *some* of their claims; each individual also appears on the list of those as to whom exhaustion is disputed because the defendant argues that these individuals failed to exhaust regarding certain claims. *See id.* at 1 n.1, 4–10. The parties also agreed that sixty plaintiffs did not properly exhaust their administrative remedies and thus should be dismissed from this case, *id.* at 2–3,[5] and that seven more had indicated to counsel their intent to withdraw from the case. *Id.* at 3–4.[6] Finally, the report listed the remaining plaintiffs as to whom exhaustion was disputed (this list included the seventeen plaintiffs whom the defendant agrees exhausted some, but not all, of their claims). *See id.* at 4–10. Plaintiffs'

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[5] These plaintiffs are: Charles Akins; Monica Bailey Washington; Clarence Black; Alphonso Butler; Stephen Cannady; Keith Cathion; Bonnie Chestnut; Joe Christian; Monte Curtis; Ronald Curtis; William C. Davis; Joe Deas; Willie Dickens; Raymond Dingle; Keith Emory; Kim Y. Evans Herring; Rhonda Farmer; George Gibson; Eric Graves; Alvin Green; Moses Hart; Frentress Hickman; Meldon Jackson; Henry Jacobs; Carleton Jenkins; Thomas L. Jenkins III; Clarence Jeter, Jr.; Frank Johnson; Willie Johnson; Naudain Jones, Jr.; Mervin Jones; James Kennedy; Mack Kennedy; Dorothy Kyle; Janice Landrum; Sylvia Lassiter; Samuel McNair; Spiro Mihilis; Alfred Moffett; Marcelus Newton; Clarence Nowden; Marvin Patterson; James P. Pinnix; Kenneth Pittman; James Powell; Albert Powell, Sr.; James Proctor, Jr.; Barry Rainey; Doris Reid; Thomas Rose; Leroy Shields; Robert Steward; Kennieth Thompson; Jasper Thorne; David Trader; Stephanie Weems; James Whitt; Daniel Wilkerson; Roosevelt Williams; and Thomas Williams. *See id.*

[6] These plaintiffs are: Shawn Deneal; Yvonne Dove; Marcus Edwards; Charles Nanton, Jr.; Anthony Washington; Jolania White Sharps; and Rodric Myers. *See id.*

counsel also certified that the individuals identified in these various sections "constitute a complete list of possible class members in the Blackmon-Malloy litigation, to the best of counsel's information, knowledge, and belief." *Id.* at 11.

In accordance with the Court's Order, the plaintiffs then proceeded to submit a Fourth Amended Complaint. *See* Fourth Am. Compl., ECF No. 278. The Fourth Amended Complaint brought claims for "(1) a racially hostile work environment; and/or (2) race discrimination in promotions, other selections, work assignments, discipline, and termination; and/or (3) retaliation." *Id.* ¶ 6. The Fourth Amended Complaint contained a number of vague and general allegations regarding the plaintiffs' exhaustion of administrative remedies; at times, the Fourth Amended Complaint described a particular incident about which a plaintiff complained and vaguely asserted that other plaintiffs experienced similar events.[7] Attached as exhibits to

[7] *See id.* ¶ 6 ("Plaintiffs requested counseling and received End of Mediation Notices from the Congress's Office of Compliance as a result of these discriminatory experiences."); *id.* ¶ 16 ("From April to May 2001, the Plaintiffs in this case timely requested counseling from the Congress's Office of Compliance, initiating their discrimination claims, in response to discriminatory incidents they had experienced in the 180 days prior to seeking counseling."); *id.* ¶¶ 21–23 (describing two discrete events suffered by two plaintiffs, then claiming that many other plaintiffs suffered similar, but different, events "[d]uring the 180 days before the [plaintiffs] filed their requests for counseling").

the Fourth Amended Complaint were charts purporting to list individuals who had suffered a particular class of event (e.g. racist epithets, other allegedly racist actions, other abusive treatment) with the Complaint describing a single example or two and stating that those individuals listed in the relevant exhibit had suffered something similar and conclusorily asserting that all had made timely requests for counseling and followed the administrative process. *See id.* ¶¶ 25, 26, 28, 35, 38, 39, 45, 53, 54, 68, 73. The Fourth Amended Complaint also included more detailed narratives regarding certain individual plaintiffs. *See generally id*.

Although the defendant's motion to dismiss was not due until August 12, 2010, the plaintiffs preemptively moved to "limit the scope of" that motion. *See* Mot. to Limit, ECF No. 292. The plaintiffs' apparent concern was that the defendant might seek "to challenge whether counseling was requested as to each detail of Plaintiffs' claimed discrimination charges and thereby relitigate the exhaustion issues already decided by the Court of Appeals." *Id.* at 2. The Capitol Police Board opposed the motion, arguing, *inter alia*, that plaintiffs entirely misunderstood the Court of Appeals' decision:

> The plaintiffs erroneously assert that an officer may exhaust administrative remedies simply by receiving end of counseling and end of mediation notices [internal citations omitted]. The D.C. Circuit made no such ruling. To the contrary, the D.C. Circuit expressly held

> that each officer must show that he or she requested counseling within 180 days of the allegedly discriminatory act raised in the complaint. *Blackmon-Malloy* [*III*], 575 F.3d [at] 713 n.5 [internal citations omitted][.] The officers' statements during the counseling period are not only relevant to this inquiry, they are the most probative evidence of what alleged discriminatory act(s) an officer sought counseling for and whether the officer's request for counseling was timely (i.e., made within 180 days of the allegedly discriminatory act(s)).

Opp'n to Mot. to Limit, ECF No. 295 at 3. On August 9, 2010, the Court denied the motion without prejudice to the raising of any related arguments in connection with the defendant's forthcoming motion to dismiss. *See* Minute Order of August 9, 2010.

H. The Defendant Moves to Dismiss and the Court Refers the Motion to Magistrate Judge Facciola.

On August 12, 2010, the Capitol Police Board moved to dismiss all but a select handful of the plaintiffs and claims at issue in this case. *See* Mot. to Dismiss ("Mot."), ECF No. 298.[8] Officer Macon filed his *pro se* opposition to the motion to dismiss on November 12, 2010. *See* Macon Opp'n to Mot. ("Macon Opp'n"), ECF No. 318. After obtaining numerous extensions of the deadline to respond to the motion to dismiss, the plaintiffs (represented by the Gebhardt Attorneys and Mr. Nathaniel Johnson) filed their opposition to the motion to dismiss. *See* Pls.' Opp'n to Mot.

[8] Because of the statutory directive that counseling and mediation be "strictly confidential," 2 U.S.C. § 1416(a) & (b), the Capitol Police Board supported its motion with a sealed filing. ECF No. 299.

("Pls.' Opp'n"), ECF No. 331. After reviewing a declaration filed by Charles Ware (who represented the plaintiffs during administrative proceedings), the Capitol Police Board moved for leave to depose Mr. Ware before filing their reply brief. *See* Mot. for Discovery, ECF No. 336. Magistrate Judge Facciola promptly resolved the motion in defendant's favor, noting that the issue "[w]hether the non-present plaintiffs did or did not comply with the [administrative-exhaustion] requirements imposed by the court of appeals is a precise function of what Ware did or did not do." Order, ECF No. 348 at 4.

Days before the defendant's reply brief was due, the plaintiffs submitted a pleading purporting to "amend" their opposition to the motion to dismiss, in light of matters that arose during the deposition of Mr. Ware. *See* Suppl. Opp'n to Mot., ECF No. 353-1.[9] The Court granted extensions of the

[9] Days later, on November 8, 2011, the plaintiffs filed a consent motion seeking to dismiss the claims of nineteen plaintiffs "voluntarily, with prejudice." Pls.' Mot. to Dismiss, ECF No. 354 at 1. These plaintiffs are: Alphonso Butler; Masood Darsanni; Yvonne Dove; Kim Y. Evans-Herring; Michael Funderburk; Alvin Green; James Griffin; Frentress Hickman; Henry L. Jacobs; Mack Kennedy; Ollie McCoy; Calvin K. Shields, Jr.; Robert Stewart; Kennieth F. Thompson; Jasper Thorne; David A. Trader; Steven Washington; Victoria J. Williams; and Reginald P. Wilson. *Id.* Due to the convoluted attorney-representation issues that had pervaded this case, the Court ordered the plaintiffs' counsel to "confirm to the Court, forthwith, via an ECF filing, that they represent the 19 referenced plaintiffs and are authorized, therefore, to move for their voluntary dismissal from the case." Minute Order of November 14, 2011. Upon receipt

deadline for the defendant to file its reply brief. On December 21, 2011, the plaintiffs again supplemented their opposition to the motion to dismiss. *See* Notice, ECF No. 361. On December 23, 2011, the defendant filed its reply brief in further support of its motion to dismiss. *See* Reply in Supp. of Mot. ("Reply"), ECF No. 363. On March 9, 2012, the Court referred the motion to dismiss to Magistrate Judge Facciola for preparation of a report and recommendation. *See* Minute Order of March 9, 2012.

I. Magistrate Judge Facciola Issues a Second Set of Reports and Recommendations Regarding the Defendant's Renewed Motion to Dismiss.

Magistrate Judge Facciola issued his Report and Recommendation on December 14, 2012. *See* R. & R., ECF No. 376 ("ECF No. 376"). Magistrate Judge Facciola began by noting that notwithstanding this Court's direction that the Fourth Amended Complaint "plead[] subject matter jurisdiction as set forth in the D.C. Circiut's decision," Order, ECF No. 271 at 2, "[p]laintiffs often *state* that they have exhausted their claims, without giving any of the information necessary for the Court to

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of this confirmation as to all 19 plaintiffs, ECF No. 356, the Court granted the motion to dismiss. *See* Minute Order of November 29, 2011. Plaintiffs later filed, on December 21, 2011, a motion seeking to dismiss with prejudice the claims of three additional plaintiffs: John W. Euill, II; Ronald L. Richardson; and Claudette Squires. *See* Pls.' Mot. to Dismiss, ECF No. 360. Because this motion contained the requisite confirmation, the Court granted it. *See* Minute Order of January 3, 2012.

determine whether or not that is true." ECF No. at 6 (emphasis in original).

1. Magistrate Judge Facciola Recommends Dismissal of Renewed Claims and Plaintiffs' Claims Previously Dismissed.

Magistrate Judge Facciola noted at the outset the plaintiffs' failure to comply with prior warnings to avoid "'includ[ing] claims that have previously been dismissed.'" *Id.* at 6 (quoting Minute Order of Feb. 15, 2008). In their Fourth Amended Complaint, the plaintiffs had raised a number of such claims.

First, the plaintiffs reasserted discrimination claims "on behalf of black officers 'who would otherwise have participated in the promotion process but concluded that participation was futile based on the racist history of the promotion process.'" ECF No. 376 at 7 (quoting Fourth Am. Compl., ECF No. 278 at 21). Judge Facciola found this inappropriate, as this Court had concluded in 2004 that such claims were not viable because the date for opting in to the 2000 Sergeant's and Lieutenant's exam was more than 180 days before any plaintiff began counseling under the Congressional Accountability Act, so, by definition, such a claim was not properly exhausted. *See id.* at 7 (citing *Blackmon-Malloy*, 338 F. Supp. 2d at 110–12). "That holding was neither addressed nor disturbed on appeal, and therefore must stand," Magistrate Judge Facciola held. *Id.* This resulted in a recommendation that these claims, raised by those individuals

listed in Exhibit 9 to the Fourth Amended Complaint, be dismissed. *See id.*; Ex. 9 to Fourth Am. Compl., ECF No. 278-9.

Similarly, the plaintiffs renewed their disparate impact claims "which were . . . specifically disallowed by [this Court's] previous ruling." *Id.* (citing *Blackmon-Malloy*, 338 F. Supp. 2d at 112). Magistrate Judge Facciola reiterated, as this Court had previously found, that "[t]he disparate impact claims were not alleged within 180 days of the first request for counseling, and therefore were not timely." *Id.* at 7–8. He therefore recommended their dismissal. *See id.*; Ex. 4 to Fourth Am. Compl., ECF No. 278-4; Ex. 5 to Fourth Am. Compl., ECF No. 278-5.

Third, Magistrate Judge Facciola found that "a number of plaintiffs 1) were voluntarily dismissed from the case; 2) indicated they wanted to be dismissed; 3) failed to respond to show cause orders requiring them to assert why they should not be dismissed; or 4) were deemed by both parties to be out of the case for failure to have properly exhausted their administrative remedies." ECF No. 386 at 8. Magistrate Judge Facciola recommended that each of these plaintiffs remain dismissed—whether the Court granted the request for voluntary dismissal or formally dismissed the plaintiff for failing to show cause. *See id.* at 8 n.6 (noting that a final order of judgment is not necessary because "'[w]hen the plaintiff files a notice of

dismissal before service by the adverse party of an answer or of a motion for summary judgment, the dismissal takes effect automatically.'") (quoting *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987)). This included plaintiffs Clinton Bradford and Shafton Adams — who failed to respond to orders to show cause, as well as others who had their claims voluntarily dismissed or sought to do so. *See id.* at 8-9.

2. Magistrate Judge Facciola Recommends Agreeing with the Defendant that More is Needed to Prove that a Claim Was Presented in Counseling and that Specific Notice Was Given During Mediation.

Magistrate Judge Facciola next resolved a legal dispute between the parties regarding what is needed to comply with two of the four requirements set forth in *Blackmon-Malloy III* for completing counseling and mediation under the Congressional Accountability Act—(1) proving that a particular claim was brought to counseling within 180 days of its occurrence; and (2) providing notice of the claim to the Capitol Police Board upon request during mediation. *Id.* at 10. Magistrate Judge Facciola rejected plaintiffs' reliance upon Title VII exhaustion requirements—which permit, among other things, vicarious exhaustion—because "plaintiffs cannot rely on the properly noticed claims of their fellow officers," cannot "simply say 'this claim was timely exhausted' without putting forth any evidence showing as much," and must recognize that "[w]hen

timely satisfaction of an administrative regime is jurisdictional, dates and details matter." *Id.* at 10–11.

Magistrate Judge Facciola found this inquiry necessary under the Court of Appeals' decision in *Blackmon-Malloy III*, and noted that "[i]t would defeat the purpose of the [Congressional Accountability Act's] administrative regime if a group of 200+ claimants were deemed to have put the defendant on sufficient notice of their claims merely because their attorney said that 'these 150 experienced a racial slur' or that 'these 100 were unfairly disciplined' without providing any indication of when those events allegedly occurred." *Id.* at 11. Without more, the plaintiffs cannot be said to have provided notice that would permit their employer "to determine what went wrong and how any violations could be remedied." *Id.* Magistrate Judge Facciola also rejected the plaintiffs' attempt to shift the blame for any deficiency to the Office of Compliance for failing to ask for more specificity: "Because the plaintiffs bear the burden of proof with regards to jurisdiction, which includes showing that each claim was timely brought and properly noticed, plaintiffs must be able to show 1) exactly when the event occurred; and 2) that all subsequent steps of the administrative process were satisfied." *Id.* at 12.

Magistrate Judge Facciola recognized the difference between a hostile-work-environment claim and a discrimination claim. A

hostile work environment claim would require only that "an officer sought counseling within 180 days of any act that contributed to the hostile work environment claim." *Id.* Nonetheless, he found that this was not a license to recast discrete-act claims under the hostile-work-environment framework in the Fourth Amended Complaint. *See id*. Rather, "[u]nless raised as such at the administrative level, and without any evidence affirming exhaustion of that specific claim, any hostile work environment claims now asserted by the plaintiffs cannot possibly be considered in a manner consistent with the court of appeals' determination that the exhaustion requirements are jurisdictional." *Id.* at 12–13. Magistrate Judge Facciola found "a genuine factual dispute" whether Mr. Ware had raised such a claim on behalf of those plaintiffs who went to counseling in April 2001. *See id.* at 13. He did not need to resolve this dispute at the pleading stage, but noted that it was nonetheless necessary at this stage that "individual plaintiffs must have raised information sufficient to put the defendant on notice of his or her hostile work environment claim during the administrative process." *Id.* at 13-14.

3. Magistrate Judge Facciola Analyzes Individual Plaintiffs Over Whom There Is At Least Arguable Dispute.

In view of the large number of plaintiffs for whom absolutely no information was supplied, Magistrate Judge Facciola did not discuss every single plaintiff's individual scenario. *See generally* ECF No. 376. He first explained why plaintiffs' general approach of discussing in the Fourth Amended Complaint a few discrete events and then attaching a list of names purporting to be evidence that each plaintiff listed had suffered a similar harm failed. "[T]his approach fails in two respects: 1) it does not follow the strict instructions of the Court of Appeals or [this Court] that each claim for each plaintiff must be stated with specificity, and must include the relevant dates and timeliness under the [Congressional Accountability Act]; and (2) it provides no factual support upon which any reasonable court could determine whether a claim was properly exhausted." *Id.* at 15–16. He therefore concluded that "the vast majority of the plaintiffs are unable to satisfy their burden for each of their claims." *Id.* at 16.

Magistrate Judge Facciola then proceeded to discuss twenty-five individual plaintiffs who presented unique issues. *See id.* at 17–38. He attached to his Report a list naming those plaintiffs and stating that he recommended they should be permitted to proceed. *See id.* at 40.

4. Magistrate Judge Facciola Issues Two Supplemental Reports and Recommendations.

On January 4, 2013, Magistrate Judge Facciola issued a separate Report and Recommendation addressing the claims of Derrick Macon, who has proceeded *pro se* in this case. *See* Macon Report & Recommendation, ECF No. 378. In his initial Report, Magistrate Judge Facciola noted the need for clarification regarding five plaintiffs. *See* ECF No. 376 at 17–18, 22, 24–25, 33–35, 41. After receiving supplemental materials from the parties regarding those plaintiffs, Magistrate Judge Facciola issued a supplemental report and recommendation regarding the issues raised in his December 14, 2012 report. *See* Suppl. Report & Recommendation, ECF No. 389.

J. The Plaintiffs Object to the Reports and Recommendations, and Subsequently Seek Leave to File a Fifth Amended Complaint.

The plaintiffs (represented by the Gebhardt Attorneys and Mr. Johnson) timely objected to Magistrate Judge Facciola's December 14, 2012 Report and Recommendation and his March 7, 2013 Supplemental Report and Recommendation. *See* Pls.' Objs. to R. & R., ECF No. 386; Pls.' Objs. to Suppl. R. & R., ECF No. 390. Officer Macon also timely objected to the Report and Recommendation regarding his claims. *See* Macon Objs. to R. & R., ECF No. 384. The defendant filed a response to Officer Macon's objections on April 1, 2013, and to the plaintiffs' objections

on May 3, 2013. *See* Response to Macon Objs., ECF No. 391; Response to Pls.' Objs., ECF No. 394.

Just over two months after the briefing of the plaintiffs' objections to Magistrate Judge Facciola's reports and recommendations had become ripe, the plaintiffs moved for leave to file a Fifth Amended Complaint. *See* Mot. for Leave, ECF No. 396. The plaintiffs asserted that although "[t]he proposed Joint Fifth Amended Complaint adds absolutely no information or allegations that have not already been presented to the Court in previous Complaints and/or Plaintiffs' Opposition to Defendant's 2010 Motion to Dismiss and the Exhibits filed therewith," it was needed "in order to clarify for the Court which Plaintiffs remain in the case and how each of them exhausted their administrative remedies." Mem. in Supp. of Mot. for Leave, ECF No. 396-1 at 1. The defendant opposes that motion. *See* Opp'n to Mot. for Leave, ECF No. 398. The plaintiffs filed a reply brief in further support of their motion. *See* Reply in Supp. of Mot. for Leave, ECF No. 400.

K. Attorney Representation Issues Arise Once More.

On April 21, 2015, the Gebhardt Attorneys filed a motion for leave to withdraw from representation of the plaintiffs. *See* Mot. to Withdraw, ECF No. 401. They asserted that the law firm of which they had once been members had "ceased to exist on May 31, 2014" and that the various attorneys no longer have the

resources necessary to prosecute this case. *See id.* at 2. In view of this filing, the Court held a status hearing on April 30, 2015. During that status hearing, the Court inquired of those plaintiffs who were present how much time they needed to attempt to secure new counsel; and an approximate deadline of October 15, 2015 was agreed upon, subject to the potential need for an extension if representation was difficult to secure. *See* Minute Order of May 1, 2015. The Court then entered a Minute Order directing the plaintiffs' counsel to file a motion to withdraw from representation by May 29, 2015, staying the case until further Order of the Court, and scheduling a status hearing for October 15, 2015. *See* Minute Order of May 1, 2015.

The Court subsequently received a letter from plaintiff Duvall Phelps, asserting his disagreement with the Gebhardt Attorneys' request, and other disputes with those attorneys. *See* Letter, ECF No. 404. The Gebhardt attorneys also filed their motion to withdraw, along with signed forms from certain plaintiffs consenting to the withdrawal. *See* First Mot. to Withdraw, ECF No. 405; Second Mot. to Withdraw, ECF No. 406; First Suppl. Notice, ECF No. 407; Second Suppl. Notice, ECF No. 408. The Court held an additional status hearing on June 12, 2015. *See* Minute Entry of June 12, 2015. On June 15, 2015, the Court entered the following Minute Order memorializing those proceedings:

The Court enters this Minute Order to memorialize the discussion held on the record during the June 12, 2015 status hearing, and to govern further proceedings in this case. First, as the Court indicated during the status hearing, the Court intends to issue a written opinion providing the Court's reasoning and intended resolution of the pending objections to Magistrate Judge Facciola's Report and Recommendation regarding the defendant's motion to dismiss and the plaintiffs' pending motion for leave to file an amended complaint. In view of the ongoing representation issues regarding the many plaintiffs currently represented by Joseph Gebhardt and members of his former law firm, the Court will delay entry of any final order and stay the effectiveness of this opinion pending resolution of those representation issues. No party raised any objection to the Court proceeding in this manner during the June 12, 2015 status hearing. Second, as discussed during the status hearing, Attorney Joseph Gebhardt and members of his former law firm seek to withdraw from representing the plaintiffs they have represented in this case. Further, Mr. Nathaniel Johnson—who currently represents a number of other plaintiffs, as reflected in the list of plaintiffs recited on the record by defendant's counsel during the status hearing—may intend to withdraw from representation of one of his clients, Frank Adams, who expressed his current opposition to such a request. These representational issues shall be governed as follows: Any attorney who seeks to withdraw as counsel for one or more of his or her clients shall forthwith contact Bar Counsel for the District of Columbia to discuss the attorney's responsibilities with respect to withdrawing from representation in this case and facilitating his or her client's ability to continue to prosecute this case. Any attorney seeking to withdraw as counsel for one or more of his or her clients shall also read and follow every portion of the following legal provisions—as well as any others that Bar Counsel may indicate are appropriate—Local Civil Rule 83.6, D.C. Rules of Professional Responsibility 1.1 and 1.16. In view of the admitted inadequacy of the notice provided thus far, Attorney Gebhardt and members of his former law firm shall ensure that all of their clients receive the complete notice of the pending request for withdrawal as well as an appropriate explanation of the client's rights and responsibilities regarding further prosecution of this action, by first-class mail and

> certified mail, to the last-known address of each client, in accordance with the discussion held during the June 12, 2015 status hearing.

Minute Order of June 15, 2015. For those reasons, the Court proceeds to express its intended resolution of all matters currently pending before the Court other than the attorney-representation issues. As the Court's Minute Order suggested, these rulings will not become effective, nor will a Final Order effectuating them be entered, until the various representation issues are resolved. The parties will be permitted a reasonable period of time to resolve the representation issues.

II. Motion for Leave to File a Fifth Amended Complaint

The plaintiffs ask this Court for leave to file a Fifth Amended Complaint, which, plaintiffs admit, "adds absolutely no information or allegations that have not already been presented to the Court in previous Complaints and/or Plaintiffs' Opposition to Defendant's 2010 Motion to Dismiss and the Exhibits filed therewith." Mot. to Amend, ECF No. 396-1 at 1. The purpose plaintiffs proffer for seeking to file a Fifth Amended Complaint is instead "to clarify for the Court which Plaintiffs remain in the case and how each of them exhausted their administrative remedies." *Id.* The defendant opposes the motion, calling it "a last ditch attempt to avoid the recommendations proposed by Magistrate Judge Facciola" and arguing that granting leave to amend "will unnecessarily delay

this case and prevent the parties from moving forward with a defined set of individuals whose claims meet the required jurisdictional threshold . . . all while wasting over three years of judicial resources." Opp'n to Mot. to Amend, ECF No. 398 at 1. The Court agrees with the defendants.

Federal Rule of Civil Procedure 15(a)(2) governs requests for leave to amend a complaint before trial, but after the brief period during which amendment may be filed as a matter of course. Fed. R. Civ. P. 15(a)(2). It provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has set forth the generally liberal policy in favor of allowing amendments, with important limitations:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182 (1962); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1487 (3d ed. 2015) ("The liberal amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases."). "[U]nder Rule 15, 'the non-movant generally carries the burden in persuading the court to deny leave to amend.'" *Heller v. District of Columbia*, 290 F.R.D. 1, 3 (D.D.C. 2013) (quoting *Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004)).

Timeliness is a relative consideration, and "[i]t would be unreasonable to restrict a party's ability to amend to a particular stage of the action inasmuch as the need to amend may not appear until after discovery has been completed or testimony has been taken at trial." 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1488 (3d ed. 2015). A request to amend, nonetheless, "should be made *as soon as the necessity for altering the pleading becomes apparent*": "A party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time." *Id.* (emphasis added). In this Circuit, "[a]bsent evidence of prejudice, delay . . . cannot justify denying a motion to amend to clarify the legal basis for a complaint." *Harrison v. Rubin*, 174 F.3d 249, 250 (D.C. Cir. 1999); *see also Caribbean Broad. Sys. v. Cable & Wireless, PLC*, 148 F.3d 1080, 1084 (D.C. Cir. 1998) ("The length

of a litigation is relevant only insofar as it suggests either bad faith on the part of the moving party or potential prejudice to the non-moving party should an amendment be allowed.") (internal citation omitted). Accordingly, "the significance of a delay depends on the prejudice it causes." *Heller*, 290 F.R.D. at 4. This requires that the Court inquire into "the position of both parties and the effect the request will have on them," including "the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted." 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1487 (3d ed. 2015).

That the plaintiffs have delayed in presenting their Fifth Amended Complaint is undisputed — they admit that the Complaint "adds absolutely no information or allegations that have not already been presented to the Court in previous Complaints and/or Plaintiffs' Opposition to Defendant's 2010 Motion to Dismiss and the Exhibits filed therewith." Mot. to Amend, ECF No. 396-1 at 1. Plaintiffs' opposition to the motion to dismiss was filed on March 1, 2011; plaintiffs' motion to amend was filed on July 10, 2013—over two years later.

Plaintiffs do not explain this delay at all. Nor is this "a case where facts unearthed during discovery revealed new claims

or defects in the pleadings." *Heller*, 290 F.R.D. at 4. The purpose plaintiffs proffer for seeking to file a Fifth Amended Complaint is only "to clarify for the Court which Plaintiffs remain in the case and how each of them exhausted their administrative remedies." Mot. to Amend, ECF No. 396-1 at 1. But that is the issue that has been before this Court and the Court of Appeals in various postures for some time. An issue, moreover, on which the Court long ago directed the plaintiffs to provide much-needed clarity. *See* March 5, 2010 Order, ECF No. 271 at 2 (directing the plaintiffs to submit a Fourth Amended Complaint "pleading subject matter jurisdiction as set forth in the Court of Appeals' decision for individual and class claims" and including "a comprehensive list of plaintiffs/class members"). Plaintiffs fail to explain coherently why they did not include this clarifying information in the Fourth Amended Complaint that this Court required them to file in 2010.

Plaintiffs' delay would plainly prejudice the defendant by subjecting the defendant to extremely burdensome additional litigation and nullifying three years' worth of work by the parties and the Magistrate Judge. Such circumstances constitute prejudicial delay. *See, e.g.*, *Doe v. Cassell*, 403 F.3d 986, 991 (8th Cir. 2005) (finding prejudicial delay where the district court had previously directed the plaintiffs to submit an amended complaint explaining more clearly the particular

defendants sued and the acts or omissions affiliated with each defendant, but the plaintiff failed to do so in filing an amended complaint and sought later to amend once more); *Nat'l Sec. Counselors*, 960 F. Supp. 2d 101, 135 (finding prejudicial delay where the plaintiff had long been aware of the facts it sought to add and "had over sixteen months to seek an amendment" but "chose not to do so, waiting until five weeks after the Court ruled on the motion to dismiss to seek such an amendment"). This is all the more so where the relevant facts have been known previously and the plaintiff offers little reason for the delay in presenting those facts. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987) (affirming denial of leave to amend "when so much time has passed and where the movant has had abundant opportunity over the course of a half-dozen years to raise the issue"); *Howard v. Blank*, 891 F. Supp. 2d 95, 101–02 (D.D.C. 2012) (noting "that the relevant facts have been known since the 1990s," and the plaintiffs had not "offered any justification for failing to add these counts despite two prior opportunities to amend."), *aff'd in relevant part, rev'd on other grounds sub nom. Howard v. Pritzker*, 775 F.3d 430 (D.C. Cir. 2015).

Indeed, it was only after the expenditure of significant resources by the parties and the Magistrate Judge that the plaintiffs deemed it appropriate to seek to amend their

Complaint yet again to clarify matters to which the Court of Appeals and this Court had directed their attention years earlier. The plaintiffs filed their Fourth Amended Complaint in 2010 in response to the Court's direction to clarify these very same issues; the parties briefed the defendant's motion to dismiss between 2010 and 2011, with the plaintiffs filing numerous supplements and amendments to their opposition; the parties took jurisdictional discovery in 2011; Magistrate Judge Facciola issued three comprehensive Reports and Recommendations recommending dismissal of all but a few claims in 2012 and 2013; and the parties fully briefed the plaintiffs' objections to those reports in 2013. Only after all of those events had occurred did the plaintiffs seek leave to submit a Fifth Amended Complaint, which would happen to have the effect of mooting the defendant's motion to dismiss—the motion that Magistrate Judge Facciola has recommended that this Court grant.

Not only would plaintiffs' unexplained and extensive delay prejudice the defendant, while denial of the motion for leave would, based on their own statements, appear to be of minimal harm to the plaintiffs, but the Court is also concerned as to the true purpose of the motion. "'[C]ourts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, [or] to

present theories seriatim in an effort to avoid dismissal.'" *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d at 133 (D.D.C. 2013) (quoting *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006)). Such tactics are especially concerning when a plaintiff appears to be using a request for leave to amend as a means to evade prior unfavorable rulings. *See id.* at 134 ("When a plaintiff seeks leave to amend its complaint in 'an attempt to evade the effect of [an Opinion] dismissing the plaintiff's claims . . . the request will be denied.'") (quoting *Kurtz v. United States*, No. 10-1270, 2011 WL 2457923, at * 1 n.1 (D.D.C. June 20, 2011)(internal citation omitted)). Waiting until the issuance of a "ruling upon dispositive motions," therefore, "has been considered an undue delay." *Becker v. District of Columbia*, 258 F.R.D. 182, 185 (D.D.C. 2009).

Two factors lead the Court to conclude that plaintiffs' motion for leave is in fact a bad-faith attempt to make the complaint a moving target and thereby evade Magistrate Judge Facciola's recommendation that this Court grant the motion to dismiss. First, the timing of plaintiffs' request to amend. It was filed only shortly after the parties concluded briefing of the plaintiffs' objections to Magistrate Judge Facciola's Reports and Recommendations, even though the need for clarity regarding the administrative-exhaustion issue had been apparent since at least 2010. Second, the absence of any explanation of the reason

for the delay. If the proposed Fifth Amended Complaint does not present any new evidence or legal theory to the Court, includes information that could have been put into an amended complaint much earlier, and does not articulate any reason for plaintiffs' delay, the reasonable conclusion is that the defendant is correct: The motion is "a last ditch attempt to avoid the recommendations proposed by Magistrate Judge Facciola." Opp'n to Mot. to Amend, ECF No. 398 at 1. For this additional reason, the Court finds that plaintiffs have unduly delayed such that their motion should be denied.

The prejudice to the plaintiffs of denying leave, moreover, appears relatively minimal as they admit that the amendment "adds absolutely no information or allegations that have not already been presented to the Court in previous Complaints and/or Plaintiffs' Opposition to Defendant's 2010 Motion to Dismiss and the Exhibits filed therewith." Mot. to Amend, ECF No. 396-1 at 1. This assertion is remarkably similar to that of plaintiffs whose request for leave was denied in *Barry v. Wing Mem'l Hosp.* 142 F. Supp. 2d 161 (D. Mass. 2001). In that case, the amendment "would not assert any new claims or legal theories on which recovery could be granted," but the plaintiffs claimed it would "'amplif[y] those alleged facts which form the basis' of [plaintiff's] pre-existing claims." *Id.* at 168. As the court held in *Barry*, "[t]hese facts have been thoroughly amplified

through discovery and the summary judgment motions; amending the claims to include those amplifications would not stave off summary judgment." *Id.* So too here. Any reorganization to "clarify" facts already presented to the Magistrate Judge and this Court is unnecessary.

* * *

For all of these reasons, the Court will **DENY** plaintiffs' motion for leave to file a Fifth Amended Complaint.

III. Motion to Dismiss

The administrative-exhaustion issues raised by the parties' pleadings are largely, though not exclusively, questions of the application of the Court of Appeals' legal standard to the facts alleged and proffered by each of the many plaintiffs in this case. The parties, however, do disagree as to portions of the legal standard. Accordingly, the remainder of the Court's Opinion proceeds as follows: In Part A, the Court briefly discusses the relevant Standards of Review. In Part B, the Court resolves a number of other disputes regarding the Court's previous dismissal of claims on grounds that were never appealed to the Court of Appeals. In Part C, the Court reviews the legal standard for administrative-exhaustion under the Congressional Accountability Act as set forth by the Court of Appeals and resolves the parties' disputes about that standard's application. In Part D, the Court addresses the application of

these legal standards to the plaintiffs in this case. In Part D, the Court addresses all 312 plaintiffs. Finally, for ease of reference, Appendix I to this Memorandum Opinion contains a chart listing the disposition of each plaintiffs' claims and the reasons therefore. Appendix II lists the remaining plaintiffs and their viable claims.

A. Standard of Review

1. Objections to a Magistrate Judge's Report and Recommendation.

Pursuant to Federal Rule of Civil Procedure 72(b), once a magistrate judge has entered a recommended disposition, a party may file specific written objections. The district court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to," and "may accept, reject or modify the recommended disposition." Fed. R. Civ. P. 72(b)(3). Proper objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for objection." Local R. Civ. P. 72.3(b). As numerous courts have held, "objections which merely rehash an argument presented to and considered by the magistrate judge" are not properly objected to and are therefore "not entitled to de novo review." *Morgan v. Astrue*, Case No. 08–2133, 2009 WL 3541001, at *3 (E.D. Pa. Oct. 30, 2009) (collecting cases). Likewise, the Court need not consider cursory objections made

only in a footnote. *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999); *see also Potter v. District of Columbia*, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, J. concurring) ("[J]udges are not like pigs, hunting for truffles buried in briefs.")(internal citations omitted).

2. Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

A federal district court may only hear a claim over which it has subject matter jurisdiction; therefore, a Rule 12(b)(1) motion for dismissal is a threshold challenge to a court's jurisdiction. Fed. R. Civ. P. 12(b)(1). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court has jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). That burden must be established by a preponderance of the evidence. *Gordon v. Office of the Architect of the Capitol*, 750 F. Supp. 2d 82, 87 (D.D.C. 2010). In evaluating the motion, the Court must accept all of the factual allegations in the complaint as true and give the "plaintiff the benefit of all inferences that can be [drawn] from the facts alleged." *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)(internal citation omitted). The Court is "not required . . . to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Cartwright Int'l Van Lines, Inc. v. Doan*, 525 F.

Supp. 2d 187, 193 (D.D.C. 2007) (quotation marks omitted). However, because the plaintiff bears the burden, the "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." *Gordon*, 750 F. Supp. 2d at 87 (internal citations omitted). Finally, to resolve a 12(b)(1) motion, the Court "'may consider materials outside of the pleadings.'" Id. (quoting *Jerome Stevens Pharm, Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

B. Plaintiffs and Claims Previously Dismissed from this Case.

Magistrate Judge Facciola correctly found that plaintiffs' Fourth Amended Complaint sought to raise claims and plaintiffs that had previously been dismissed from this case on grounds that were neither appealed from nor otherwise challenged. *See supra* at 25-26. Other than asserting these claims on behalf of some officers, the plaintiffs did not object to his recommendation that the disparate-impact claims be dismissed because they had previously been dismissed by this Court. R. &. R., ECF No. 376 at 7-8; *see generally* ECF No. 386. Accordingly, the Court **ADOPTS** the dismissal of the disparate-impact claims raised by plaintiffs in Exhibits 4 and 5 to the Fourth Amended Complaint. To the extent a plaintiff asserts one of these claims only, that plaintiff is accordingly **DISMISSED** from this case.

The plaintiffs did object to Magistrate Judge Facciola's dismissal of claims of those who chose not to participate in the 2000 Promotions Process. But, as Magistrate Judge Facciola found, this Court's prior ruling on this issue was not challenged or disturbed on appeal and the plaintiffs have not moved for relief or reconsideration. ECF No. 376 at 7. Plaintiffs offer no reason why this finding must be altered—beyond a general assertion that their success in appealing other legal rulings of this Court somehow vacates the rulings they chose not to appeal. ECF No. 386 at 25-26. This argument is unpersuasive and provides no authority for the proposition that the Court of Appeals' partial reversal of this Court's Order on certain issues somehow vacates all other rulings this Court issued that were not challenged. Accordingly, the Court **ADOPTS** the dismissal of the claims to the 2000 Promotions Process listed in Exhibit 9 to the Fourth Amended Complaint. To the extent a plaintiff asserts this claim only, that plaintiff is accordingly **DISMISSED** from this case.

Next, the plaintiffs object to some of Magistrate Judge Facciola's decisions with respect to plaintiffs who had previously been dismissed from this case, asked to be dismissed, failed to respond to show cause orders, or were admitted by all parties to have failed to exhaust their administrative remedies. The plaintiffs appear only to challenge the findings with

respect to those who did not respond to show cause orders and who asked to be, but were not formally, dismissed from the case. *See* ECF No. 386 at 16.

As for the plaintiffs who sought to be voluntarily dismissed, only later to join in the notice of appeal from this Court's administrative-exhaustion ruling, Pls.' Objs., ECF No. 386 at 17, the Court agrees with the defendant that the plaintiffs failed to explain any challenge to Magistrate Judge Facciola's legal conclusion that those plaintiffs who asked to be dismissed from the case were barred from the case. *See Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987) ("When the plaintiff files a notice of dismissal before service by the adverse party of an answer or of a motion for summary judgment, the dismissal takes effect automatically.").

As for Shafton Adams and Clinton Bradford, who "failed to respond to the District Court's April 17, 2008 Order to show cause why they should not be dismissed", plaintiffs appear to argue that those individuals are still part of the case because they do not recall receiving the Show Cause Order and no final order was issued dismissing them for failing to respond to the Show Cause Order. ECF No. 386 at 18-19. They offer no legal authority for this proposition — as defendant notes, they were represented by counsel — and the Court further finds no reason to disagree with the Magistrate Judge's conclusion that their

failure to respond to the show-cause order must result in their dismissal from this case and that nothing in the Court of Appeals remand allows them to rejoin this case.

C. Administrative Exhaustion under the Congressional Accountability Act.

The Congressional Accountability Act of 1995, 2 U.S.C. § 1301, *et seq.*, "extend[s] the protections of Title VII of the Civil Rights Act of 1964, as well as ten other remedial federal statutes, to employees of the legislative branch." *Blackmon-Malloy III*, 575 F.3d at 701. Subchapter IV of the Act (Sections 1401–1416) governs the procedures for the administrative processing of any disputes under the Act. As relevant here, it sets forth "a three-step process that requires counseling and mediation before an employee may file a complaint seeking administrative or judicial relief." *Id.* The employee must first engage in counseling regarding her particular complaint. Then, she must proceed to mediation. Upon completion of mediation, she may elect to file suit in federal court.

In determining whether the employee "has completed counseling and mediation," 2 U.S.C. § 1408(a), as required to file a lawsuit, the Court is not empowered to examine what actually transpired in any counseling or mediation session or to determine the effectiveness of those sessions. *Blackmon-Malloy III*, 575 F.3d at 711–12. Rather, "the reference in section

1408(a) to 'completed counseling . . . and mediation' means no more than that[: (1)] the employee timely requested counseling and mediation, [(2)] that the employee did not thwart mediation by failing to give notice of his or her claim upon request, [(3)] that the mandated time periods have expired, and [(4)] that the employee received end of counseling and mediation notices from the Office." *Id.* at 713.

1. The Counseling Requirement

The first step an employee must take is "counseling as provided in section 1402." 2 U.S.C. § 1401(1). "'[T]o commence a proceeding,' the employee must request counseling within 180 days of the date of the alleged violation of a law made applicable by the [Congressional Accountability Act]." *Blackmon-Malloy III*, 575 F.3d at 702 (quoting 2 U.S.C. § 1402(a)). "As regards counseling, '[t]he Office shall provide the employee with all relevant information with respect to the rights of the employee.'" *Id.* at 702 (quoting 2 U.S.C. § 1402(a)). "The [Congressional Accountability Act] further provides that '[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period.'" *Id.* (quoting 2 U.S.C. § 1402(b)). The Court of Appeals held that the counseling requirement does not encompass a requirement that the complaining employee be physically present for counseling, "[g]iven the limited purpose of counseling to provide the

employee with information about his or her rights and the limited benefit that would inure to the employee or the Office from performing this function in person." *Id.* at 708. Finally, "[t]he Office must 'notify the employee in writing when the counseling period has ended.'" *Id.* (quoting 2 U.S.C. § 1402(c)).

2. The Mediation Requirement

The second step that an employee must take is "mediation as provided in section 1403." 2 U.S.C. § 1401(2). "'[N]ot later than 15 days after receipt . . . of notice of the end of the counseling period . . . but prior to and as a condition of making an election under section 1404," the employee must "file a request for mediation with the Office.'" *Blackmon-Malloy III*, 575 F.3d at 702 (quoting 2 U.S.C. § 1403(a)). "Mediation 'may include the Office, the covered employee, the employing office, and one or more individuals appointed by the Executive Director' of the Office, but '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.* (quoting 2 U.S.C. § 1403(b)(1), (2)). "The mediation period 'shall be 30 days,' which may be extended upon joint request of the parties, and (as with counseling) the Office must 'notify in writing the covered employee and the employing office when the mediation period has ended.'" *Id.* (quoting 2 U.S.C. § 1403(c)).

Just as for counseling, mediation need not involve the complaining individual's physical presence. *See id.* at 710.

3. Election

The third and final step is "election, as provided in section 1404 . . . of either . . . a formal complaint and hearing . . . subject to Board review . . . and judicial review in the United States Court of Appeals for the Federal Circuit . . . or . . . a civil action in a district court of the United States as provided in section 1408." 2 U.S.C. § 1401(3); *see also Blackmon-Malloy III*, 575 F.3d at 702. If the civil-action route is chosen, the three-step procedure constitutes a jurisdictional requirement. The Congressional Accountability Act declares that "[t]he district courts of the United States shall have jurisdiction over any civil action commenced under section 1404 . . . by a covered employee who has completed counseling under section 1402 . . . and mediation under section 1403 . . . . 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). This language, combined with its location in a section entitled "jurisdiction," led the Court of Appeals to hold that "it is apparent from the plain terms of the text that Congress intended counseling and mediation to be jurisdictional requirements." *Blackmon-Malloy III*, 575 F.3d at 705. Accordingly, district courts are "not

empowered to apply the equitable doctrine of vicarious exhaustion to excuse compliance." *Id.* at 706.

D. The Plaintiffs Misinterpret the Jurisdictional Requirements of Exhaustion under the Congressional Accountability Act.

Although the Court of Appeals appeared to have resolved the legal issues previously raised by the plaintiffs regarding administrative exhaustion in this case, the plaintiffs have raised yet more disputes. Their concern relates to precisely what they must do to demonstrate compliance with two parts of the analysis prescribed by the Court of Appeals: (1) showing that they alleged during counseling violations that occurred within 180 days of proceeding to counseling; and (2) showing that they did not thwart mediation and provided notice of their individual claims upon request. *See Blackmon-Malloy III*, 575 F.3d at 713. The defendant argues that, given that administrative exhaustion is a jurisdictional requirement, the plaintiffs bear the burden of presenting to this Court material that could support a finding that each claim of each plaintiff related to an action that occurred within the counseling timeframe and that if the Capitol Police Board asked for notice of that plaintiff's claim, such notice was provided. *See* ECF No. 394 at 5-6.

As to the timeliness requirement, although they assert that the plaintiffs that remain in the case timely requested counseling, plaintiffs' counsel state that they

> attempted to contact all of the remaining Plaintiffs to ascertain whether they are interested in remaining in the case, to ascertain precisely their claims, and to determine whether their claims arose during the 180 days preceding their requests for counseling. Due to the passage of time since this case began, 12 years ago, many of the Plaintiffs were unable to recall with sufficient specificity the time period during which they suffered discriminatory treatment; and others were simply unavailable to counsel.

ECF No. 386 at 4.

Moreover, plaintiffs assert that for the remaining plaintiffs, exhaustion of remedies is either indisputable, or the individual Officer's declarations attached to the plaintiffs' opposition to the motion to dismiss "describe the discriminatory events that occurred within 180 days of their requests for counseling." *Id.* at 5. To prove that a particular claim was timely raised in counseling, however, the plaintiffs cannot rely upon blanket statements that all plaintiffs exhausted their administrative remedies nor on declarations in which an officer asserts that she timely sought counseling without specifying the date upon which the alleged violation occurred. This Court has indicated as much on many occasions, yet plaintiffs persist in using vague language to describe their claims. *See generally* Fourth Am.

Compl, ECF No. 278. Moreover, because the plaintiffs are proceeding under a jurisdictional requirement, under Rule 12(b)(1), they bear the burden of establishing, by a preponderance of the evidence, that they sought counseling within 180 days of the alleged violation. *See Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 69 (D.D.C. 2011) (dismissing where plaintiff failed to meet his burden of "establish[ing] by a preponderance of the evidence that any one of these discrete incidences of denial of leave or denial of Telework privileges occurred within the 180–day statutory window.").

As to the notice-of-claim requirement, the plaintiffs respond that mediation is less formal and that parties should not be required to present in mediation excessive detail. In so arguing, the plaintiffs rely on the Court of Appeals's decision in *Artis v. Bernanke*, 630 F.3d 1031 (D.C. Cir. 2011), which as Magistrate Judge Facciola found, is distinguishable for a number of reasons. *Artis* guides this Court insofar as it held that "[w]here counseling produces sufficient information to enable the agency to investigate the claim, th[e] purpose [of counseling] has been served." *Id.* at 1035 (quotation marks omitted). "To hold otherwise would turn the informal counseling requirement into a trap for unwary counselees rather than a step toward remediation, and it would violate the principle that

Title VII's exhaustion requirement should not be read to create useless procedural technicalities." *Id.* A plaintiff therefore must provide notice of her individual claim upon request, but need not provide exhaustive detail.

Plaintiffs err in relying on *Artis* for the proposition that their class-wide presentation of general grievances, along with a handful of instances of individual allegations, was sufficient to exhaust administrative remedies for each and every plaintiff. Such a procedure was sufficient in *Artis* because the case arose under Title VII, which permits the theory of vicarious exhaustion that the plaintiffs appear to be raising. *See Artis,* 630 F.3d at 1039. There, class representatives had initiated

> class-wide counseling by presenting a document that claimed the Board paid them lower salaries than non-minority secretaries, awarded them fewer and smaller bonuses, granted them fewer promotions, deflated their performance appraisals, denied them privileges and training that non-minority secretaries enjoyed, unfairly enforced leave procedures against them, and discriminated against them in the quantity and quality of work assignments.

Id. at 1033. As the Court of Appeals held, however, vicarious exhaustion is inapplicable to the Congressional Accountability Act. *See Blackmon-Malloy III,* 575 F.3d at 706. So while this Court must keep in mind *Artis'* suggestion that plaintiffs not be required to present too much information during counseling, the

Court cannot find that plaintiffs' presentation of a class-wide complaint similar to that utilized in *Artis* served to exhaust administrative remedies for a single plaintiff.

As to which officers received end of mediation notices and made timely elections pursuant to 2 U.S.C. § 1404, plaintiffs, relying on the declaration of Charles Jerome Ware, Esq., who represented the plaintiffs during the administrative process, assert that "[t]here can be no serious dispute" that the plaintiffs "received end of mediation notices, and [ ] made timely elections pursuant to section 1404" of the CAA. ECF No. 386 at 2. In his declaration, Mr. Ware states that he prepared an administrative complaint which was presented to the Office of Compliance on April 12, 2001, at which time counseling was also requested. ECF No. 331-3, Ex. 8 at 1. The fifteen count administrative class-action complaint alleged the following: (1) racial discrimination; (2) sex/gender discrimination; (3) abusive discharge; (4) civil conspiracy; (5) intentional infliction of emotional distress and/or mental distress or anguish; (6) disparate treatment/hostile work environment; (7) sexual harassment; (8) discrimination in promotions based on race and color; (9) discrimination in promotions based on sex; (10) discrimination in hiring based on race and color; (11) discrimination in assignments based on sex; (12) discrimination in assignments based on race and color; (13) discrimination in

hiring based on sex; (14) discrimination in discipline based on race and color; (15) reprisal and/or intimidation. ECF No. 331-1, Ex. 7. The Administrative Complaint includes lists of complainants categorized by claim. ECF No. 353-4, Ex. 105. Mr. Ware stated that during the first meeting with the Capital Police Board, he informed "counsel and the mediators that all of the Officers were complaining of a hostile work environment" and that some were "complain[ing] of racial discrimination in assignments, discipline, and the promotion process." ECF No. 331-3 at 5-6.

The Notice of End of Mediation issued August 2, 2001 states that "[t]he subject of the requests for mediation were allegations that the employing office discriminated based on race and sex in violation of Section 201 and retaliation in violation of Section 207 of the Congressional Accountability Act." *Id.* at 11. This Notice, as supplemented on August 8, 2001, provides a list of the Officers who completed mediation and accordingly could proceed to filing a formal compliant with the Office of Compliance, or file a civil action in federal Court. *Id*. at 11-25.

While there is little dispute as to which officers received end of mediation notifications based on the counseling periods that began on April 12, May 9, May 11, and May 15, 2001 for allegations of discrimination based on race and sex, and for

retaliation, most plaintiffs discussed in detail below have been unable to demonstrate that, pursuant to 2 U.S.C. § 1402(a), they sought counseling with 180 days of the alleged violation of law. As stated above, because the plaintiffs are proceeding under a jurisdictional requirement, under Rule 12(b)(1), they bear the burden of establishing, by a preponderance of the evidence, that (1) they sought counseling within 180 days of the alleged violation(s) of law; and (2) counseling and mediation were completed for the violation(s) alleged.

E. A Review of All 312 Plaintiffs

As an initial matter, the Court observes that there is little or no dispute as to the dismissal of the vast majority of the plaintiffs in this case. In particular, 111 plaintiffs have previously been dismissed or have requested that they be dismissed from the case. *See infra* Section III.E.1. For another 140 individuals who were at some point in time listed as plaintiffs in this case, plaintiffs did not mention them in their objections to Magistrate Judge Facciola's Report and Recommendation and thus no objection was made to the recommendation that they be dismissed from the case. *See infra* Section III.E.2. For another 12 plaintiffs, there is no dispute that at least some of their claims should proceed. *See infra* Section III.E.3. This leaves 49 plaintiffs as to whom there is a dispute as to whether some or any of their claims should

proceed. *See infra* Sections III.E.3, 4. For the majority of the plaintiffs as to whom a dispute remains, plaintiffs have failed to demonstrate that the officer requested counseling within 180 days of the date of the alleged violation of a law because they have not provided the date(s) upon which the alleged violation(s) of law occurred, nor have they demonstrated that counseling and mediation were completed for the violation alleged. Following the Court of Appeals' decision in *Blackmon-Malloy III*, the Court permitted the plaintiffs to take limited jurisdictional discovery "with regard to defendant's factual attacks on plaintiffs' exhaustion claims only." Order, ECF No. 271 at 2. Plaintiffs therefore had ample opportunity to gather evidence demonstrating which claims had been exhausted. As discussed below, the Court has determined that the claims of 24 plaintiffs may proceed. *See infra* Sections III.E.3, 4; III.F.

1. Plaintiffs Dismissed from the Case

A total of 111 plaintiffs have previously been dismissed from the case or have requested that they be dismissed from the case: (1) Shafton Adams[10]; (2) Charles Akins; (3) Earl Allen; (4) Monica Bailey-Washington; (5) Kenneth Baldwin; (6) Clarence Black; (7) Gayle Boone; (8) Clinton Bradford;[11] (9) Grady

[10] *See supra* 48-49.
[11] *See id*.

Bradford, Sr.; (10) Robert Braswell;[12] (11) Sandra Brown-James as to claims in Civil Action No. 01-2221 only; (12) Alphonso Butler; (13) Stephen Cannady; (14) Keith Cathion; (15) Bonnie Chestnut; (16) Joe Christian; (17) Monte Curtis; (18) Ronald Curtis; (19) Masood Darsanni; (20) William C. Davis; (21) Joe Deas; (22) Shawn Deneal; (23) Willie Dickens; (24) Jerry Dickson or Dixon; (25) Raymond Dingle; (26) Yvonne Dove; (27) Marcus Edwards; (28) Keith Emory; (29) John Euill; (30) Kim Evans-Herring; (31) Kim Ewings;[13] (32) Rhonda Farmer; (33) Michael Funderburk; (34) George Gibson; (35) Eric Graves; (36) Tammie Green as to Civil Action No. 01-2221 only; (37) Alvin Green; (38) Clara Grice-Washington; (39) James Griffin; (40) Derek Hamilton; (41) Moses Hart; (42) Fentress Hickman; (43) Larry Hudson; (44) Kevin Jackson; (45) Meldon Jackson; (46) Henry Jacobs; (47) Carleton Jenkins; (48) Michael Jenkins;[14] (49) Thomas L. Jenkins, III; (50) Clarence Jeter, Jr.; (51) Frank

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[12] Plaintiffs assert that Officer Braswell states a claim for hostile work environment and futility, but do not assert that he exhausted his administrative remedies. *See* ECF No. 386 at 36. However, Officer Braswell was dismissed from this case in 2007. *See* Appendix I.

[13] Plaintiffs assert that Officer Ewings has a timely claim for discrimination in the promotion process. *See* ECF No. 386 at 39. However, Officer Ewings was dismissed from this case in 2007. *See* Appendix I.

[14] Plaintiffs assert that Officer Jenkins' claim for hostile work environment was timely. *See* ECF No. 386 at 42. However, Officer Jenkins was dismissed from this case in 2007. *See* Appendix I.

Johnson; (52) Willie Johnson; (53) Naudain Jones, Jr.; (54) Linval Jones; (55) Mervin Jones; (56) James Kennedy; (57) Mack Kennedy; (58) Michael Killebrew; (59) Dorothy Kyle; Alana Lambert; (60) Janice Landrum; (61) Sylvia Lassiter; (62) Mark Latson (63) Brenda Luckey; (64) Michael Malloy; (65) Ollie McCoy; (66) Samuel McNair; (67) Spiro Mihilis; (68) Alfred Moffat; (69) Luanne Moran; (70) Rodric Myers; (71) Charles Nanton, Jr.; (72) Marcellus Newton; (73) Clarence Nowden; (74) Marvin Patterson; (75) Sherrie Perkins; (76) James Pinnix; (77) Kenneth Pittman; (78) Jacqueline Portee-Raymond; (79) James Powell; (80) Albert Powell, Sr.; (81) James Proctor, Jr.; (82) Barry Rainey; (83) Doris Reid; (84) Ronald Richardson; (85) Thomas Rose; (87) Calvin Shields; (87) Leroy Shields; (88) Conrad Smith;[15] (89) Robert Spratt; (90) Claudette Squires; (91) Robert Stewart; (92) Wendell Summers; (93) Gerald Thomas;[16] (94) Kennieth Thompson; (98) Jasper Thorne; (99) David Trader; (100) Anthony Washington; (101) Steven Washington; (102) Stephanie Weems; (103) Jolania White-Sharpes (Cobbin); (104) James Whitt;

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[15] Plaintiffs assert that Officer Smith exhausted his administrative remedies in Civil Action No. 04-320. *See* ECF No. 386 at 46. However, Officer Smith was dismissed from this case in 2007. *See* Appendix 1.

[16] Plaintiffs assert that Officer Thomas has established a timely claim for discrimination in the opportunities for specialty assignments. *See* ECF No. 386 at 47. However, Officer Thomas was dismissed from this case in 2007. *See* Appendix I.

(105) Daniel Wilkerson; (106) Kado Wilks; (107) Roosevelt Williams; (108) Thomas Williams; (109) Victoria Williams; (110) Reginald Wilson; (111) John Young. The basis for the dismissal for each plaintiff is indicated in Appendix I to this Memorandum Opinion. To clarify the record in this case, and to the extent a prior Order of the Court has not been entered dismissing these plaintiffs from the case, the Court will **DISMISS** these plaintiffs from the case.

2. Plaintiffs As To Whom No Specific Objection Was Raised in Response to Magistrate Judge Facciola's Recommendation that the Plaintiff be Dismissed from the Case.[17]

The 140 individuals listed below were at some point listed as plaintiffs in this case. In their Objections to the Report and Recommendation of the Magistrate Judge, plaintiffs do not address these individuals. *See generally* ECF No. 386. In his report and recommendations, Magistrate Judge Facciola stated that

> [a]ny plaintiffs not discussed in the following paragraphs should be dismissed outright because absolutely no evidence was submitted on their behalf showing 1) that they properly raised their claims in the administrative process; 2) that they exhausted the process; and 3) that they timely proceeded to federal court in either Civil Action No. 01-2221 or one of the consolidated cases.

[17] This category does not include plaintiffs who were dismissed from the case as set forth in Section III.E.1. *supra*.

ECF No. 376 at 16-17. The plaintiffs listed below were not discussed by Magistrate Judge Facciola. Furthermore, for the plaintiffs listed below, no objection was raised in the Plaintiffs' Objections to the Report and Recommendation of the Magistrate Judge. *See generally* ECF No. 386. Therefore, plaintiffs have not objected to Magistrate Judge Facciola's recommendation that they be dismissed from the case.

Accordingly, the Court will **ADOPT** the recommendation as to the individuals listed below and they will be **DISMISSED** from this case: (1) Damon Adams; (2) Twanda Alexander-Wise; (3) Vernon Alston; (4) Marsha Anderson; (5) Audrey Augustus; (6) Sherry Bailey; (7) Daryl Banks; (8) Trenton Bass; (9) Larry Bennett; (10) Lewin Blackston; (11) Shirley Bland; (12) Darrin Bloxson; (13) Eric Boggs; (14) Wilbert Booth, Jr.; (15) Sylvia Bradley; (16) Rani Brooks; (17) Kalyana Byrd; (18) John W. Caldwell, Jr.; (19) Bryan Carter; (20)Pernell Clark; (21) Karen D. Clay; (22) William Cleveland; (23) Luarthur Cochran; (24) Charles Coffer, Jr.; (25) Reginald Collins; (26) Michael Covington; (27) Beverly Davis; (28) William Diggs; (29) Tyrone Dixon; (30) Cheryl Duncan-Woodland; (31) Leo Dunklin; (32)Vanessa H. Edwards; (33) Deforest L. Fleming; (34) Marcus Fleming; (35) Robert Fountain; (36) Larry Gaines; (37) Tierre B. Golsby; (38) Raymond Goodine; (39) James Graham, Jr.; (40) Mark A. Gray; (41) Patrick F. Gray; (42) Larry Grear; (43) Clifford Green; (44) Pamela J. Green;

(45) Lynwood Guise; (46) David Hamlett; (47) Macco Harper III; (48) Timothy Harrell; (49) John R. Harris, Jr.; (50) Robin Harris-Sanabria; (51) Nikkol P. Hicks; (52) Timothy Hunter; (53) Korey Irby; (54) Bernard Jackson; (55) Edward Jackson; (56) Wainwright Jackson; (57) Gregory Jacobs; (58) Stephen T. James; (59) Denea Jamison; (60) Arva Johnson; (61) Larverne Johnson-Reynolds; (62) Ronald P. Jones; (63) Wanda Kennedy; (64) John Lanceslin; (65) Lonnie Lane; (66) Cynthia Lassiter-Norris; (67) Errington Lindo; (68) Anthony Lucas; (69) Clarence Luckey, Sr.; (70) Robert Lumkpin; (71) Sheryl Lutrell; (72) William R. Maedel, Jr.; (73) Daniel Malloy; (74) Joseph Tyrone Marshall; (75) Brandy Martin-Wilcher; (76) David Massie; (77) Dawyna Mauney; (78) Keisha McCatty; (79) Dina McIlwain; (80) Jeanita Mitchell; (81) Jocelyn Moore; (82) Morris Moore, Jr.; (83) Monique Moore; (84) Renoard Moore; (85) Denise Morris; (86) Clark Morton; (87) Adrian Motley; (88) David Nelson; (89) Glenn Newell; (90) Brandell Odom; (91) Paula Orem; (92) Cynthia (Edwards) Parker; (93) Sherrie Parker; (94) Trudy Parker; (95) Antoinette Pettis; (96) Wayne Powell; (97) Paul Proctor; (98) Willie Ragland; (99) Michael Richardson; (100) Ritchie Glenn, Jr.; (101) Darius Rose; (102) Felicia Ross; (103) Lloyd Rudd; (104) Gregory Rush; (105) Daryl Scott; (106) Steven S. Scott; (107) Jeffrey Scruggs; (108) Glynis Senn; (109) Kenneth Shaw; (110) Michael Shirley; (111) Dorman Simmons; (112) Floyd

Simpson, Jr.; (113)Henry Smith, Jr; (114) Maurita Smith; (115) Samuel Smith; (116) Pinkney Speights; (117) Chauncey Spriggs; (118) Michael Spriggs (Springs?); (119) Reginald M. Straughn; (120) Patricia R. (Sumber) Sumlin; (121) Chadd Sutton; (122) Shelly (Moore) Taylor; (123) Gladys Trader; (124) Tyrone Tucker; (125) Clinton Turner, III; (126) Irvin Washington; (127) Thurston Weaver; (128) James Westbrooks, II; (129) Angela Wheeler; (130) Rita Wheeler; (131) Charles Williams, Jr.; (132) Kathy B. Williams; (133) Malcolm Williams; (134) Stefani Williams; (135) Tanya Williams; (136) Johnny Wilson; (137) Renee Wilson; (138) Spencer Wilson; (139) Robert C. Woodland; (140) Clabe Wright.

3. Plaintiffs Listed by Magistrate Judge Facciola

Below, the Court addresses twenty-two individual plaintiffs discussed in detail by Magistrate Judge Facciola.

a. Frank Adams

Magistrate Judge Facciola recommends that Lt. Adams' thirty-three claims in the main case and Mr. Adams' cases filed *pro se* that survived in his 2007 Report and Recommendation go forward. ECF No. 376 at 17. Magistrate Judge Facciola notes that the defendant had "previously conceded jurisdiction for Lt. Adams' hostile work environment and adverse actions claims filed in the main case." *Id*. Magistrate Judge Facciola also notes that the defendant had conceded jurisdiction for Lt. Adam's claims in

Civil Action Nos. 04-943 and 06-653 for the following claims: (1) non-selection to Johns Hopkins PELP program; (2) non-selection to a management college; (3) non-selection to the FBI Academy; (4) threat of transfer; (5) involuntary transfer; and (6) non-selection to Captain claim. *Id.*

With regard to Lt. Adams' claims in the main case, plaintiffs disagree with Magistrate Judge Facciola's recommendation only as to those of Lt. Adams' hostile work environment claims that the Magistrate Judge found to be timely in his 2007 Report and Recommendation. ECF No. 386 at 32-33. With regard to Lt. Adams' claims in Civil Action No. 04-943, plaintiffs, citing Lt. Adams' declaration, disagree with Magistrate Judge Facciola's recommendation only as to Lt. Adams' "claim for a hostile work environment created by the negative remarks of Division Commander Callaway." *Id*. at 33. With regard to Lt. Adams' claims in Civil Action No. 05-491, plaintiffs state that Lt. Adams' "claims of hostile work environment, including discrimination in training opportunities" should be allowed to proceed. *Id*. at 33-34. With regard to Lt. Adams' claims in Civil Action No. 06-653, plaintiffs state that Lt. Adams' claim of a continuing hostile work environment should be allowed to go forward. *Id*. at 34. The defendant responds that Lt. Adams' did not exhaust his administrative remedies regarding his claims in Civil Action No 06-0653. ECF No. 394 at 10.

With regard to Lt. Adams' claims in the main case, except for Lt. Adams' claim for hostile work environment created by racist words, it is not clear which of Lt. Adams' claims in the Fourth Amended Complaint correlate to the claims that Magistrate Judge Facciola recommended survive in his 2007 Report and Recommendation. *Compare* ECF No. 278 *with* ECF No. 151-1 *and* ECF No. 376 at 17-18, App. B. ***Consequently, by no later than 14 days after the Court issues the Final Order associated with this Memorandum Opinion, plaintiffs shall file a supplemental briefing regarding Lt. Adams' claims in the main case as set forth in Appendix I to this Memorandum Opinion and identify which claims in the Fourth Amended Complaint correlate to the claims listed in ECF No. 151-1. Following the response and the reply, the Court will determine which of Lt. Adams' claims in the main case may proceed. The Court will only consider argument on claims in the main case.***

b. Sharon Blackmon-Malloy

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Lt. Blackmon-Malloy and the defendant raises no objections. *See* ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and Lt. Blackmon-Malloy's claims listed in Attachment II to this Memorandum Opinion may proceed. Lt. Blackmon-Malloy's remaining claims will be **DISMISSED**.

c. Regina Bolden-Whittaker

Magistrate Judge Facciola recommends dismissing all of Officer Bolden-Whittaker's claims in Civil Action No. 01-2221 but that the claim for retaliation for refusing to sign a deputation form in Civil Action 03-2644 be allowed to proceed. *See* ECF No. 376 at 20-21. Magistrate Judge Facciola states that the defendant conceded that Officer Bolden-Whittaker adequately exhausted her retaliation claim in Civil Action No. 03-2644. *Id.* at 20. With regard to Officer Bolden-Whittaker's claim for retaliation for refusing to wear body armor, plaintiffs conceded that she did not request counseling for this claim until September 2001; therefore she did not exhaust her administrative remedies on that claim prior to the filing of this lawsuit on October 29, 2001. *Id.* at 20-21.

Citing her declarations as well as Magistrate Judge Facciola's prior dismissal based on her failure to attend mediation in person, plaintiffs object only to the dismissal of Officer Bolden-Whittaker's claims for "hostile work environment, including repeated discriminatory denials of assignment." ECF No. 386 at 34. Plaintiffs argue that Magistrate Judge Facciola had recommended dismissal of these claims in his 2007 Report and Recommendation because Officer Bolden-Whittaker did not attend mediation in person and since in person attendance is not required per the Court of Appeals' prior decision in this case,

this is no longer a reason to dismiss these claims. *See id*. at 35. Plaintiffs then argue that Officer Bolden-Whittaker's claim for retaliation for refusal to wear body armor "is not properly part of the main case", but is properly part of Civil Action No. 03-2264 as part of her continuing retaliatory hostile work environment claim. *Id*.

The defendant responds that Office Bolden-Whittaker's "own declaration admits that she did not mediate any of her claims in Civil Action 01-2221 because she was recovering from surgery." ECF No. 394 at 11. However, what Officer Bolden-Whittaker's declaration states is that she did not attend a mediation session [in person] because she was recovering from surgery. *See* ECF No. 331-7, ¶ 7.

With regard to her claim for "hostile work environment, including repeated discriminatory denials of assignment" in one of her declarations, Officer Bolden-Whitaker states that she was discriminated against when she was not considered for a bus driver position in 2000 and that when the same position was announced in January 2001, she did not apply for it because she thought that reapplying would be futile. ECF No. 331-7, Ex. 30 at 1. Her other two declarations do not provide additional information about this claim. *See generally* ECF No. 331-7, Ex. 29 and 31. The declaration does not provide the specific date upon which the alleged violation occurred. *See generally id*.

Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violation alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Bolden-Whitaker sought counseling within 180 days of the alleged violation. With regard to plaintiffs' argument that Officer Bolden-Whittaker's claim for retaliation for refusal to wear body armor is properly part of Civil Action No. 03-2644 as part of her continuing retaliatory hostile work environment claim, the complaint in that case does not contain a hostile work environment claim. *See generally* First Am. Compl., ECF No. 21 in Civil Action No. 03-2644. Accordingly, the Court WILL **ADOPT** the recommendation. Officer Bolden-Whittaker's claim for retaliation for refusing to sign a deputation form in Civil Action No. 03-2264, as listed in Attachment II to this Memorandum Opinion, may proceed. Officer Bolden-Whittaker's remaining claims will be **DISMISSED**.

d. Tyrone Brooks

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Officer Brooks and the defendant raises no objections. *See* ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and Officer Brooks' claims listed in Attachment II to this

Memorandum Opinion may proceed. Officer Brooks remaining claims will be **DISMISSED**.

e. Sandra Brown-James

The parties filed a joint praecipe in which they agree that Officer Brown-James exhausted her administrative remedies regarding her claims in Civil Action No. 04-320, but that she did not exhaust her administrative remedies concerning the claims she raised in Civil Action No. 01-2221 and she must be dismissed from that case. *See* ECF No. 379-2. In his supplemental Report and Recommendation filed March 7, 2013, Magistrate Judge Facciola acknowledged the joint praecipe; however, his recommendation that Officer Brown-James be permitted to proceed on a claim in Civil Action No. 01-2221 is clearly an error.

Accordingly, the Court WILL **ADOPT IN PART** and **REJECT IN PART** the recommendation. Officer Brown-James' claim in Civil Action No. 04-320 as listed in Attachment II to this Memorandum Opinion may proceed. Officer Brown-James will be **DISMISSED** from Civil Action No. 01-2221.

f. Arnold Fields

Magistrate Judge Facciola recommends that Officer Fields' claims in Civil Action No. 01-2221 be dismissed "as no evidence was provided showing those claims were properly exhausted," but that Officer Fields' claims in Civil Actions No. 02-1346, 03-1505, and 03-2644 be allowed to proceed. *See* ECF No. 376 at 24.

Citing his declarations, plaintiffs object only to the dismissal of Officer Fields' claim for hostile work environment and retaliation in Civil Action No. 01-2221 based on events that began in April 2000 through January 2001. ECF No. 386 at 39. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Jones' declaration does not provide the necessary information. *See* ECF No. 394 at 24-25.

In his declaration, Officer Fields states that on January 2, 2001, there was an incident that involved a disciplinary charge because he did not wear his badge and that on May 9, 2001, he requested counseling for this incident. ECF No. 332-1, Ex. 42 at 2. Officer Fields asserts that this incident constituted a hostile work environment. *Id*. This is the only incident discussed in his declaration regarding Civil Action No. 01-2221. *See generally id*. Although Officer Fields' declaration refers to an Attachment, that Attachment was not included in the Exhibit. *Id*.

If Officer Fields requested counseling for this incident on May 9, 2001, his request would have been timely. However, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance

of the evidence, that Officer Fields sought counseling within 180 days of the alleged violation. The defendant does not object to Mr. Fields proceeding on his claims in Civil Action Nos. 02-1346, 03-1505, and 03-2644. ECF No. 394 at 23-24. Accordingly, the Court will **ADOPT** the recommendation and Officer Fields' claims in Civil Action No. 01-2221 will be **DISMISSED**. Officer Fields may proceed on the claims in the consolidated cases as listed in Attachment II to this Memorandum Opinion.

g. Gary Goines

Magistrate Judge Facciola recommends that all of Officer Goines' claims in Civil Action No. 01-2221 be dismissed for failure to provide adequate documentation of exhaustion, but that Officer Goines' claim in Civil Action No. 04-0320 be allowed to proceed. ECF No. 376 at 25. Citing his declaration and the defendant's prior concession that Officer Goines had timely requested counseling for this claim, plaintiffs object only to the recommended dismissal of Officer Goines' claim for discrimination and retaliation in the 2000 promotion process. ECF No. 376 at 40. With regard to the prior concession, the defendant "conceded that Officer Goines timely requested counseling regarding his 2000-2002 promotion claim." ECF No. 90 at 16. The defendant does not dispute the prior concession, but appears to claim that the concession was in error. ECF No. 394 at 26. The defendant conceded the timeliness of Officer Goines'

2000-2002 promotion claim and has not adequately explained why that concession was in error. Furthermore, the defendant does not object to Magistrate Judge Facciola's recommendation that Mr. Goines proceed on his claim in Civil Action No. 04-320. Accordingly, the Court will **ADOPT IN PART AND REJECT IN PART** the recommendation. Officer Goines may proceed on the claim for discrimination and retaliation in the 2000 promotion process in Civil Action No. 01-2221 and on the claim for discrimination in the Sergeant promotion process from 2002-2004 in Civil Action No. 04-320 as listed in Attachment II to this Memorandum Opinion. Officer Goines' remaining claims will be **DISMISSED**.

h. Tammie D. Green

Plaintiffs concede that Officer Green must be dismissed from the main case for failure to properly exhaust her administrative remedies. ECF No. 379 at 4-5; ECF No. 386 at 40. However, Officer Green is not included in the Fourth Amended Complaint nor in any of the Exhibits thereto. *See generally* ECF No. 278. Magistrate Judge Facciola stated that "plaintiffs submitted sufficient documentation to support a finding of timeliness on Officer Green's retaliation claim stemming from the 2003 Sergeants' exam" which Officer Green asserts in Civil Action No. 04-329. ECF No. 389 at 4. The defendant asserts that Office Green did not exhaust her administrative remedies in Civil Action No. 04-329 but provides no argument as to why. *See* ECF

No. 394 at 26-27. Accordingly, the Court will **ADOPT** the recommendation and Officer Green may proceed on the claim in Civil Action No. 04-329 as set forth in Attachment II to this Memorandum Opinion. To the extent Officer Green alleges any claims in the Fourth Amended Complaint, they will be **DISMISSED**.

i. Ave Maria Harris

Plaintiffs concur with Judge Facciola's Report and Recommendations as to Officer Harris and the defendant raises no objections. *See* ECF No. 386 at 28, *see generally* ECF No. 394. The Court will **ADOPT** the recommendation and Officer Harris may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Harris' remaining claims will be **DISMISSED**.

j. Larry Ikard

Magistrate Judge Facciola recommends that Sergeant Ikard's claims for discrimination based on non-promotion as a K-9 officer and for hostile work environment and/or discrimination regarding the name given to a dog in the K-9 unit be allowed to proceed. ECF No. 376 at 27-28. Magistrate Judge Facciola recommends dismissal of "Sgt. Ikard's retaliation claim, premised on his not being promoted to a K-9 officer [because it] was not alleged in the complaint in any detail, and there was no demonstration that administrative remedies were exhausted for this claim." ECF No. 376 at 28.

Citing his declarations, plaintiffs object to the dismissal of other hostile work environment claims and the retaliation claim based on Sgt. Ikard's non-promotion as a K-9 officer. ECF No. 386 at 41. Plaintiffs state that Sgt. Ikard should be able to pursue his non-promotion claim as an act of retaliation, not only as an act of discrimination. *See id.* Plaintiffs also state that although Sgt. Ikard is not listed in the complaint for Civil Action No. 04-320, it is a proposed class action and thus includes Sergeant Ikard. *Id.* Further, according to plaintiffs, Sgt. Ikard has exhausted his claims in that case. *See id*. The defendant earlier conceded that Sgt. Ikard exhausted his claim regarding the name of the dog in the K-9 unit. ECF No. 315-1 at 142.

The defendant responds that the plaintiffs have not identified the incidents or dates that the other hostile work environment claims were exhausted, that Sgt. Ikard did not assert a non-promotion claim in the Fourth Amended Complaint, and that Sgt. Ikard did not demonstrate that he exhausted his administrative remedies in Civil Action No. 04-320. ECF No. 394 at 32-33.

Sgt. Ikard asserted only one hostile work environment claim in the Fourth Amended Complaint. *See generally* ECF no. 278. Accordingly, plaintiffs' contention that he should be able to proceed on additional hostile work environment claims is unavailing. The Court agrees with plaintiffs that Sgt. Ikard may

proceed on his retaliation claim based on not being promoted to a K-9 officer position. Magistrate Judge Facciola found that Sgt. Ikard exhausted his administrative remedies for a hostile work environment claim arising out of those facts and Officer Ikard has asserted a retaliation claim in the Fourth Amended Complaint. The Court rejects the plaintiffs' argument that Sgt. Ikard can proceed with his claims in Civil Action No. 04-320 because he is not a named plaintiff in that case. Accordingly, the Court will **ADOPT IN PART** and **REJECT IN PART** the recommendation and Sgt. Ikard may proceed on his two claims as listed in Appendix II to this Memorandum Opinion. Sgt. Ikard's remaining claims will be **DISMISSED**.

k. John N. Johnson

Magistrate Judge Facciola recommends that Officer Johnson's claim of non-selection following the 2000 sergeant exam should go forward because the parties agreed that his claim was timely, but that his claim for racist words or actions should be dismissed because "there was no demonstration that administrative remedies were exhausted for this claim." ECF No. 376 at 28. The plaintiffs do not object to Magistrate Judge Facciola's recommendation, but relying on Officer Johnson's

declaration in the main case,[18] assert that Officer Johnson's claim in Civil Action No. 04-320 should proceed as well. ECF No. 386 at 43. Magistrate Judge Facciola's Report and Recommendation is silent on this claim. *See generally* ECF No. 376.

Although the defendant has conceded the timeliness of this claim, *see* ECF No. 315-1 at 156 and ECF No. 275, the defendant argues that Officer Johnson did not exhaust his administrative remedies with regard to a retaliation claim regarding the 2002 Sergeant's promotion process in Civil Action No. 01-2221. ECF No. 394 at 36-37. However, Officer Johnson did not assert this claim in the Fourth Amended Complaint. The defendant does not respond to plaintiffs' arguments regarding Civil Action No. 04-320.

In Civil Action No. 04-320, Officer Johnson asserts disparate treatment and retaliation claims arising out of the year 2003 promotion to Sergeant and Lieutenant examinations. Compl., ECF No. 1 at 14-15. However, the plaintiffs have provided no evidence to demonstrate that Officer Johnson exhausted his administrative remedies with regard to that claim. Accordingly, Officer Johnson's claim in Civil Action No. 04-320 will be **DISMISSED**.

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[18] The declaration cited in Plaintiffs' opposition does not exist in the record.

With regard to Civil Action No. 01-2221, the Court will **ADOPT** the recommendation and Officer Johnson may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Johnson's remaining claims will be **DISMISSED.**

l. *Governor Latson*

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Officer Latson and the defendant raises no objections. ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and Officer Latson may proceed on the claim as listed in Attachment II to this Memorandum Opinion. Officer Latson's remaining claims will be **DISMISSED**.

m. Derrick Macon

Magistrate Judge Facciola found that Officer Macon, whose claims are included in the Fourth Amended Complaint, but who is proceeding *pro se*, raised four claims in this case: "1) that he was subjected to a hostile work environment; 2) that he was denied training in April of 2000; 3) that he was selected for a training regarding pick-pocketing in November of 2000, but was never given the opportunity to attend; and 4) that he was denied sick leave in retaliation for filing a complaint." *Id.* at 2 (citing Fourth Am. Compl., ECF No. 278 ¶ 33; Macon Decl., ECF No. 318-1). Magistrate Judge Facciola found that Officer Macon failed to supply evidence of having exhausted the hostile work

environment claim "because no evidence was presented showing that Officer Macon raised this claim at the administrative level." *Id.* (internal citation omitted). The claim regarding pick-pocket training had not been raised at the administrative level, Magistrate Judge Facciola found, because even the evidence submitted by the plaintiff did not contain anything that would indicate that the claim was raised until June 27, 2001, more than 180 days after the November 2000 training. *See id.* at 3. The claim regarding the April 2000 training was similarly infirm because Officer Macon did not contact a counselor about anything until April 12, 2001. *See id.* at 2 n.3. Finally, Magistrate Judge Facciola found Officer Macon's retaliation claim had not been exhausted "because no date was provided for when this alleged violation occurred." *Id.* at 3. Magistrate Judge Facciola did not specifically address Officer Macon's claims that were listed in the Appendices to the Fourth Amended Complaint, but clearly recommended that all of Officer Macon's claims in the Fourth Amended Complaint be dismissed. *Id.* at 3.

Officer Macon objects to the recommended dismissal of his claims and attaches to his objections "all documents given to him from the Office of Compliance (OOC) as additional evidentiary support of his exhaustion of administrative remedies." Objs., ECF No. 384 at 2. Officer Macon relies on

"Chart A" and "Chart B," which the parties provided to the Court in response to the Court's request, as evidence that he exhausted his administrative remedies. *Id.* at 2-3. Officer Macon also objects to Magistrate Judge Facciola's recommended dismissal of his hostile environment claims stemming from events that occurred prior to October 14, 2000 because, according to Officer Macon, as long as he timely sought counseling for any act that contributed to that claim, his claim is timely. *Id.* at 4-5.

The defendant responds that: (1) Officer Macon has not complied with Local Civil Rule 72.3(b) in making his objections to Magistrate Judge Facciola's Report and Recommendations; (2) Officer Macon was provided with clear guidance of what evidence he needed to provide to show that he exhausted his administrative remedies and he failed to provide evidence to show that he exhausted those remedies; (3) the parties agree that Officer Macon attended counseling on April 12, 2001, but Officer Macon has not shown that his claims arose within 180 days of the alleged violation;(4) Officer Macon did not present any facts or dates related to his hostile work environment claim nor his denial of sick leave claim and so he did not show that he timely pursued these claims; (5) Officer Macon's claim for denial of training claim is untimely because it arose in April 2000 but he did not seek counseling until April 12, 2001; and

(6) Although Officer Macon's claim regarding the denial of pick-pocket training arose in November 2000, he did not raise this claim until June 27, 2001, and even if he had, the Fourth Amended Complaint did not include the denial of pick-pocket training. Def's Resp., ECF No. 391 at 3-5.

As a preliminary matter, the Court has already dismissed the disparate-impact claims raised by plaintiffs in Exhibits 4 and 5 to the Fourth Amended Complaint, *see supra* at 47, as well as the futility claims in Exhibit 9. *See supra* at 48. The Court has reviewed the materials Officer Macon attached to his opposition. Exhibit 1 is a June 27, 2001 letter from Officer Macon to Ms. Malloy regarding the claims he sought to pursue in District Court after going through counseling and mediation. This letter cites various alleged violations that occurred in 1990, 1992, 1993, 1999 and 2000 (pick-pocket training class) but does not provide the specific dates upon which any of the alleged violations occurred. The documents provided at Exhibit 2 are dated 2003 or later and therefore are not relevant to any claims asserted in Civil Action No. 01-2221 which was filed on October 29, 2001. With regard to "Chart A" (Exhibit 3) and "Chart B" (Exhibit 4), these Charts were provided in response to the Court's request that the parties provide a chart indicating their exact cause of action and pertinent information regarding their exhaustion of administrative remedies. Chart A indicates

that Officer Macon asserts the following claims in Civil Action No. 01-2221: (1) denied the opportunity to take the sergeant's exam in 1990; (2) internal affairs conducted investigation into a traffic stop of him by Park Police; (3) the review board found him guilty of conduct prejudicial to reputation of the department but he was not disciplined; and (4) discipline pending for two years and during those two years he was unable to transfer or be promoted. Chart A, ECF No. 127-1. "Chart B" indicates that Officer Macon alleged discrimination based on the 1990 sergeant promotion process, discipline, and hostile work environment and that the date of the alleged violation was November 30, 2000. ECF No. 384-1 at 42. The chart also provides the date counseling was requested and attended in person, the date the end of counseling notice was received, the date that mediation was requested and attended in person, and the date the end of mediation notice was received. *Id.* Comparing the information in "Chart A" to Officer Macon's claims in the Fourth Amended Complaint shows little correlation between his claims in the complaint originally filed in this case and the claims asserted in the Fourth Amended Complaint. Exhibit 5 contains defendant's acknowledgement that Officer Macon's denial of participation in pickpocket training class falls within the 180-day window preceding his April 12, 2001 request for counseling, but defendant states that it does know whether this incident was

the subject of Officer Macon's request for counseling. Exhibit 6 contains Appendix A to Magistrate Judge Facciola's First R. & R. in this case. Exhibit 7 contains Magistrate Judge Kay's (unsigned) order regarding a settlement conference in Civil Action No. 03-1592 and Exhibit 8 contains a confirmation of the date and time for the settlement conference. Lastly, Exhibit 9 contains the formal request for counseling dated May 8, 2001 pertaining to a promotional exam for which scores were made public in the second week of January 2001. This material appears to pertain to the futility claim, which the Court has already dismissed.

Although plaintiffs were given the opportunity to take discovery in order to obtain evidence to refute the defendant's factual attacks on plaintiffs' exhaustion claims, Mr. Macon has provided no evidence other than the letter at Exhibit 1 to show that he presented the pick-pocket training incident in counseling and mediation. Mr. Macon has therefore failed to meet his burden of establishing, by a preponderance of the evidence, that he presented this incident in counseling and mediation.

With regard to the remaining claims in the Fourth Amended Complaint, Officer Macon failed to meet his burden of establishing, by a preponderance of the evidence, that he sought counseling for any of the claims within 180 days of the alleged violations because neither the Fourth Amended Complaint, the

Exhibits thereto, nor the materials Officer Macon cites provides the specific date(s) upon which any of his claims arose, nor that those claims were raised in counseling and mediation. Accordingly, the Court will **ADOPT** the recommendation and Officer Macon will be **DISMISSED** from the case.

Both Magistrate Judge Facciola and Officer Macon state that Civil Action No. 03-1592 has been dismissed without prejudice. Suppl. R. & R., ECF No. 378 n.1; Objs. n.1. However, this case was dismissed with prejudice on August 15, 2007, Order, ECF No. 36 at 1, and Officer Macon has not sought relief from this judgment. *See generally* Docket for Civil Action No. 03-1592.

n. Kevin Matthews

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Officer Matthews and the defendant raises no objections. ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and Officer Matthews may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Matthews' remaining claims will be **DISMISSED**.

o. Danny McElroy

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations that Officer McElroy be permitted to proceed on his non-promotion claim in Civil Action No. 04-320 and his 2001 claim for improper discipline in Civil Action No. 01-2221. *See*

ECF No. 386 at 28, ECF No. 376 at 30-31. The defendant objects only to the non-promotion claim, but does not explain why Magistrate Judge Facciola's recommendation was incorrect. See ECF No. 394 at 40. Accordingly, the Court will **ADOPT** the recommendation and Officer McElroy may proceed on the claims listed in Attachment II to this Memorandum Opinion. Officer McElroy's remaining claims will be **DISMISSED**.

p. Brent Mills

Magistrate Judge Facciola recommends that Officer Mills' claim in Civil Action No. 04-320 for retaliatory non-promotion in 2003 proceed and that all of his claims in Civil Action No. 01-2221 be dismissed. ECF No. 376 at 31-32. With regard to Officer Mills' non-promotion claim in the main case, Magistrate Judge Facciola states that he had recommended dismissal of this claim "for failure to exhaust administrative remedies, because the plaintiff's declaration was incomplete and inconsistent with his counsel's assertions regarding dates of counseling and mediation." ECF No. 376 at 31.

Citing his declaration, the plaintiffs object to the recommended dismissal of Officer Mills' claim for discrimination in promotion based on a November 5, 2000 incident. *See* ECF No. 386 at 43. In his January 3, 2004 declaration, Officer Mills states that he was discriminated against on November 5, 2000 when the defendant promoted four other officers to the rank of

sergeant, and that he sought counseling for this incident on April 12, 2001. ECF No. 332-2, Ex. 63 at 2. The defendant responds that in an earlier document, Officer Mills stated that he was denied a chance at promotion on September 28, 2000, which makes his claim 16 days late. *See* ECF No. 394 at 41-42.

Plaintiffs have not responded to Magistrate Judge Facciola's concerns about Officer Mills' declaration. Accordingly, the Court will **ADOPT** the recommendation and Officer Mills may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Mills' remaining claims will be **DISMISSED.**

q. Duvall Phelps

Magistrate Judge Facciola recommends that Officer Phelps' claims in Civil Action No. 01-2221 be dismissed, including his claim for discrimination in discipline "because Officer Phelps entered into a settlement agreement regarding his retirement in June 2000, and did not seek counseling until 10 months later on April 28, 2001." ECF No. 376 at 32, App. B. With regard to Officer Phelps' claims in Civil Action No. 02-2644, Magistrate Judge Facciola recommends that Officer Phelps' claims in that case proceed based on Office of Compliance certifications and Officer Phelps' declaration. ECF No. 376 at 33.

Plaintiffs disagree with the recommendation only as to Officer Phelps' claim for discrimination in discipline. ECF No. 386 at 30-31. Plaintiffs' theory is that Officer Phelps was coerced

into retiring because he would have been terminated if he had not settled, and thus his claim is timely because he sought counseling once it was "safe" for him to do so – on April 28, 2001, which was within 180 days of his actual separation on October 31, 2000. ECF No. 386 at 31.

Defendants respond that the plaintiffs did not identify why Magistrate Judge Facciola's recommendation was wrong, and that moreover, under binding precedent in this Circuit pursuant to *Brees v. Hampton*, 877 F.2d 111 (D.C. Cir. 1999) a plaintiff who enters into a settlement agreement is barred from raising discrimination claims. *See* ECF No. 394 at 47. In that case, however, the settlement agreement itself precluded the plaintiff from filing additional claims. See *Brees v. Hampton*, 877 F.2d at 117. In this case, the terms of Officer Phelps' settlement agreement are not in the record.

Given that the terms of the settlement agreement were not provided to the Court, the Court will **ADOPT IN PART** the recommendation and this claim will be dismissed without prejudice. Officer Phelps' remaining claims in Civil Action No. 01-2221 will be **DISMISSED**. Officer Phelps may proceed on the claims listed in Attachment II to this Memorandum Opinion. Officer Phelps' remaining claims will be **DISMISSED.**

r. Vernier Riggs

Magistrate Judge Facciola recommends that two of Sgt. Riggs' claims proceed – the claim for discrimination with respect to denials of sick leave as to specific incidents of harassment that occurred after October 14, 2000, and the claim that she was retaliated against by being admonished for wearing an incorrect shirt. ECF No. 376 at 33-34. Plaintiffs object only to the date restriction on the claim for discrimination with respect to denials of sick leave on the grounds that this is a hostile work environment claim. ECF No. 386 at 32. The defendant does not respond. *See generally* ECF No. 394. However, Sgt. Riggs does not allege a hostile work environment claim in the Fourth Amended Complaint, *see generally* ECF No. 278, and may not refashion her retaliation claim as hostile work environment in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, the Court will **ADOPT** the recommendation and Sgt. Riggs may proceed on the claims listed in Attachment II to this Memorandum Opinion. Sgt. Riggs' remaining claims will be **DISMISSED.**

s. Leonard Ross

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Officer Ross and the defendant raises no objections. ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and

Officer Ross may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Ross' remaining claims will be **DISMISSED.**

t. Reginald Waters

Magistrate Judge Facciola recommends that Officer Waters be permitted to proceed on his hostile work environment claim. *See* ECF No. 389 at 6. Relying on their response to Magistrate Judge Facciola's request for clarification, plaintiffs assert that Officer Waters exhausted his administrative remedies in both Civil Action Nos. 01-2221 and 04-320. ECF No. 386 at 49. The defendant concedes that it did not object to Officer Waters' hostile work environment claim in its motion to dismiss. ECF No. 394 at 62. With their one-sentence general objection, plaintiffs have failed to "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for objection." Local R. Civ. P. 72.3(b). Accordingly, the Court will **ADOPT** the recommendation and Officer Waters may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Waters' remaining claims will be **DISMISSED**.

u. Richard Webb

Magistrate Judge Facciola recommends that Officer Webb be permitted to proceed on his K-9 unit non-promotion and hostile work environment claims in Civil Action No. 01-2111 and his non-

promotion discrimination claim in Civil Action No. 04-320. *See* ECF No. 376 at 36. Citing his declaration, plaintiffs object to the dismissal of Officer Webb's claim that he was unfairly denied a promotion after the 2000 sergeants' examination. ECF No. 386 at 49. The defendant does not respond. *See generally* ECF No. 394. With regard to this claim, Officer Webb states that he took the promotional examination during the 1999-2000 process. ECF No. 332-4, Ex. 79 at 30. The declaration does not provide specific dates upon which this incident occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violation alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Webb sought counseling within 180 days of the alleged violation. Accordingly, the court will **ADOPT** the recommendation and Officer Webb may proceed on the claims listed in Attachment II to this Memorandum Opinion. Officer Webb's remaining claims will be **DISMISSED.**

v. Frank Wilkes

Plaintiffs concur with Magistrate Judge Facciola's Report and Recommendations as to Officer Wilkes and the defendant raises no objections. *See* ECF No. 386 at 28, *see generally* ECF No. 394. Accordingly, the Court will **ADOPT** the recommendation and Officer

Wilkes may proceed on the claim listed in Attachment II to this Memorandum Opinion. Officer Wilkes' remaining claims will be **DISMISSED**.

4. *Plaintiffs Not Listed by Magistrate Judge Facciola But Addressed Individually by the Plaintiffs*

With regard to the 42 plaintiffs listed below, Magistrate Judge Facciola recommends dismissal of their claims "because absolutely no evidence was submitted on their behalf showing 1) that they properly raised their claims in the administrative process; 2) that they exhausted the process; and 3) that they timely proceeded to federal court in either Civil Action No. 01-2221 or one of the consolidated cases." ECF No. 376 at 16-17. The plaintiffs' objections to Magistrate Judge Facciola's recommendations as to these plaintiffs and the defendant's responses are set forth below and the Court resolves plaintiffs' objections.

a. *Roy Anderson*

Citing his Declaration, plaintiffs object to the recommended dismissal of Officer Anderson's claim that he was unfairly denied a promotion after the 2000 Sergeant's examination. ECF No. 386 at 34. The defendant responds that the plaintiffs have provided no evidence to support their contention that the defendant received notice of Officer Anderson's administrative claim. ECF No. 394 at 11.

In his declaration, Officer Anderson alleges that he participated in the 2000 promotion process, but that he was not provided with the "Incident Command Book" needed to prepare for the exam until after the exam and thus received a low score because he was unable to properly prepare. ECF No. 331-6, Ex. 26 at 2. Officer Anderson asserts that when he initiated counseling on April 12, 2001, it was within 180 days of the acts about which he complains. *Id*. However, the declaration does not provide specific dates upon which any of the incidents occurred, s*ee general id*., and the Fourth Amended Complaint does not allege the date upon which the year 2000 Sergeant's examination(s) took place. Fourth Am. Compl. ¶ 53. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Anderson sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Anderson will be **DISMISSED** from the case.

b. Helen Bond-Jones

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Bond-Jones' claim for "hostile work environment based on observing the treatment of other African-

American Officers." ECF No. 386 at 52-53. Officer Bond-Jones did not assert a hostile work environment claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, the Court WILL **ADOPT** the recommendation and Officer Bond-Jones will be **DISMISSED** from this case.

c. *Armando Bowman*

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Bowman's claim for disparate treatment in assignments. ECF No. 386 at 36. The Court has already dismissed all claims for disparate treatment in assignment. *See supra* at 47. Accordingly, the Court will **ADOPT** the recommendation and Officer Bowman will be **DISMISSED** from this case.

d. Kevin Bull

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Bull's claim for discrimination in the 2000 promotion process. ECF No. 386 at 17. Defendants respond that Office Bull does not appear in the complaint originally filed in this case, and thus plaintiffs have not shown that Officer Bull timely filed his claim in this court. ECF No. 394 at 17. Officer Bull is not listed as a plaintiff in Civil Action No. 01-2221 nor in any of the consolidated cases although he is listed in Exhibits 1,2, 4, 7, and 9 of the Fourth Amended Complaint. *See generally* Docket for Civil Action No. 01-2221 and ECF No. 278.

In his declaration, Officer Bull states that he was discriminated against as a result of the 1999-2000 promotion exam for sergeant. ECF No. 332-1, Ex. 37. The declaration does not provide specific dates upon which the incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violation alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Bull sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Bull – to the extent he is a plaintiff in this case – will be **DISMISSED** from this case.

e. Loretta Bullock

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Bullock's claims for discrimination in assignment and hostile work environment based on witnessing discrimination against other African-American officers. ECF No. 386 at 37. The Court has already dismissed the disparate impact claims raised by plaintiffs in Exhibits 4 and 5 to the Fourth Amended Complaint. *See supra* at 47. Officer Bullock did not assert a hostile work environment claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation.

Accordingly, the Court will **ADOPT** the recommendation and Officer Bullock will be **DISMISSED** from this case.

f. Saphonia Butler

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Butler's claim for hostile work environment based the fact that "openings for specialty assignments were not made known to African American Officers and based on her observation that African American Officers were consistently passed over for specialty assignments and promotions" and the fact that she ceased applying for promotions because she deemed it futile. ECF No. 386 at 37-38. The Court has already denied Office Butler's sole claim that she was unfairly denied a promotion after the 2000 sergeant's examination. *See supra* at 48. Officer Butler did not assert a hostile work environment claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, the Court will **ADOPT** the recommendation and Officer Butler will be **DISMISSED** from this case.

g. *Dorian Coward*

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Coward's claim for "hostile work assignment," which the Court understands to be a claim for hostile work environment. *See* ECF No. 386 at 38. In his

declaration, Officer Coward states that he experienced racial discrimination as a result of specific events up to October 16, 2000 and through at least April 11, 2001. ECF No. 332-5, Ex. 87 at 1. Officer Coward states that he was regularly yelled at and disrespected by white officers, he was denied assignments, and in general was subjected to a very hostile work environment. *Id.* The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Coward sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Coward will be **DISMISSED** from this case.

h. J. Carroll Creekmur

Citing his declaration, and asserting that the claims are timely, plaintiffs object to the recommended dismissal of Officer Creekmur's claim of "hostile work environment based on . . . discriminatory conduct by white Officers towards African American members of the public and retaliation against him for complaining to his superiors about this conduct." ECF No. 386 at 38. The Court understands this to be Officer Creekmur's hostile

work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Creekmur's declaration does not provide the necessary information. *See* ECF No. 394 at 19.

In his declaration, Officer Creekmur alleges that he experienced racial discrimination between October 16, 2000 and April 11, 2001. ECF No. 345-14, Ex. 100 at 2. Officer Creekmur describes how white officers would racially profile motorists and homeless persons. *Id*. at 2-5. The only information in the declaration regarding any actions taken against Officer Creekmur himself were that "[w]hen he brought [the racial profiling] to my Caucasian Sergeant's attention . . he published my name as though I were complaining and I was pulled into IAD." *Id.* at 3. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Creekmur sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Creekmur will be **DISMISSED** from this case.

i. Donald Dixon

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Dixon's "claim for a hostile work environment based on discriminatory discipline, unfounded IAD investigations, and an involuntary transfer." ECF No. 386 at 38. The Court understands this to be Officer Dixon's hostile work environment claim raised in the Fourth Amended Complaint. *See* ECF No. 278 ¶¶ 25, 28 Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Dixon's declaration does not provide the necessary information. ECF No. 394 at 20-21.

In his declaration, Officer Dixon alleges that he experienced racial discrimination between November 2000 and April 2001. ECF No. 333-2, Ex. 91 at 2. In particular, Officer Dixon states that he was blamed for a breach in discipline even though he was not on duty at the time of the incident. *Id.* at 3. Officer Dixon also states that from "October 2000 through 2001, he was subjected to numerous IAD investigations for the most ridiculous alleged infractions" and that he was "involuntarily transferred." *Id*. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that

counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Dixon sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Dixon will be **DISMISSED** from this case.

j. Kevin R. Evans

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Evans' claim for "hostile work environment based on the discriminatory refusal to correct information in his personnel file to reflect accurately his education and enable him to be considered for specialty assignments for which he was qualified based on his education and experience." ECF No. 386 at 38-39. The Court understands this to be Officer Evans' hostile work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Evans' declaration does not provide the necessary information. ECF No. 394 at 21.

In his declaration, Officer Evans alleges that he experienced racial discrimination between October 2000 and April 2001. ECF No. 332-1, Ex 40 at 2. Specifically, Officer Evans states that despite numerous requests to correct his employment record to reflect that he had a college degree so that he could be

considered for job advancement, this never occurred. *Id*. at 2-4. The declaration does not provide specific dates upon which Office Evans requested that his employment record be corrected. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Evans sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Evans will be **DISMISSED** from this case.

k. David Fleming

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Fleming's claim for "hostile work environment, based on an unwarranted accusation by white Officers that he had been smoking marijuana and an improper investigation of that charge." ECF No. 386 at 39-40. The Court understands this to be Officer Fleming's hostile work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Fleming's declaration does not provide the necessary information. ECF No. 394 at 24-25.

In his declaration, Officer Fleming states that he experienced racial discrimination between October 16, 2000 and April 11, 2001. ECF No. 345-15, Ex. 101. In particular, Officer Fleming alleges that on November 11, 2000, he was "singled out" by "two white officers and accused of smoking marijuana" and that there was "no legitimate reason for [him] to have been accused of this." *Id*. at 2. *Id*. Officer Fleming does not state that he sought counseling and mediation for this alleged violation of law. *See generally id*.

If Officer Fleming requested counseling for this incident on April 12, 2001, his request would have been timely. However, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the this incident. Accordingly, the Court will **ADOPT** the recommendation and Officer Fleming will be **DISMISSED** from this case.

l. James Gupton

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Gupton's claim that he did not participate in the 2000 promotion process because he deemed it futile. ECF No. 386 at 53. Officer Gupton does not allege this claim in the Fourth Amended Complaint, but does allege that he was unfairly denied a promotion after the 2000 sergeant's examination. In his declaration, Officer Gupton states that he "did not participate

in the 2000-2002 promotion cycle because [he] deemed it to be futile." ECF No. 332-2, Ex. 45, ¶5. The Court has already dismissed claims that participation in the 2000 promotion process would have been futile. *See supra* at 48. Accordingly, the Court will **ADOPT** the recommendation and Officer Gupton will be **DISMISSED** from this case.

m. Clarence Haizlip

Citing his declarations, plaintiffs object to the recommended dismissal of Officer Haizlip's claim for "hostile work environment based on observing the treatment of other African American Officers." ECF No. 386 at 52-53. Officer Haizlip did not assert any claims in the Fourth Amended Complaint, *see generally ECF* No. 278, and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, Officer Haizlip will be **DISMISSED** from this case.

n. Ernestine Harding

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Harding's claim for "hostile work environment based on observing the treatment of other African American Officers." ECF No. 386 at 52-53. The Court understands this to be Offer Harding's hostile work environment claim in the Fourth Amended Complaint. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth

Amended Complaint and that Officer Harding's declaration does not provide the necessary information. ECF No. 394 at 29-30.

In her declaration, Officer Harding alleges that she experienced racial discrimination between November 2000 and April 2001 when she witnessed the use of racial epithets, and that she "witnessed White officers yelling, threatening, and denying normal privileges provided to White officers" resulting in the Capital Police department being a hostile work environment for her. ECF No. 332-2, Ex. 47 at 5-6. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Harding sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Harding will be **DISMISSED** from this case.

o. Mark Harrison

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Harrison's claim for retaliation. ECF No. 386 at 40. However, Officer Harrison's sole claim in the Fourth Amended Complaint is for "additional" hostile work environment.

See generally ECF No. 278. Officer Harrison did not assert a retaliation claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, the Court will **ADOPT** the recommendation and Officer Harrison will be **DISMISSED** from this case.

p. Jerry Howard

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Howard's claim for "hostile work environment based on observing the treatment of other African American Officers." ECF No. 386 at 52-53. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Howard's declaration does not provide the necessary information. ECF No. 394 at 29-30.

In his declaration, Officer Howard alleges that although he cannot remember the exact dates, he experienced racial discrimination between November 1, 2000 and April 11, 2001, in the form of "the use of a hangman's noose, the use of a swastika, unprovoked stops while driving and fake write-ups (also known as "bear hunting"). ECF No. 332-2, Ex. 50 at 22. Officer Howard also alleges that during this time period he "witnessed Black Officers being yelled at, threatened, denied privileges that White Officers were receiving, and having their

pictures posted on exam files" resulting in the Capitol Police department being a hostile work environment for him. *Id.* at 23. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Howard sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Howard will be **DISMISSED** from this case.

q. Dwayne Inabinet

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Inabinet's claim for hostile work environment based on discrimination in assignments. ECF No. 386 at 42. The Court has already dismissed all claims for disparate treatment in assignment. S*upra* at 47. Plaintiffs cannot refashion the disparate-impact claim as a hostile work environment claim to attempt to avoid dismissal. Accordingly, the Court will **ADOPT** the recommendation and Officer Inabinet will be **DISMISSED** from this case.

r. Gregory Jackson

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Jackson's claims for hostile work environment and retaliation. ECF No. 386 at 42. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Jackson's declaration does not provide the necessary information. ECF No. 394 at 34-35.

In his declaration, Officer Jackson alleges that he experienced racial discrimination between November 2000 and April 2001 in the form of racial epithets, which he either overheard or were directed at him, and that he "witnessed White officers yelling, threatening, denying normal privileges provided to White officers, and Black Officers' pictures posted on exam files" resulting in him being subjected to a hostile work environment. ECF No. 332-2, Ex. 52 at 38. Officer Jackson further alleges that he was subjected to discrimination in discipline based on race and that he was retaliated against for opposing racial discrimination when his white supervisors would inform him that complaints had been made against him but would not provide him with any details about the complaints. *Id*. at 39. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at

2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Jackson sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Jackson will be **DISMISSED** from this case.

s. Theortis Jones

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Jones' claims for hostile work environment and retaliation. ECF No. 386 at 43. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Jones' declaration does not provide the necessary information. ECF No. 394 at 37.

In his declaration, Officer Jones alleges that he experienced racial discrimination between November 2000 and April 2001 in the form of racist epithets, which he overheard or were directed at him; and that he "witnessed White officers yelling, threatening, denying normal privileges provided to White officers, and Black Officers' pictures posted on exam files" resulting in him being subjected to a hostile work environment. ECF No. 332-2, Ex. 56 at 49-50. Officer Jones also alleges that "he witnessed and experienced racial discrimination in the form of racist actions and practices such as the hangman's noose,

swastika, threats, unprovoked stops while driving, or issuing fake write-ups (also knowns as "bear hunting")." *Id.* at 50. Officer Jones states that he "witnesse[d] African American officers routinely receive less desirable assignments than White officers," that "African American officers received harsher penalties than White Officers for similar offenses," and that he "experienced retaliation for opposing racial discrimination in the Capitol Police Department." *Id.* at 51. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Jones sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Jones will be **DISMISSED** from this case.

t. Jerome Lofty

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Lofty's claim for hostile work environment. ECF No. 386 at 43. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth

Amended Complaint and that Officer Lofty's declaration does not provide the necessary information. ECF No. 394 at 38-39.

In his declaration, Officer Lofty alleges that he experienced racial discrimination between October 2000 and April 2001 in the form of racist epithets that he overheard or that were directed toward him. ECF No. 332-2, Ex. 59 at 58. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Lofty sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Lofty will be **DISMISSED** from this case.

u. Ronnie Massie

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Ronnie Massie's claim for "hostile work environment based on observing the treatment of other African American Officers." ECF No. 386 at 52-53. Officer Massie's name does not appear in the Fourth Amended Complaint, nor in any of

the Exhibits to that Complaint, *see generally* ECF No. 278.[19] Officer Ronnie Massie cannot raise claims not asserted in the Fourth Amended Complaint in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Accordingly, Officer Massie will be **DISMISSED** from this case.

v. Joseph Moore

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Moore's claims for discrimination in promotion based on his participation in the 2000 promotion process and for hostile work environment based on discrimination in assignments. ECF No. 386 at 44. The defendant responds that Officer Moore neither asserted the discrimination in promotion claim in the Fourth Amended Complaint nor did he timely seek mediation or timely file his claim in district court. ECF No. 394 at 42. Officer Moore did assert a futility claim, *see* ECF No. 278, ¶¶ 43, 57, Ex. 9, but the Court has already dismissed the futility claims. *See supra* at 48. Officer Moore did not assert a "hostile work environment based on discrimination in assignments" but if he had asserted a disparate treatment in assignments claim, the Court has already dismissed that claim as

[19] Even if Officer Massie had asserted claims in the Fourth Amended Complaint, his declaration does not specify the dates upon which any incidents of alleged discrimination occurred, *see* ECF No. 332-2 at 65-66, and so he could also be dismissed for that reason.

well. *See supra* at 47. Accordingly, the Court will **ADOPT** the recommendation and Officer Moore will be **DISMISSED** from this case.

w. *Teresa Bradby (Morgan*)

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Bradby (Morgan's) claim for hostile work environment created by racist words. ECF No. 386 at 44. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Bradby (Morgan's) declaration does not provide the necessary information. ECF No. 394 at 43.

In her declaration, Officer Bradby (Morgan) states that she appeared at mediation and described the disparaging comments made repeatedly about African-Americans and African-American Officers by white officers. ECF No. 331-6, Ex. 20. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Bradby (Morgan) sought counseling within 180 days of the alleged violation. The Court therefore

will **ADOPT** the recommendation and Officer Bradby (Morgan) will be **DISMISSED** from this case.

x. Barry Nixon

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Nixon's hostile work environment claim and his claim that he did not participate in the 2000 promotion process because he believed it would be futile to do so. ECF No. 386 at 44-45. The Court has already dismissed the futility claims. *See supra* at 48. The defendant responds that plaintiffs have provided no factual details about Officer Nixon's hostile work environment claim in the Fourth Amended Complaint and that Officer Nixon's declaration does not provide the necessary information. *See* ECF No. 394 at 44-45.

In his declaration, Officer Nixon alleges that he experienced a hostile work environment between October 15, 2000 and April 12, 2001, including being spoken to in a derogatory manner, being addressed with racist epithets, observing other African-American Officers being treated in a similar way and being criticized or disciplined for conduct that White officers were not criticized or disciplined for, African-American Officers were assigned less desirable posts. ECF No. 366-3, Ex. 115 at 2-3. Officer Nixon further alleges that African-American officers were not made aware of opportunities for specialty assignments until it was too late to apply for them. *Id*. The declaration

does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Nixon sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Nixon will be **DISMISSED** from this case.

y. Luther Peterson

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Peterson's claim for discriminatory discipline. ECF No. 386 at 45. Plaintiffs assert that the defendant conceded the timeliness of this claim. *Id.* The defendant does not respond to this assertion. ECF No. 394 at 45-46. Because the defendant conceded the timeliness of Officer Peterson's disparate treatment in discipline claim, ECF No. 90 at 5-6, the Court will **REJECT** the recommendation and Officer Peterson may proceed on the claim for discriminatory discipline as set forth in Attachment II to this Memorandum Opinion. Officer Peterson's other claims will be **DISMISSED**.

z. Mary Jane Rhone

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Rhone's retaliation claim. *See* ECF No. 386 at 45. The defendant responds that Officer Rhone's retaliation claims were previously considered and dismissed by this Court in Civil Action No. 11-292. ECF No. 394 at 47. However, the claims asserted by Officer Rhone in Civil Action No. 11-292 are distinct from the claims asserted in this case.

In her declaration dated January 20, 2011, Officer Rhone asserts that she was subject to retaliation "within the last 180 days" and that she was retaliated against after she filed her case in September 2010. ECF No. 333-2, Ex. 93. Thus any retaliation would have occurred after this case was filed. In a letter addressed "To Whom it May Concern" dated June 4, 2001, Officer Rhone asserts that for the prior five years she was retaliated against by being denied access to advancement through training, experience and knowledge as a result of her efforts to expose injustice. ECF No. 299-8, Ex. 36. The letter does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the

evidence, that Officer Rhone sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Rhone will be **DISMISSED** from this case.

aa. James Roberts

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Roberts' claim for disparate treatment in assignments. See ECF No. 386 at 45. The Court has already dismissed this claim. *See supra* 47. Accordingly, the Court will **ADOPT** the recommendation and Officer Roberts will be **DISMISSED** from this case.

bb. Theodore Rodgers

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Rodgers' claims for discriminatory non-promotion as a result of the 2000 promotion process and for hostile work environment. ECF No. 386 at 45. However, Officer Rodgers did not assert a discriminatory non-promotion claim in the Fourth Amended Complaint. ECF No. 278, Ex. 7; ECF No. 343. The Court understands Officer Rodger's hostile work environment claim to be the claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Rodgers' declaration does not provide the necessary information. *See* ECF No. 394 at 49-50.

In his declaration, Officer Rodgers alleges that he experienced racial discrimination between October 16, 2000 and April 11, 2001, when he was falsely accused of stealing money, unfairly disciplined, and denied a position as a bicycle man. ECF No. 332-4, Ex. 72 at 2-3. Officer Rodgers also states that a noose was hanging in the locker room. *Id.* at 3. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Rodgers sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Rodgers will be **DISMISSED** from this case.

cc. Joseph Simpson

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Simpson's claims for discriminatory non-promotion as a result of the 2000 promotion process and for hostile work environment. ECF No. 386 at 46. However, Officer Simpson did not assert a discriminatory non-promotion claim in the Fourth Amended Complaint. ECF No. 278, Ex. 7; ECF No. 343. The Court understands Officer Simpson's hostile work environment

claim to be the claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Simpson's declaration does not provide the necessary information. ECF No. 394 at 50-51.

In his declaration, Officer Simpson alleges that he was subjected to a hostile work environment between October 2000 and April 2001 when he learned that African-American officers would be passed over for promotion and not put on special detail. ECF No. 332-4, Ex. 75 at 14-15. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Simpson sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Simpson will be **DISMISSED** from this case.

dd. Thomas Spavone

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Spavone's claims for disparate treatment in assignments and his futility claim. *See* ECF No. 386 at 46. The

Court has already dismissed these two claims. *See supra* at 47-48. Accordingly, the Court will **ADOPT** the recommendation and Officer Spavone will be **DISMISSED** from this case.

ee. Robert Spruill

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Spruill's claims for discriminatory non-promotion as a result of the 2000 promotion process and for hostile work environment. ECF No. 386 at 47. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Spruill's declaration does not provide the necessary information. ECF No. 394 at 55.

In his declaration, Officer Spruill alleges that he experienced racial discrimination between October 2000 and April 2001 as a result of witnessing African-American officers being subjected to mistreatment including the noose incident, witnessing an African-American officer being called a racist name, witnessing disparaging comments, and not offering to African-American officers the tutoring provided to white officers. ECF No. 332-6, Ex. 89 at 2-3. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed

for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Spruill sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Spruill will be **DISMISSED** from this case.

ff. Keith Steward

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Steward's claim for "hostile work environment based on observing the treatment of other African-American Officers." ECF No. 386 at 52-53. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Steward's declaration does not provide the necessary information. ECF No. 394 at 55-56.

In his declaration, Officer Steward alleges that he experienced racial discrimination between October 16, 2000 and April 11, 2001 when he heard about and witnessed unfair disciplinary actions against African-American officers, the belittling of African-American officers, and unfair treatment of African-American officers with regard to promotion. ECF No. 332-4, Ex. 76 at 17-18. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices,

ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Steward sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Steward will be **DISMISSED** from this case.

gg. Dwight Sturdivant

Citing Officer Sturdivant's declaration, plaintiffs object to the dismissal of his claim for hostile work environment based on "discrimination in assignments and on the observed discriminatory treatment of other African-American Officers with whom he worked." ECF No. 386 at 47. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Sturdivant's declaration does not provide the necessary information. ECF No. 394 at 56-57.

In his declaration, Officer Sturdivant alleges that he was discriminated against because of his race between October 15, 2000 and April 12, 2001 because African-American officers were much less likely to be given a preferred duty assignment and because African-American officers were disciplined for infractions for which white officers were not disciplined. ECF No. 353-7, Ex. 108 at 2-3. The declaration does not provide

specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Sturdivant sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Sturdivant will be **DISMISSED** from this case.

hh. Anwar Thompson

Citing his declaration, plaintiffs object to the dismissal of Officer Thompson's "claim for hostile work environment, based on comments to him, comments he overheard, sabotage of his bicycle, and discrimination in publicizing assignments." ECF No. 386 at 47-48. The defendant mistakenly responds that Officer Thompson's name does not appear on any exhibit to the Fourth Amended Complaint, and that in any event, plaintiffs have provided no factual details about these claim in the Fourth Amended Complaint and that Officer Thompson's declaration does not provide the necessary information. ECF No. 394 at 58-59. The Court understands this to be Officer Thompson's hostile work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1.

In his declaration, Officer Thompson alleges that he experienced racial discrimination between November 2000 and April 2001 when he frequently heard African-American officers being spoken of in a derogatory manner and using specific derogatory words, information about specialty posts were not made known to African-American officers in time to be able to apply for them, and his bicycle brakes were disabled, which he believes was an attack on him as an African-American officer. ECF no. 353-9, Ex. 110 at 2-3. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Thompson sought counseling within 180 days of the alleged violation. The Court therefore will **ADOPT** the recommendation and Officer Thompson will be **DISMISSED** from this case.

ii. Dale Veal

Citing his declarations, plaintiffs object to the dismissal of Officer Veal's claim for "hostile work environment, especially discrimination in assignments and access to training, the most recent of which was denials of overtime in late 2000." ECF No.

386 at 48. Plaintiffs assert that the defendant conceded the timeliness of Officer Veal's claim for discrimination in the assignment of overtime. *See id.* The defendant does not respond to this assertion and otherwise responds that plaintiffs have provided no factual details about these claims in the Fourth Amended Complaint and that Officer Veal's declaration does not provide the necessary information. ECF No. 394 at 60-61. As they are alleged separately in the Fourth Amended Complaint, the Court considers Officer Veal's claims for hostile work environment and for discrimination as a result of being denied overtime assignments as separate claims.

In his declaration,[20] Officer Veal asserts that "blatant racial discrimination and harassment were part of the job when I worked for the Capitol Police" including discrimination in assignments, supervisors making derogatory and racist statements, and discriminatory discipline. ECF No. 332-4, Ex. 77 at 20. The declaration does not provide specific dates upon when any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus

[20] The document cited by plaintiffs as Doc. 332-1, Ex. 2 does not exist in the record.

failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Veal sought counseling within 180 days of the alleged violation.

With regard to Officer Veal's claim for discrimination in the assignment of overtime, the defendant did not respond to the plaintiff's assertion that the defendant has conceded jurisdiction on this claim. *See generally* ECF No. 394. The Court therefore finds that the defendant conceded the timeliness of Officer Veal's disparate treatment in discipline claim. *See* ECF No. 90 at 5-6. Accordingly, the Court will **ADOPT** the recommendation and Officer Veal's claims in Exhibits 1 and 3 of the Fourth Amended Complaint will be **DISMISSED**. The Court will **REJECT** the recommendation as to Officer Veal's claim for discrimination in the assignment of overtime and that claim may proceed as listed in Appendix II to this Memorandum Opinion.

jj. McArthur Whitaker

Citing his declarations, plaintiffs object to the recommended dismissal of Officer Whitaker's claims for discrimination in assignments and discipline, and that participating in the 2000 promotion process would have been futile. ECF No. 386 at 49-50. The Court has already dismissed claims for disparate treatment in assignments and that participation in the 2000 promotion process would have been futile. *See supra* at 48. Accordingly,

the Court will **ADOPT** the recommendation and Office Whitaker will be **DISMISSED** from this action.

kk. McKinley White

Citing his declaration, plaintiffs object to the recommended dismissal of Officer White's claims for discrimination in assignment with regard to non-selection for the canine unit, hostile work environment based on retaliation against African-American Officers who spoke out against discrimination, and that he did not participate in the 2000 promotion process because he deemed it futile. ECF No. 386 at 50. The Court has already dismissed claims that participation in the 2000 promotion process would have been futile. *See supra* at 48. Officer White did not raise a claim related to the canine unit promotion process in the Fourth Amended Complaint, ECF No. 278, ¶¶ 21 51, and cannot do so in plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. The Court understands the remaining claim to be Officer White's hostile work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer White's declaration does not provide the necessary information. ECF No. 394 at 63-64.

In his declaration, Officer White alleges that he experienced racial discrimination and a hostile work environment between

October 15, 2000 and April 12, 2001 when he and others were not made aware of specialty assignments until it was too late to apply for them, and officers who spoke out against discrimination were retaliated against. ECF No. 368-3, Ex. 116 at 1-2. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer White sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer White will be **DISMISSED** from this case.

ll. Howard Whitehurst

Citing his declarations, plaintiffs object to dismissal of Officer Whitehurst's claims for hostile work environment based on disparate treatment in assignments and that participation in the 2000 promotion process would have been futile. ECF No. 386 at 50-51. Officer Whitehurst's name does not appear in the Fourth Amended Complaint, nor in any of the Exhibits to that Complaint, ECF No. 278, ECF No. 343, and he cannot raise claims not asserted in the Fourth Amended Complaint in the plaintiffs' objections to Magistrate Judge Facciola's Report and

Recommendation. Even if Officer Whitehurst had done so, the Court has already dismissed claims for disparate treatment in assignments, *see supra* at 47, and that participation in the 2000 promotion process would have been futile. S*ee supra* at 48. Accordingly, Officer Whitehurst will be **DISMISSED** from this case.

mm. Cynthia Williams

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Williams' claims for "hostile work environment based on observing the treatment of other African-American Officers" and that participation in the 2000 promotion process would have been futile. ECF No. 386 at 52-53. The Court has already dismissed claims that participation in the 2000 promotion process would have been futile. *See supra* at 48. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Williams' declaration does not provide the necessary information. ECF No. 394 at 66-67.

In her declaration, Officer Williams alleges that between October 15, 2000 and April 12, 2001 she was subjected to a hostile work environment because African-American officers were "yelled at or criticized or disciplined for conduct permitted to white officers, [were] addressed with racist epithets, or denied promotions or assignments." ECF No. 353-10, Ex. 111 at 2-3. The

declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Williams sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Williams will be **DISMISSED** from this case.

nn. Dianne Willis

Citing her declaration, plaintiffs object to the recommended dismissal of Officer Willis' claim for "hostile work environment in the form of discrimination in assignments and disrespectful treatment" and to the recommended dismissal of Officer Willis' claim that she did not participate in the 2000 promotions process because she believed it would be futile. ECF No. 386 at 51. Officer Willis did not assert a hostile work environment claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Even if Officer Willis had asserted this claim, the Court has already dismissed claims that participating in the 2000 promotions process would be futile. *See supra* at 48.

Accordingly, the Court will **ADOPT** the recommendation and Officer Willis will be **DISMISSED** from this case.

oo. Craig Young

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Young's claim for discrimination in assignments. ECF No. 386 at 51. However, the Court has already dismissed that claim. *See supra* at 47. Plaintiffs further object to dismissal of Officer Young's claim that participation in the 2000 promotion process would have been futile. ECF No. 386 at 51. Officer Young did not assert a futility claim in the Fourth Amended Complaint and cannot do so in the plaintiffs' objections to Magistrate Judge Facciola's Report and Recommendation. Even if Officer Young had done so, the Court has already dismissed that claim. *See supra* at 48. Plaintiffs further object to dismissal of Officer Young's claim for hostile work environment based on the retaliation experienced by African-American officers who were outspoken about racial discrimination. ECF No. 386 at 51-52. The Court understands this to be Officer Young's hostile work environment claim raised in the Fourth Amended Complaint. ECF No. 278 ¶ 25, Ex. 1. The defendant responds that plaintiffs have provided no factual details about this claim in the Fourth Amended Complaint and that Officer Young's declaration does not provide the necessary information. ECF No. 394 at 68-69.

In his declaration, Officer Young alleges that he experienced racial discrimination between November 2000 and April 2001 when he observed "African-American Officers were treated unfairly, by being denied privileges, training opportunities, or accommodations extended to white Officers. . . given less desirable work assignments . . . and . . . held more strictly to disciplinary standards." ECF No. 353-11, Ex. 112 at 2. Officer Young also states that he observed African-American officers being retaliated against, and that specialty assignments were not posted and thus African-American officers were not made aware of opportunities. *Id.* at 3. The declaration does not provide specific dates upon which any of these incidents occurred. *See generally id*. Furthermore, other than citing the end of mediation notices, ECF No. 386 at 2, the plaintiffs have not demonstrated that counseling and mediation were completed for the violations alleged. Plaintiffs have thus failed to meet their burden of establishing, by a preponderance of the evidence, that Officer Young sought counseling within 180 days of the alleged violation. Accordingly, the Court will **ADOPT** the recommendation and Officer Young will be **DISMISSED** from this case.

pp. Kendrick Young

Citing his declaration, plaintiffs object to the recommended dismissal of Officer Young's single claim that participation in

the 2000 promotion process would have been futile. ECF No. 386 at 52. The Court has already dismissed that claim. *See supra* at 48. The Court therefore will **ADOPT** the recommendation and Officer Young will be **DISMISSED** from Civil Action No. 01-2221. Plaintiffs further assert that the defendant has conceded that Officer Young exhausted his administrative remedies in Civil Action No. 04-0320. *See* ECF No. 386 at 52. In 2010, the parties agreed that Officer Young had exhausted his administrative remedies, *see* ECF No. 275 at 2, and the defendant has not explained why that was in error. *See* ECF No. 394 at 69-71. The Court therefore will **REJECT** the recommendation in **PART** and Officer Young's claim in Civil Action No. 04-230 may proceed.

F. Remaining Plaintiffs and Viable Claims.

The 24 plaintiffs listed below remain plaintiffs in these consolidated cases. Attachment II to this Memorandum Opinion sets forth which of their claims are viable: (1) Frank Adams;[21] (2) Sharon Blackmon-Malloy; (3) Regina Bolden-Whittaker; (4) Tyrone Brooks; (5) Sandra Brown-James; (6) Arnold Fields; (7) Gary Goines; (8) Tammie Green; (9) Ave Maria Harris; (10) Larry Ikard; (11) John N. Johnson; (12) Governor Latson; (13) Kevin Matthews; (14) Danny McElroy; (15) Brent Mills; (16) Luther Peterson; (17) Duval Phelps; (18) Vernier Riggs; (19) Leonard

[21] Which of Mr. Adams' claims are viable will be determined following supplementary briefing.

Ross; (20) Dale Veal; (21) Reginald Waters; (22) Richard Webb; (23) Frank Wilkes; and (24) Kendrick Young.

IV. Conclusion

For the foregoing reasons, the Court will **DENY** plaintiffs' motion for leave to file a Fifth Amended Complaint. The Court will **ADOPT IN PART AND REJECT IN PART** Magistrate Judge Facciola's Reports and Recommendations and will **GRANT IN PART AND DENY IN PART** defendant's motion to dismiss. With regard to Officer Macon, who is proceeding *pro se* in this matter, the Court will **ADOPT** Magistrate Judge Facciola's Supplemental Report and Recommendation and **GRANT** defendant's motion to dismiss his claims. Only those plaintiffs listed in Appendix II will be allowed to proceed in this action, and they will be permitted to proceed only as to the claims listed in that chart. All other claims will be **DISMISSED WITH PREJUDICE** for failure to exhaust administrative remedies. Nothing in this Opinion shall constitute a final decision on any pending motion or issue. The Court's recitation of its reasoning and intended rulings shall go into effect only upon entry of a final Order, which shall be held in abeyance pending resolution of the various attorney-representation issues pending before the Court.

A Status Hearing shall take place **January 19, 2017 at 4:00 pm in Courtroom 24A** so that the parties may update the Court on the status of the attorney representation issues.

Signed: Emmet G. Sullivan
United States District Judge
October 13, 2016