UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christine Mills et. al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	**Civil Action No. 04-2205 (HHK/AK)**
James Billington, Librarian, Library of Congress,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("Federal Rules"), Defendant, James Billington, Librarian of Congress, moves to dismiss the above-captioned suit for lack of jurisdiction or failure to state a claim upon which relief can be granted. Alternatively, pursuant to Rule 56 of the Federal Rules, Defendant moves for summary judgment in his favor because there are no material facts in genuine dispute and Defendant is entitled to judgment as a matter of law. Pursuant to Local Rules 7(a), 7(h) and 7(c) respectively, a memorandum of points and authorities supporting this motion, a concise statement of facts not in dispute, and a proposed order consistent with the relief requested in the motion are attached.

Respectfully submitted,

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Plaintiffs	
v.	
James Billington, Librarian, Library of Congress,	**Civil Action No. 04-2205 (HHK/AK)**
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

Plaintiffs, Christine Mills, Runako Balondemu, Geraldine Duncan, David Hubbard, Priscilla Ijeomah, Clifton Knight, Charles Mwalimu, Lawrence Perry, Sharon Taylor, and William Rowland, are current or former employees of the Library of Congress (also referred to as "Library"). They brought this action alleging that they have been discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., as amended. Pls.' Second Am. Class Action Compl. ¶ 27. They specifically seek to represent a class of minority employees who have allegedly been subjected to a hugely expansive and diverse range of discriminatory employment acts, and ask that the Court certify this case as a class action. *Id.*, p. 10. For reasons stated below, this suit should be dismissed for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted. Alternatively, summary judgment should be granted to Defendant.

A. STATEMENT OF FACTS

1. Statutory and Regulatory Background

By statute, "[a]ll personnel actions affecting employees or applicants for employment" in the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). A Library employee who believes that he or she has been discriminated against and wishes to bring Third Party (class action) claims must file a complaint, in writing, with the Library's Assistant Chief, Equal Employment Opportunity Complaints Office ("EEOCO"). LCR 2010-3.1, sec. 12 (attached hereto as Ex. 1). Specifically, the employee who wishes to be a class agent and who believes he or she has been subjected to discrimination must submit Library Form 16-5, Allegation of Discrimination, within sixty (60) workdays of the date of the matter giving rise to the allegation of individual discrimination, or sixty (60) workdays of its effective date, if it is a personnel action. LCR 2010-3.2, sec. 4.A (attached hereto as Ex. 2).

A complaint, or a portion thereof, may be rejected if it is not timely filed, consists of allegations contained in a previous complaint, is not within the purview of LCR 2010-3.2, is untimely, lacks specificity and detail, was not submitted in writing or signed by the class agent, or does not meet the requirements for a class action (i.e,. numerosity, common questions of fact, typicality, and representation). *Id.*, sec. 6.B. If the Complaint is accepted, the Library then has thirty (30) workdays to investigate the Complaint. Ex. 1, LCR 2010-3.1, sec. 8.B. An Equal Opportunity Officer reviews the Investigator's report and file, and submits written findings to the Assistant Chief, EEOCO, no later than ten (10) workdays after the Officer receives the investigative report. *Id.*, sec. 8.C. Within five (5) days of receiving the Equal Opportunity

Officer's written findings, the Assistant Chief, EEOCO, examines the written findings, and prepares a written report containing his/her conclusions and recommendations. *Id*., sec. 8.D. The Assistant Chief submits his/her report and the complete file to the Chief, EEOCO. *Id*., sec. 8.E. The Chief, EEOCO, renders the final agency decision with or without an administrative hearing. *Id*., sec. 12.F. If the employee is dissatisfied with the final agency decision, he or she may file a civil action within 90 days of receipt of the final decision, or alternatively, after 180 days after filing the administrative complaint with the Assistant Chief, EEOCO, if there has been no decision on the complaint. Ex. 2, LCR 2010-3.2, sec. 17.A.

2. Facts and Prior Proceedings

a. *Cook v. Billington*, Civil Action No. 82-0400(GK)

This case raises similar claims to those presented in *Cook v. Billington*, Civil Action No. 82-0400(GK). In *Cook*, the plaintiffs alleged that "the Library engaged in racially discriminatory employment practices, including the use of illegal non-competitive appointments to exclude African-Americans from advancement." *Cook v. Billington*, No.Civ.A. 82-0400(GK), 2003 WL 24868169, *1 (D.D.C. Sept. 8, 2003). In addition to their claim based on hiring and promotions, the *Cook* plaintiffs also alleged that the Library practiced unequal recruitment standards, undertook harsher and more stringent performance standards and more severe disciplinary penalties against minority employees, and refused to promote or assign appropriate duties to those employees who successfully completed training programs. *Cook v. Billington*, Civil Action No. 82-0400(Compl., p. 24)(attached hereto as Ex. 3). In the complaint, Cook, a class agent, identified multiple positions for which he had applied and had been rejected. *Id.*, pp. 18-21.

In September 1995, the *Cook* parties entered into a Settlement Agreement which included both monetary relief ($8.5 million) and injunctive relief. *Cook v. Billington*, 2003 WL 24868169, *1; *see also* Ex. 4, Settlement Agreement. The terms of the agreement "constitute[d] full and complete satisfaction of all claims of Class Members against the Library concerning racial discrimination in violation of Title VII. . ., resulting in non-selecction, either competitively or non-competitively, in or into Professional and Administrative positions within the Library that [arose] out of events occurring up to final District Court approval of the Agreement." Ex.4, Settlement Agreement, ¶ 31. Further, upon final Court approval of the Agreement, "the class as a whole and each class member [were] bound by the doctrines of res judicata and collateral estoppel with respect to all such claims." *Id.* ¶ 31. The Settlement Agreement was granted final approval on September 22, 1995, and became fully effective on December 1, 1996. *Cook v. Billington*, 2003 WL 24868169, *1. The Agreement included relief in the form of promotions and, as indicated above, monetary awards totaling $8.5 million. *Id.* The Agreement was set to expire on December 1, 2000, but two years prior, in 1998, the *Cook* plaintiffs alleged non-compliance with the Settlement Agreement. *Id.*

In January 2001, in lieu of ruling on the plaintiffs' 1998 Motion regarding the Library's alleged non-compliance, the Court approved the parties' jointly proposed resolution "and ordered the Library to adopt new statistical analysis and selection process modifications." *Id.* at 3; *see also Cook v. Billington*, Civil Action No. 82-0400(GK)(Docket Entry No. 836, Order) . Pursuant to the Court's Order, the parties' joint resolution (specifically, their Joint Report) became part of the record in the case and defined the obligation of the Library of Congress under the Settlement Agreement. *Id.*

As to the selection process modification, the "Library implemented a [] three-stage competitive selection procedure." *Cook v. Billington*, 2003 WL 24868169, *2. As noted by the Court in its September 8, 2003 Memorandum Opinion, the procedure is a "validated" hiring process comporting with the Uniform Guidelines on Employee Selection procedures. *Id.* "The Library used 'AVUE,' a computerized hiring system, to implement [the] [] procedure." *Id.* As to the first stage of the competitive selection procedure, the AVUE system ranks applicants based on application responses and generates a list of the top seven applicants for referral for interview. *Id.* The second stage of this validated process is the interview of all referred applicants and the third stage is the final selection from those applicants found to be "fully acceptable" for the position. *Id.* The Court extended its oversight period of the selection process to December 1, 2002. *Id.*, at *7.

Shortly before expiration of the Court's oversight period, in November 2002, the *Cook* plaintiffs moved to extend the oversight period and for the appointment of a receiver. *Cook v. Billington*, Civil Action No. 82-0400(GK)(R. 861). On September 8, 2003, the Court denied that motion.

Notably, nine of the ten plaintiffs in this case were class members of the *Cook* class action, and all nine received monetary relief in addition to the non-pecuniary relief provided to the class as a whole. Specifically, Mills received $1,832.60, Balondemu received $1,596.98, Duncan received $5,513.32, Hubbard received $2,613.94, Ijeomah received $1,007.93, Mwalimu received $8,277, Knight received $6,532.58, Perry received $5412. 27, and Rowland received $7,370.92. Ex. 5, Claimant Review Status Report (Excerpts). Geraldine Duncan also received a promotion as part of the *Cook* settlement. *Id.* Sharon Taylor, the remaining plaintiff, did not

receive any monetary relief not because she opted out of the *Cook* class action but because she was not even employed by the Library during the relevant period

b. The Current Lawsuit

On or around May 28, 2004, just eight months after the Court denied the *Cook* plaintiffs' motion to extend the oversight period, plaintiffs, Christine Mills, Priscilla Ijeomah and Amy Barnes, filed an administrative complaint with the Library of Congress, pursuant to Library of Congress Regulations (LCR) 2010-3.1. R. 1-1, Letter from Christine M. Mills, Priscilla C. Ijeomah, and Amy D. Barnes to Jean Y. Myers, May 28, 2004. The complaint alleged that the Library discriminated against all African American and minority employees on the basis of color, race, national origin and sex. *Id.* at 1.

The administrative complaint specifically alleged that the Library (1) denies African American and other minority employees equal opportunity for hiring by assigning them to the least desirable jobs where opportunities for training and advancement are limited, (2) utilizes job recruiting methods for supervisory, managerial, technical, and non-professional and professional positions designed primarily to reach white persons, (3) utilizes classification systems to keep African-American and other minority employees concentrated in lower graded positions, (4) uses a dual classification system to prevent African American and other minority employees classified as non-professional from working at home, (5) denies African American employees training and other experience building assignments which would enhance their promotion opportunities, (6) maintains and utilizes testing, education, training experience, and other job requirements and selection criteria which exclude African Americans, Spanish speaking, and other minority staff from hiring, training and promotion opportunities, (7) maintains a segregated work force placing

African American and Spanish speaking employees in a promotion and training system based upon subjective evaluations of white supervisors locking the minority employees into discriminatory assignments and denying them equal opportunity for promotion, (8) disciplines African Americans more harshly than white employees, (9) recruits contract employees to avoid equal employment opportunity for African American employees, (10) maintains standards, selections, promotions, and assignments in a manner that gives contract employees the advantage over African American employees, (11) retaliates against African Americans for filing charges of discrimination against the Library, (12) maintains a workforce that keeps African American males in lower paying grades and positions, (13) maintains devices, regulations, and systems using U.S. Government funds to allow no bid awards resulting in preselection having an adverse impact on African Americans, (14) grants open access to private contract employees to the personnel files, records and databases of Federal employees violating the private and civil rights of government employees, (15) establishes offices which ostensibly are for the purpose of serving employees, but instead exist as conspiracies by management and have an adverse impact on African American employees, and (16) maintains a system of regulations and labor union contracts which are discriminatory against African American employees. *Id.*

On September 20, 2004, the Library of Congress dismissed the administrative complaint on multiple grounds. R. 1-1, Letter from Ricardo H. Grijalva to Christine Mills, Sept. 24, 2004. The Library of Congress found that the Plaintiffs had failed to make a good faith effort to cooperate with the Library during the investigation of the Complaint, grounds for dismissal pursuant to the Library's regulations. *Id.*; *see also* Ex. 1, LCR 2010-3.1, sec. 7.C. The Library also declined the Plaintiffs' administrative complaint on exhaustion grounds finding that the

Plaintiffs' complaint was vague and lacked specificity and detail. R. 1-1, Letter from Ricardo H. Grijalva to Christine Mills, at 1, Sept. 24, 2004. The Library noted that the EEO counselor had made multiple attempts to "acquire precise dates for the acts of discrimination as alleged in the complaint." *Id.* at 1-2. The EEO counselor's report also revealed that the class agents could not identify incidents of alleged discrimination specific to the agents, and also "failed to identify any responsible management official(s) other than the Librarian and the Deputy Librarian." *Id.* at 2. In addition to dismissing Plaintiffs' administrative complaint for failure to exhaust administrative remedies because of the Plaintiffs' lack of cooperation during the administrative investigation and lack of specificity in the administrative complaint, the Library also dismissed the Complaint as moot because certain of the allegations in the administrative complaint - i.e., those related to hiring, the classification system, and standards for selections and promotions - were identical to those raised in the *Cook* class action. *Id.* at 7. The Library also dismissed Plaintiffs' administrative complaint for failure to state a cause of action because of the lack of any specific allegation of discrimination personal to any of the complainants. *Id.*

On December 20, 2004, Plaintiffs (Mills, Barnes, Ijeomah, Runako Balondemu, Arnice Cook, Robert Cooper, Michael Durrah II, Geraldine Duncan, Priscilla Ijeomah, Lawrence Perry, William Rowland, and Mark A. Wilson) filed this suit. On June 6, 2005, Defendant moved to dismiss this suit for failure to exhaust administrative remedies based on Plaintiffs' failure to cooperate in good faith with the administrative EEO process. R. 6, Def.'s Mot. Dismiss. On August 1, 2005, Plaintiffs opposed Defendant's motion, and on May 16, 2006, this Court denied Defendant's Motion to Dismiss. The Court explained that there was conflicting evidence as to Plaintiffs' participation in the administrative process. R. 15, Mem. Op. and Order, p. 9. Noting

that the Plaintiffs accepted the counselor's invitations to meet and disputed the allegation that they were unwilling to provide specific details concerning discrimination, the Court explained that the record in this case did not reflect "[a] reluctance [by plaintiffs] to assist the efforts of the agency counselor." *Id.*, at 10. The Court also found that the Library, contrary to its regulations, failed to give Plaintiffs notice of the deficiencies in the complaint and an opportunity to correct the deficiencies. *Id.* Concluding that the Library erred in processing Plaintiffs' complaint, the Court found that "plaintiffs constructively exhausted their administrative remedies." *Id.* at 12.

On December 11, 2006, Plaintiffs, now joined by Clifton Knight, filed their First Amended Complaint, and on April 2, 2007, they filed their Second Amended Complaint. They alleged discrimination on the basis of compensation, promotions, wage classifications and job assignments, recruitment, harassment/hostile work environment, and retaliation. Second Am. Class Action Compl. ¶ 2. They claim that the questions of law "common to the Class" include without limitation whether (1) the Library's operating practices and procedures discriminate against minority employees, (2) the Library's policies granting discretionary authority to its managers has a negative impact on class members, (3) the Library has a policy or practice of paying minority employees less than Caucasian employees for the same work, (4) the Library has a policy or practice of grooming Caucasian employees for advancement but denying minorities similar opportunities, (5) the Library has a policy or practice of assigning lesser job classifications and wage grades to minority employees, (6) the Library has a policy or practice of giving less desirable work assignments to minority employees, (7) minority employees are subject to a pattern of racial harassment, (8) the Library's conduct constitutes a hostile work

environment for the Class, and (9) the Library has a policy or practice of retaliating against Class members who object to the Library's unlawful employment practices.[1] *Id.* ¶ 11.

However, neither in their Complaint nor in discovery responses do any of the Plaintiffs identify the specific adverse personnel actions taken against them occurring within 60 days of the filing of the administrative complaint. The allegations raised by the specific class members follow:

> Christine Mills - Plaintiff Mills has been employed with the Library of Congress since 1983. R. 120-6, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 (Christine Mills). She is currently a GS-8 Senior Circulation Technician. *Id.* In the Second Amended Complaint, Mills states that she is an African-American female employed in a non professional series and that she has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.a.. However, she does not identify any specific acts serving as bases for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed against her personally of which she complained within 60 days of the filing of the May 2004 administrative complaint). Similarly, her discovery responses describe no specific acts or events which serve or can serve as the bases for a timely filed administrative claim. Specifically, she alleges that she has applied "for numerous

[1]At a September 17, 2009 Meet and Confer conference which was transcribed, Plaintiffs' counsel averred that his clients were no longer pursuing harassment, hostile work environment, and retaliation claims. R. 164-1, Meet and Confer Transcr., 5:7 to 6:5; 47:9 to 47:16; and 49:21 to 50:2 (Sept. 17, 2009). Accordingly, these claims are not addressed herein. If, however, Plaintiffs do in fact pursue these claims, Defendant anticipates supplementing this motion to address the claims.

positions and fought for promotions/reclassifications in her position" but provides no information on this allegation – nothing whatsoever on the positions/vacancies sought, the time frame, whether she was determined qualified for the positions which she sought, the selectee for the position, etc. R. 120-6, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls. at 1 (Christine Mills). She alleges that she is adversely affected by the AVUE system but, again, does not identify any position for which she applied and which serves or can serve as the basis of a timely filed administrative complaint. *Id.* at 1-2. She alleges that blacks are more likely to be disciplined – downgraded, suspended or terminated from positions -- but does not allege that she has been subjected to any discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 1-2. She alleges that being classified as a non-professional limits her professional opportunities. However, she provides no information on this allegation - for example, information indicating that she sought reclassification of her position, from whom she sought reclassification, and the reasons presented for the denial. Notably, she provides no facts indicating that this matter was raised within sixty (60) days of the filing the administrative complaint. *Id.* at 2. Further, she does not identify which Library classification policy or practice is at issue, and how the policy or practice adversely affected her. She points to her years of experience at the Library and her belief that she has performed her work in a professional manner as the grounds for her belief that her position should be reclassified. *Id.* at 8. Yet she does not identify why these factors are determinative for purposes of reclassification, and thus, the Library's failure to reclassify her position suggests a discriminatory policy or practice. She alleges

that she has been denied "significant training details" but does not identify any specific training requested, from whom she sought the training, any reasons presented for denial, and for purposes of a timely filed administrative complaint, whether she sought the training within 60 days of the filing of the administrative complaint. *Id.* at 3. She was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 5, grooms Caucasian employees for advancement, fails to promote qualified minorities to higher positions, *id.* at 6, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.*, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 6-7. She was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 6-7.

Runako Balondemu - Plaintiff Balondemu has been employed with the Library at the GS-9 level since 2003. R. 120-2, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 (Runako Balondemu). In the Second Amended Complaint, Mwalimu alleges that, as an African-American male employed by the Library of Congress, he has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.b. However, in the Second Amended Complaint, he does not identify any specific acts serving as bases for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, his discovery responses

describe no specific acts or events serving as the bases for a timely filed administrative claim. He alleges that he was given sporadic performance evaluations but otherwise does not identify any specific facts related to this allegation which indicate that the purported wrongful acts could serve as the basis for a timely filed administrative complaint. R. 120-2, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 (Runako Balondemu). He explains that his performance appraisal was used to retaliate against him when his supervisor, who had not been employed for a year with the Library, wrote the evaluation, but does not otherwise plead any facts indicating that this occurrence served or can serve as the basis for a timely filed administrative complaint. *Id.* at 1. He alleges that he was denied "cash awards, training[], supervisory assistance, and [] overtime, comptime, and credit hours," but again does not plead or otherwise describe any facts indicating that the acts or occurrences related to the allegations serve or can serve as the bases for a timely filed administrative complaint. *Id.* at 1 and 3. He alleges that he was denied career ladder promotions but does not plead or otherwise describe any facts indicating that this alleged occurrence served or can serve as the basis for a timely filed administrative complaint. *Id*. at 3. Indeed, he provides no information on the matter at all – nothing on the time frames in which he sought promotions, the decision makers, the reasons presented for the denial of the promotions. He alleges that he applied for other positions twice "but felt pressured to cancel his application[,]" but does not describe any facts indicating that the occurrences serve or can serve as the bases for a timely filed administrative complaint. *Id.* at 2. He alleges that the AVUE system "asks applicants to identify their race [and that] this allows

for discrimination in selections to occur[,]" but presents no facts indicating that he himself applied for a position for purposes of supporting a timely filed administrative complaint. *Id.* at 3. He alleges that he has been denied "significant training details" or other experience-building opportunities but does not identify any specific training or professional opportunities which he sought but which were denied, for purposes of establishing a timely filed administrative complaint. *Id.* at 2. He claims that he has been the "victim of arbitrary Library of Congress disciplinary procedures that punishes blacks more severely than whites" alleging that he "has been falsely accused of being AWOL from meetings,. . .subjected to oral warnings, and threatened with removal for situations that would not prompt the same reaction for whites." *Id.* However, he provides no facts indicating that these events serve or can serve as the bases for a timely filed administrative complaint. *Id.* at 2. He alleges that being classified as a non-professional limits his professional opportunities but does not allege that he sought reclassification of his position and was denied reclassification, i.e., he does not state facts indicating that this occurrence serves or can serve as the basis for a timely filed administrative complaint. *Id.* at 2 and 3. Nor does he identify which Library classification policy or practice is at issue, and how the policy or practice adversely affected him in a discriminatory manner. Further, he points to his high school diploma, college courses, years of experience as a human resources professional, and training by the Library as the grounds for his belief that his position should be reclassified. *Id.* at 8. Yet, he does not identify why these factors are determinative for purposes of reclassification, and thus, the Library's failure to reclassify his position suggests a discriminatory policy or practice. He

alleges that, "as a non-professional union member[,]" he is not allowed a telework arrangement but, for purpose of establishing a timely filed administrative complaint, does not describe the Library's telework policy, and presents no facts or other evidence indicating that he sought but was denied telework or made efforts to have the telework policy changed, and did so within the 60 days prior to the filing of the administrative complaint. *Id.* at 3. He also fails to describe the Library's telework policy and identify how the Library's telework policy adversely affects African Americans compared with other employees. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 4-5, grooms Caucasian employees for advancement, fails to promote qualified minorities to higher positions, *id.* at 5, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 5-6, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 6. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 8.

Geraldine Duncan - Plaintiff Duncan has been employed with the Library since 1971, and has been employed at her current grade level (GS-9) since 1994. R. 120-8, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 (Geraldine Duncan). In the Second Amended Complaint, Duncan alleges that she is an African-American female employed by the Library of Congress, and that she has been injured by the acts and practices set forth in the Complaint. Second

Am. Class Action Compl. ¶ 6.c. However, in the Second Amended Complaint, she does not identify any specific acts which can serve as bases for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at her personally of which she complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, her discovery responses describe no specific act or event which could serve as the basis for a timely filed administrative claim. Duncan alleges that she has applied for over 30 positions, but presents no information on this allegation – nothing about the specific positions for which she applied, whether she was qualified, the decision maker for the positions, and when she applied for the positions, a critical point for purposes of establishing a timely filed administrative complaint. R. 120-8, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls, at 1 (Geraldine Duncan). She alleges that she is adversely affected by the AVUE system which asks applicants to identify by race, and alleges that there have been discrepancies and confusion regarding the role of AVUE but, again, provides no information on any position for which she applied (and was denied) and which can serve as the basis of a timely filed administrative complaint. *Id.* She expresses concern about "certain non-competitive positions that are secretive and tend to benefit whites," but presents no facts on this matter – nothing whatsoever on the specific positions at issue, whether she herself was qualified for the positions, and for purposes of establishing a timely filed administrative complaint, the time frame in which these positions were filled. *Id.* at 2. She alleges that she has been given sporadic performance evaluations but provides no facts on this allegation which can serve as the basis for a timely filed

administrative complaint. *Id.* at 2. In fact, she states that when she does receive evaluations, they are always "outstanding." *Id.* She alleges that she has been denied training details and other experience-building opportunities but presents no information on this allegation – i.e., any specific training or professional opportunities which she sought but which were denied, the decision maker, and for purposes of establishing a timely filed administrative complaint, the time frame in which she sought the training. *Id.* at 2. She alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that she has been subjected to any discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 2 and 3. She alleges that, "as a non-professional union member[,] she is not allowed a telework arrangement. *Id.* at 2. However, for purposes of a timely filed administrative complaint, she fails to describe the telework policy at issue, and presents no facts or other evidence indicating that she sought but was denied telework or made efforts to have the policy on teleworking changed and did so within the 60 days prior to the filing of the May 2004 administrative complaint. *Id.* at 2 and 4. She also fails to describe the Library's telework policy and to identify how this policy adversely affects African Americans compared with other employees. She was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 5, grooms Caucasian employees for advancement, fails to promote qualified minorities to higher positions, *id.* at 5-6, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 6, and makes less desirable work assignments to minority employees than to Caucasian

employees, *id.* at 6. She was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 8.

David Hubbard - Plaintiff David Hubbard has been employed with the Library of Congress since 1981. R. 120-4, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 (David Hubbard). In January 2009, he was promoted to a GS-9 Problem Resolution Specialist. *Id.* In the Second Amended Complaint, Hubbard alleges that as an African-American male employed by the Library of Congress, he has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.d. However, in the Second Amended Complaint, he does not identify any specific act serving as a basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, his discovery responses describe no specific act or event which could serve as the basis at a timely filed administrative claim. He alleges that he is adversely affected by the AVUE system which asks applicants to identify by race. R. 120-4, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 and 3 (David Hubbard). However, he does not identify any position for which he applied and which can serve as the basis of a timely filed administrative complaint. He alleges that he was given sporadic performance evaluations but does not provide additional facts on this allegation which can serve as the basis for a timely filed administrative complaint. *Id.* at 2 and 3. In

fact, he states that when he receives evaluations, they are "excellent." *Id.* He alleges that he has been denied training details or other experience-building opportunities but provides no information on this allegation – for example, he does not identify the specific training or professional opportunities sought, the decisionmakers, the reasons given for denial of the training requests, and for purposes of a timely filed administrative complaint, when he sought the training. *Id.* at 2 and 3. He alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that he has been subjected to any discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 2 and 3. He alleges that, as a non-professional, he is denied the opportunity for rapid career advancement and is not allowed to telework. *Id.* However, for purposes of a timely filed administrative complaint, he does not describe the Library's telework policy, and presents no facts or other evidence indicating that he sought but was denied telework or made efforts to have the policy on teleworking changed and did so within the 60 day period prior to the filing of the administrative complaint. *Id.* He also fails to identify how the Library's telework policy adversely affects African Americans compared with other employees. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 4-5, grooms Caucasian employees for advancement, *id.*, fails to promote qualified minorities to higher positions, *id.* at 5, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.*, and makes less desirable work assignments to minority

employees than to Caucasian employees, *id.* at 6. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 8.

Priscilla Ijeomah-Mills - Plaintiff Ijeomah-Mills has been employed with the Library since 1987. R. 120-5, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Priscilla Ijeomah-Mills). She is currently working as a Senior Circulation Technician. *Id.* In the Second Amended Complaint, Ijeomah-Mills alleges that she is an African-American female employed by the Library of Congress, and that she has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.e. However, in the Second Amended Complaint, she does not identify any specific act serving as the basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at her personally of which she complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, her discovery responses describe no specific acts or events which could serve as the bases for a timely filed administrative complaint. Ijeomah-Mills alleges that she has been denied promotions but provides no information on this allegation – nothing whatsoever on any promotions sought and why the promotions were denied, whether she was determined qualified for promotion, the decision maker, and for purposes of establishing a timely filed administrative complaint, the time frame when she sought the promotion. R. 120-5, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls, at 1 and 4. (Priscilla Ijeomah-Mills). She alleges that being classified as a

non-professional limits her professional opportunities but does not allege that she sought reclassification of her position and was denied reclassification within the 60 day period required for establishing a timely filed claim. *Id.* at 5. Nor does she identify which Library classification policy or practice is at issue, and how the policy or practice adversely affected her in a discriminatory manner. Further, she points to her years of experience at the Library and her belief that she has performed her work in a professional manner as the grounds for her view that her position should be reclassified. *Id.* at 8. Yet, she does not identify why these factors are determinative for purposes of reclassification, and thus, the Library's failure to reclassify her position suggests a discriminatory policy or practice. She alleges that she has been denied "significant training details" or other experience-building opportunities but provides no additional information on this allegation – nothing whatsoever on the training sought, the reasons for the denials, the decision makers, and for purposes of establishing a timely filed administrative complaint, the time frame when she sought the training. *Id.* at 3. She alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that she has been subjected to any discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 3. She avers that her performance appraisals were sporadic but does not plead or otherwise aver that the appraisals were negative or that she challenged the appraisal within the 60 day period required for establishing a timely filed administrative complaint. She was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 5, grooms Caucasian employees for advancement,

id., fails to promote qualified minorities to higher positions, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 5-6, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 6-7. She was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 8.

Clifton Knight - Plaintiff Knight has been employed by the Library of Congress since 1981, and has worked at the GS-9 level since 1992. R. 120-3, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Clifton Knight). He works in a professional position. *Id.* He has applied for over 150 positions, 122 since 2001. *Id.* In the Second Amended Complaint, plaintiff Knight alleges that he is an African-American male who has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.f. However, in the Second Amended Complaint, he does not identify any specific act serving as a basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the administrative complaint). *Id.* He alleges that he is adversely affected by AVUE and expresses concern about "certain non-competitive positions that are secretive and tend to benefit whites," but presents no facts on this allegation as applies to him – nothing whatsoever on the positions at issue, whether he himself was qualified for the positions, the decision makers, the selectees for the positions, and for purposes of a timely filed administrative complaint, the time frame at issue. R. 120-3, Pls.'

Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 2. (Clifton Knight). He alleges that he was given sporadic performance evaluations but does not provide additional facts on this allegation which can serve or serve as the basis for a timely filed administrative complaint. *Id.* at 2. In fact, he states that when he does receive evaluations, they are "no less than satisfactory and generally have been either excellent, commendable, or outstanding." *Id.* He alleges that he has been denied training details or other experience-building opportunities but provides no information on this allegation – nothing whatsoever on the training requested, the reasons for the denial, the decision makers, and for purposes of establishing a timely filed administrative complaint, the time frame in which he sought the training. *Id.* at 2. He does mention that his managers arbitrarily decided not to extend an administrative detail, but this occurred in 1988, well before the administrative complaint was filed in this case. *Id.* at 2. He alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that he has been subjected to discipline. *Id.* at 2. He alleges that, in his former position as a non-professional, he was denied the opportunity for rapid career advancement and was not allowed to telework. *Id.* at 3. As a current professional though, he does not allege any injury related to the Library's telework policy. *Id.* He also fails to identify how the Library's telework policy adversely affects African Americans compared with other employees. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 6, grooms Caucasian employees for advancement, *id.*, fails to promote qualified minorities

to higher positions, *id.* at 7, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.*, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 7-8. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 10.

Charles Mwalimu - Plaintiff Mwalimu is no longer employed by the Library of Congress. R. 120-7, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Charles Mwalimu). He was hired by the Library in 1982, and at the time of his departure, was a GS-15 Senior Legal Specialist in the Eastern Law Division of the Law Library. *Id.* at 1. In the Second Amended Complaint, Mwalimu alleges that as an African-American male employed by the Library of Congress, he has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.g. However, in the Second Amended Complaint, he does not identify any specific act serving as the basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, his discovery responses describe no specific acts or events which can serve as the bases for a timely filed administrative complaint. He alleges that he has been adversely affected by AVUE and that discrimination prevented him from being promoted to positions including the Chief of the Eastern Division for which he applied but he does not plead or otherwise allege that this act serves or can serve as a

basis for a timely filed administrative complaint for purposes of this suit. R. 120-7, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Charles Mwalimu). He alleges that he has been "targeted, reprimanded, suspended and otherwise treated in an unfair manner," but does not identify any specific occurrence which serves or can serve as the basis for a timely filed administrative complaint for purposes of this suit. *Id.* at 3. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 4, fails to promote qualified minority employees to higher positions, *id.* at 4-5, grooms Caucasian employees for advancement, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 6, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 5-6. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *See generally* R. 120-7, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls. (Charles Mwalimu).

Lawrence Perry - Plaintiff Perry has been employed with the Library since 1985, and has been employed at the GS-11 level since 1997. R. 120-9, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Lawrence Perry). In the Second Amended Complaint, Perry states that he is an African-American male employed by the Library of Congress in a professional series, and that he has been injured by the acts and practices set forth in the Complaint. Second Am. Class Action

Compl. ¶ 6.h. However, in the Second Amended Complaint, he does not identify any specific act serving as the basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* Similarly, his discovery responses describe no specific acts or events which can serve as the bases for a timely filed administrative complaint. He alleges improprieties with a desk audit which he requested (i.e., documents purportedly indicating that his position should have been listed at the GS-11/12 level, not just at the GS-11 level), but presents no facts indicating that this occurrence serves or can serve as the basis for a timely filed administrative complaint. *Id.* He alleges that he was given sporadic performance evaluations but does not identify any specific acts related to this allegation which can serve as the basis for a timely filed administrative complaint. *Id.* at 2. In fact, he states that when he does receive evaluations, they are "always positive[.]" *Id.* He alleges that he has been denied training and other career-building opportunities but presents no information on this allegation – nothing whatsoever on the specific training sought, reasons for denial, the decision maker, and for purposes of a timely filed administrative complaint, the time frame. *Id.* at 3. He alleges that he is adversely affected by the AVUE system but, again, presents no information on this allegation. He does not even identify any position for which he applied (and which was denied), and which can serve as the basis for a timely filed administrative complaint. *Id.* at 2. He alleges that being classified as a non-professional limits his professional opportunities but does not allege that he sought reclassification or promotions which were denied and which can serve as the bases

for a timely filed administrative complaint. *Id.* at 2. Nor does he identify which Library classification policy or practice is at issue, and how the policy or practice adversely affected him in a discriminatory manner. He alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that he has been subjected to any discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 4. He alleges that, "as a non-professional union member[,] he is not allowed a telework arrangement but, for purposes of a timely filed administrative complaint, fails to describe the Library's telework policy and presents no facts or other evidence indicating that he sought but was denied telework or made efforts to have the policy on teleworking changed within the 60 day period prior to the filing of the administrative complaint. *Id.* at 3. He also fails to identify how the Library's telework policy adversely affects African American employees compared with other employees. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 5, fails to promote qualified minority employees to higher positions, *id.* at 6, grooms Caucasian employees for advancement, *id.*, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 6-7, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 7. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 9-10.

Sharon Taylor - Sharon Taylor was employed by the Library as a GS-5 Copyright Clerk. R. 120-11, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (Sharon Taylor). In August 2003, she learned that she would not be made a permanent Library employee. *Id.* She alleges that blacks are more likely than whites to be downgraded, suspended or terminated from positions, but does not allege that she has been subjected to any discipline which could serve as the basis for a timely filed administrative complaint. *Id.* at 2. In the Second Amended Complaint, Taylor states that she is an African-American female who was employed as a probationary employee, and who was injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.i. However, she does not identify any specific act serving as a basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at her personally of which she complained within 60 days of the filing of the May 2004 administrative complaint). *Id.* ¶ 6.i. Additionally, she was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," fails to promote qualified minority employees to higher positions, grooms Caucasian employees for advancement, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, and makes less desirable work assignments to minority employees than to Caucasian employees. *See generally* R. 120-11, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1 and 4. (Sharon Taylor). She was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 6.

William Rowland - Plaintiff Rowland worked at the Library from 1971 to February 2006, at which time he retired as a Senior Collections Improvement Assistant/Library Technician. R. 120-10, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. (William Rowland). In the Second Amended Complaint, plaintiff Rowland states that he is an African-American male who was employed in a non professional series, and who was injured by the acts and practices set forth in the Complaint. Second Am. Class Action Compl. ¶ 6.j. However, he does not identify any specific act which can serve as a basis for a timely filed administrative complaint for purposes of this suit (i.e., identifying an alleged wrongdoing directed at him personally of which he complained within 60 days of the filing of the administrative complaint). *Id.* ¶ 6.a. Similarly, his discovery responses describe no specific acts or events which can serve as the bases for a timely filed administrative complaint. He alleges that he was adversely affected by the AVUE system which asks applicants to identify by race, and alleges that there have been discrepancies and confusion regarding the role of AVUE. However, he presents no information on this allegation – i.e., he does not identify any position which he sought, whether he was qualified for the position, the decision makers, the selectees, and for purposes of establishing a timely filed administrative complaint, the timeframe. R. 120-10, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls, at 1-4 and 6 (William Rowland). He alleges that he was denied "significant training details" and career building opportunities but presents no information on this allegation as well – i.e., the specific training sought, reasons for

denial, the decision maker, and for purposes of a timely filed administrative complaint, the time frame. *Id.* at 2. He alleges that blacks are more likely to be downgraded, suspended or terminated from positions, but does not allege that he was subjected to discipline which could serve as the basis of a timely filed administrative complaint. *Id.* at 2. He alleges that being classified as a non-professional limited his professional opportunities but presents no information on this allegation. He does not even present facts indicating that he sought reclassification or promotions which were denied, and did so within the 60 day period prior to the filing of the administrative complaint. *Id.* at 2. He also fails to identify which Library classification policy or practice is at issue, and how the policy or practice adversely affected him in a discriminatory manner. Further, his bases for reclassification are limited to his years of experience at the Library, his education (Bachelor of Arts and Masters), and his belief that he performed his work in a professional manner. *Id.* at 8. Yet, he does not identify why these factors are determinative for purposes of reclassification, and thus, the Library's failure to reclassify suggests a discriminatory policy or practice. He was not able to identify any policies or practices showing that Defendant "pays minority employees less than Caucasian employees for the same work," *id.* at 5, fails to promote qualified minority employees to higher positions, *id.* at 5-6, grooms Caucasian employees for advancement, assigns lesser job classifications or wage grades to minority employees as compared to Caucasian employees, *id.* at 6, and makes less desirable work assignments to minority employees than to Caucasian employees, *id.* at 6-7. He was also unable to describe any two-tiered classification system used by Defendant for purposes of promotion. *Id.* at 8.

B. STANDARD OF REVIEW

1. Dismissal for Lack of Subject Matter Jurisdiction (Fed.R.Civ.P. 12(b)(1))

"A motion under 12(b)(1) 'presents a threshold challenge to the court's jurisdiction.'" *Gardner v. U.S.*, No. CIV. A. 96-1467EGS, 1999 WL 164412, *2 (D.D.C. Jan. 29, 1999), *aff'd*, 213 F.3d 735 (D.C. Cir. 2000) and *cert. denied*, 531 U.S. 1153 (2001), *quoting*, *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir.1987); *see also* 4 Wright & Miller: Federal Prac. & Proc. § 1350 (R12)(2002 Supplement)("...subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power."). A court may resolve a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(1) in two ways. First, the court may determine the motion based solely on the complaint. *Herbert v. National Academy of Science*, 974 F.2d 192, 197 (D.C. Cir. 1992). Alternatively, to determine the existence of jurisdiction, a court may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. *See id.*; *see also Cureton v. United States Marshal Service*, 322 F.Supp.2d 23, 2004 WL 1435124, *2 (D.D.C. June 28, 2004).

2. Motion for Failure to State a Claim (Fed.R.Civ.P. 12(b)(6))

In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court essentially abrogated or "retired" the holding in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S.Ct. at 1968-1969, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Supreme Court stated that

Conley v. Gibson's "'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. . ." *Twombly*, 127 S.Ct. at 1968. The Supreme Court added that the "[no set of facts] phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969.

Accordingly, as clarified by *Twombly*, a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6) should be granted if the plaintiff, in his or her pleading, fails to present "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1974. "Factual allegations must be enough to raise a right to relief above the speculative level,. . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . ." *Id.* at 1265 (citations omitted); *accord Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951-1952 (2009)(allegations that senior Government officials condoned the arrest and detention of thousands of Arab Muslim men following the September 11 attacks failed to establish even a "plausible inference" of unlawful discrimination sufficient to survive a motion to dismiss.)

3. Summary Judgment (Fed. R. Civ. P. 56)

Summary judgment under Fed. R. Civ. P. 56(c)(2) is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). A genuine issue is one that could change the outcome of the litigation. *See Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 243 (1986). While all evidence and the inferences drawn therefrom must be considered in the light most favorable to the nonmoving

party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the nonmoving party - when faced with a summary judgment motion - has the burden of establishing more than the "mere existence of a scintilla of evidence" demonstrating a genuine issue in dispute for purposes of defeating the moving party's motion. *See Lester v. Natsios*, 290 F.Supp.2d 11, 19-20 (D.D.C. 2003), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-250. As the Supreme Court has stated, "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S 317, 323-324 (1986).

C. ARGUMENT

1. Plaintiffs Failed to Satisfy the Prerequisites to Suit Under Title VII.

The doctrine requiring exhaustion of administrative remedies and the principle of standing converge to establish certain predicates to a claim of discrimination under Title VII. Although these predicates are straightforward, Plaintiffs fail to satisfy them. Accordingly, as explained below, Plaintiffs' suit should be dismissed.

a. Absence of a Timely-Filed Actionable Claim

The provision of Title VII that applies to federal government employees provides, in pertinent part, that "[a]ll personnel actions affecting employees. . .shall be made free from any discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a). The extension of the coverage of Title VII to federal employees removed the bar of sovereign immunity to federal employee discrimination suits. *Brown v. General Servs. Admin.*, 425 U.S. 820, 833 (1976). However, the waiver of sovereign immunity was limited; while Title VII

created a right to file a civil action for federal employees, "[a]ttached to that right. . .are certain preconditions." *Id.* at 832. Those conditions, the Supreme Court has held, established "rigorous exhaustion requirements and time limitations." *Id.* at 833. "The principal exhaustion requirement is that the complainant must initially seek relief in the agency which has allegedly discriminated against him." *Siegel v. Kreps*, 654 F.2d 773, 776-77 (D.C. Cir. 1981). "Exhaustion of administrative remedies has generally been regarded as a prerequisite to the maintenance of a federal employee's Title VII discrimination suit, and absent special circumstances, failure to exhaust calls for dismissal of the action." *Id.* The requirement that Title VII complainants exhaust administrative remedies as a prerequisite to suit has four pertinent components: (i) the administrative process must be initiated within a certain number of days of the alleged discriminatory occurrence to which it relates, here, 60 days[2], (ii) a formal administrative complaint must thereafter be filed, *see, e.g.*, Ex. 1, LCR 2010-3.1, sec. 12, (iii) the employee must file a civil action in district court within 90 days of receiving a final agency decision (or file a civil action 180 days after filing the administrative complaint with the Assistant Chief, EEOCO, if there has been no decision on the complaint), *see, e.g.*, Ex. 2, LCR 2010-3.2, sec. 17.A, and (iv) each claim raised in federal court must have been previously advanced in the EEO administrative complaint, *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995). Further, the mere assertion of a class action in court does not relieve any plaintiff from the requirement of exhausting administrative class action remedies if such plaintiff is to be a class representative in the absence of a co-plaintiff who has exhausted class action remedies.

[2]Keeping in mind however as further explained below that the alleged wrongful action must be materially adverse. *Douglas v. Pierce*, 707 F. Supp. 567 (D.D.C. 1988), *aff'd*, 906 F.2d 783 (1990); *Mitchell v. Baldrige*, 759 F.2d 80, 84 (D.C. Cir. 1985).

"[T]he class action process" in a Title VII action is not "a tag team form of litigation." *Thomas v. Reno*, 943 F.Supp. 41, 43 (D.D.C. 1996), *aff'd*, 159 F.3d 637 (D.C. Cir. 1997).

As a threshold matter, none of the Plaintiffs in this suit have identified any adverse personnel action personally affecting them and occurring within the pertinent 60-day period prior to the filing of the administrative complaint. *See generally*, Def.'s Statement of Facts Not In Dispute (attached hereto).[3] For example, they have not identified any position or training sought by them but denied by the Library in violation of Title VII[4], or any discipline taken against them.

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[3]For purposes of jurisdictional arguments made pursuant to Fed. R. Civ. P. 12(b)(1), a statement of material facts to which there is no genuine dispute is not required. LCvR 7(h). For purposes of his arguments not made pursuant to Fed. R. Civ. P. 56 and for which the record is cited, Defendant is referring to his statement of facts for ease of reference.

[4]As indicated *supra*, Plaintiff Clifton Knight averred that he has applied for 122 positions since 2001. R. 120-3, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls., at 1. However, he fails to identify which are timely and which, for purposes of the class claims, serve as bases for the class allegation related to discriminatory practices and policies in promotions and selections. Further, as the sole plaintiff who may have applied for a position within the 60 day period preceding the filing of the administrative complaint, he still has not fully exhausted for purposes of the Plaintiffs' class claims related to promotions and selections if fully exhausting means that he himself must meet all the elements of exhaustion including filing a civil action within 90 days of receipt of the final agency decision.

This Court has stated that "[e]ach plaintiff in a Title VII class action. . .need not file an EEOC charge so long as one member of the class has met the filing prerequisite." *Marable v. District Hosp. Partners, L.P.*, Civil Action No. 01-02361(HHK), 2008 WL 5501106, *2 (D.D.C. Dec. 1, 2008). For purposes of exhaustion, this Court has stated that Title VII precludes an employee from initiating a civil suit without "first filing an administrative charge and obtaining a right to sue letter." Id., *3 n.4. Additionally, to proceed with the claims in U.S. District Court, the employee must bring a civil action within 90 days of receipt of the right to sue letter. 42 U.S.C. § 2000e-5(f).

Here, none of the administrative class agents, Christine Mills, Amy Barnes, and Priscilla Ijeomah have identified any positions for which they applied 60 days prior to bringing their administrative complaint in May 2004, *see* R. 1-1. Nor did the other named Plaintiffs identified in the December 2004 original complaint exhaust because they also failed to identify any positions for which they applied within the requisite period (i.e., 60 days) before the filing of the administrative complaint. These include Runako Balondemu, Amy Barnes, Arnice Cook, Robert

(continued...)

Id. ¶¶ 1-4, and 8. Plaintiffs have also failed to identify how any Library practice or policy materially affected them within the prescribed filing period. *Id.* ¶¶ 1-16; Pls.' Second Am. Class Action Compl. ¶¶ 6, 11, and 15-24. In the absence of identifying such events, Plaintiffs' claims must be dismissed for lack of jurisdiction or failure to state a claim upon which relief may be granted.

b. No Standing to Maintain Suit

Two of the principle prongs of the constitutional case or controversy provisions require, *inter alia*, that (i) a plaintiff establish personal injury, and (ii) that injury be redressable by judicial relief. A plaintiff has the burden of pleading facts sufficient to establish standing based upon a personal injury: "The litigant must clearly and specifically set forth facts sufficient to satisfy the [] Art. III standing requirements. A federal court is powerless to create its own

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[4](...continued)
Cooper, Michael Durrah II, Geraldine Duncan, Priscilla Ijeomah, Lawrence Perry, William Rowland, and Mark A. Wilson. *See* R. 1, Class Action Compl. This leaves Clifton Knight as the remaining named plaintiff. However, he cannot cure the deficiency with exhaustion if, consistent with the Library's regulation, he as a named plaintiff was required to file in U.S. District Court within the requisite 90 day period from receiving the final agency decision, *see* LCR 2010-3.2, sec. 17. *See also Leighton v. Gonzales*, Civil Action No. 05-01835(HHK), 2007 WL 625876, *2 (D.D.C. February 26, 2007)(Explaining that although "[t]he requirement that a suit be initiated within ninety days of receiving a final agency decision operates as a statute of limitations rather than as a jurisdictional bar," absent demonstration by plaintiff that the equitable doctrine of waiver, estoppel, or tolling, applies, "the court cannot extend the limitations period by even one day.")(citation and internal quotation marks omitted). Mr. Knight was not a party to the original complaint filed in December 2004, but instead, was added as a plaintiff in the First Amended Complaint filed December 11, 2006 (R. 24), well after the 90 day period to file in District Court. Looking at the exhaustion requirements solely on the basis of Mr. Knight, he too has failed to exhaust. *See, e.g. Stubbs v. McDonald's Corp.*, 224 F.R.D. 678, 674-75 (D.Kan. 2004)(Court found that the plaintiff was not an adequate class representative because he failed to exhaust on certain claims.) However, assuming *arguendo* that he had exhausted, Plaintiffs' pattern and practice claim based on the Library's promotion and selection determinations should still be dismissed under the doctrine of *policies* or collateral estoppel as explained below.

jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)(citations omitted); *see also Kurtz v. Baker*, 829 F.2d 1133, 1138-39 (D.C. Cir. 1987)(The Court "must police its jurisdiction" by examin[ing] each of the [plaintiff's] alleged injuries for compliance with the requirement that they be personal and concrete.")

Plaintiffs in this case should be dismissed from this action because they failed to satisfy standing requirements. Specifically, they have identified no personal injury. As explained by the Supreme Court in *Whitmore v. Arkansas*,

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable,". . .as opposed to merely "[a]bstract,". . .and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical.". . .Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

495 U.S. at 155 (internal citations omitted).

Plaintiffs have not established injury in fact. They have not, for example, identified any specific promotion, work assignments or opportunities, or training denied for purposes of standing. Pls.' Second Am. Class Action Compl. ¶¶ 6, 11 and 15-24; Def.'s Statement of Facts Not In Dispute, ¶¶ 1-15. They have also failed to identify any specific injury as to their performance appraisals. Indeed, when mentioned, they concede that their appraisals have been favorable. *Id.*¶ 15. Further, as detailed above, no plaintiff was able to identify and describe, in a manner showing specific injury to them, any policies or practices reflecting that Defendant "pays minority employees less than Caucasian employees for the same work," grooms Caucasian employees for advancement, fails to promote qualified minorities to higher positions, assigns

lesser job classifications or wage grades to minority employees as compared to Caucasian employees, and makes less desirable work assignments to minority employees than to Caucasian employees. *Id.* ¶¶ 10-14. And none were able to describe the two-tiered classification system used by the Library for purposes of promotion, and any specific injury to them from the Library's use of this system. *Id.* ¶ 15. Plaintiffs thus fail the personal injury prong of the standing requirements, i.e., they have not alleged an injury that is personal or concrete. *See, e.g. Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994)("Normally, an employee who was not aggrieved by a. . .particular hiring requirement lacks standing to challenge that. . .requirement."); *Coe v. Yellow Freight System, Inc.,* 646 F.2d 444, 451 (10th Cir.1981)("It is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff himself was injured."); *Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 668 (7th Cir.1996) ("In order for an individual plaintiff to have constitutional standing to bring a Title VII action, he must show that he was *personally injured* by the defendant's alleged discrimination and that his injury will likely be redressed by the requested relief.")(emphasis added); *Stubbs v. McDonald's Corp.*, 224 F.R.D. at 674, citing, *Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977)("To have standing to sue on a class's behalf, the plaintiff must be an adequate class representative. The plaintiff must be a part of the class and 'possess the same interest and suffer the same injury' as class members.")(citation omitted); *Lander v. Montgomery County Bd. of Com'rs*, 159 F.Supp.2d 1044, 1058 (S.D.Ohio 2001), citing, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61(1992)(In order to have constitutional standing to bring a Title VII action, [employee] must show that he [or she] personally was injured by the [employers'] alleged discrimination and that his injury likely will be redressed by the relief sought.")

Further, Plaintiffs' general allegations related to alleged discriminatory policies and practices are insufficient to maintain standing absent injury. *See, e.g.*, Def.'s Statement of Facts Not In Dispute, ¶¶ 9-15. Title VII is the exclusive remedy for employment discrimination claims raised by federal employees, *see Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976), but Title VII does not confer a freestanding right upon employees to challenge their employers' allegedly discriminatory policies without making some showing that the policy at issue specifically affected them. Basic principles of standing remain applicable in this context, and courts have thus rejected attempts to challenge race-conscious policies absent some showing that the claimant was actually affected by the policy at issue. *See Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)(abstract injury is not enough for purposes of standing); *Whalen v. Rubin*, 91 F.3d 1041, 1045 (7th Cir. 996)(discussing hypothetical employees who could not challenge their employers' clearly discriminatory policies); *Wooden v. Board of Regents of the Univ. System of Georgia*, 247 F.3d 1262, 1282-83 (11th Cir. 2001) (holding that plaintiff who was eliminated from consideration prior to the stage where race was considered lacked standing to sue); *see also Phillips v. Cohen*, 400 F.3d 388, 397 (6th Cir. 2005)(To have standing in a disparate impact case under Title VII, a plaintiff must "demonstrate *either* that he or she was denied an employment opportunity because of a practice prohibited by statute; or that he *or* she was qualified for the opportunity sought and was denied it and therefore, by inference, was subjected to discrimination.")(citation omitted). Having failed to identify any injury redressable under Title VII, Plaintiffs' suit must be dismissed in its entirety.[5]

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[5]Mr. Rowland also fails the redressability prong of the standing requirement. Mr. Rowland has been retired from the Library since 2006. He therefore is not and will not be

(continued...)

2. Plaintiffs' Claims Based on the Library's Promotion and Recruitment Procedures Are Barred By Res Judicata and/or Collateral Estoppel.

It is no surprise if this case has the specter of deja vu. Plaintiffs are essentially bringing, or attempting to bring, what can be fairly characterized as *Cook* II. Both suits involve the same primary claim – specifically, a challenge to the Library's promotion and recruitment procedures. In *Cook*, the plaintiffs brought suit on behalf of themselves and all past, present and future black employees and applicants for employment. Ex. 3, Cook Compl., p. 12. Similarly, in this suit, Plaintiffs, all African American employees, bring suit on behalf of "all minority job applicants and all past, current, and future minority employees of the Library of Congress (the proposed "Class")." Pls.' Second Am. Compl. ¶ 2. In *Cook*, the plaintiffs alleged that "minority employees are disproportionately concentrated in lower-paying positions." Ex. 3, *Cook* Compl., p. 25. In this suit, Plaintiffs allege that the Library fails to promote "minority employees to higher levels." Pls.' Second Am. Compl. ¶ 2. In *Cook*, the plaintiffs alleged unequal recruitment standards. Ex. 3, Cook Compl, p. 24. In this suit, Plaintiffs alleged these same claims – i..e, challenges to the Library's policies and practices for recruitment and promotions, including the use of AVUE. Pls.' Second Am. Class Action Compl., ¶¶ 2.b, 2.d, 9, 11.c and 22; Def.'s Statement of Facts Not In Dispute, ¶ 3.

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[5](...continued)
subject to any of the policies or practices of the Library that pertain to its employees. In *City of Los Angeles v. Lyons*, the Supreme Court held that the standing of the plaintiff "depended on whether he was likely to suffer future injury from the use of chokeholds by police officers." 461 U.S. at 104. The Court held that the plaintiff lacked standing to seek injunctive relief because "he has made no showing that he is realistically threatened by a repetition of his experience." *Id.* at 109. "The same rationale. . .would also have kept [Lyons] from bringing a suit for declaratory relief." *Fair Employment Counsel of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994). Thus, Mr. Rowland, who is no longer subject to the conduct he challenges, does not have standing to seek declaratory or injunctive relief.

However, it is "black-letter law" that the doctrine of res judicata bars "repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund. v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C.Cir.1983). Res judicata or claim preclusion is applicable when "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). "Res judicata concludes not only issues decided but also those which could have been raised and decided in the earlier proceeding." *National Savings & Trust Co. v. Rosendorf*, 559 F.2d 837, 840 n. 26 (D.C. Cir. 1977). In this way, res judicata helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and [ ] prevent serial forum-shopping and piecemail litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C.Cir.1981). Issue preclusion or collateral estoppel, on the other hand, "may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen*, 449 U.S. at 94).

Here, to the extent that Plaintiffs' claim challenges the selection process validated in the *Cook* settlement agreement, such a claim on that issue would be precluded because (1) that issue was raised and contested by the parties in *Cook*, (2) the validity of the settlement agreement was actually and necessarily determined by the *Coo*k court, and (3) preclusion in the instant case will not cause unfairness to either party bound by the determination. *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Amer. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). First, the validity of the procedures set forth in the settlement agreement

was raised by the Plaintiff in *Cook* when they sought to modify the 1994 settlement agreement. *Cook v. Billington*, 2003 WL 24868169, *1. The *Cook* Court, with competent jurisdiction, considered the Plaintiffs' claims that the procedures were invalid and confirmed that the procedures delineated in the settlement agreement, as approved by the Court in 1995, comported with the Uniform Guidelines. *Id.* at *1-2. Precluding Plaintiffs from re-litigating this issue presents no unfairness to Plaintiffs because their "incentives to litigate the point now disputed were no less present in the prior case, nor are the stakes of the present case of 'vastly greater magnitude.'" *Martin v. Dep't of Justice*, 488 F.3d at 455 (quoting *Yamaha Corp. of Amer. v. United States*, 961 F.2d at 254). Furthermore, Plaintiffs have no legitimate basis to argue that the "prior proceedings were seriously defective." *Martin v. Dep't of Justice*, 488 F.3d at 455 (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found*., 402 U.S. 313, 333, (1971)). Accordingly, Plaintiffs have previously had ample opportunity to make their arguments heard on the issue of the Library's selection process, and they should be precluded from challenging the Library's selection procedures in their current litigation.

3. Plaintiffs Fail to State A Cognizable Claim Under Title VII

Title VII recognizes two types of discrimination claims – disparate treatment and disparate impact. To establish a prima facie case for disparate treatment, a plaintiff must show by a preponderance of the evidence (1) that he belongs to a protected group, (2) that he was qualified and applied for a position, (3) that he was rejected despite his qualifications, and (4) "that after his rejection, the position remained open and the employer continued to seek

applicants from persons of [the plaintiff's] qualifications." *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 149 - 1155 (D.C. Cir. 2004).[6]

"Disparate treatment claims can be brought as class actions as well." *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000). "Plaintiffs in a class action disparate treatment case must show a 'pattern and practice' of discrimination by the employer, i.e., that 'racial discrimination was the [employer's] standard operating procedure-the regular rather than the ususal practice.'" *Id.*, quoting, *Teamsters v. United States*, 431 U.S. 324, 336 (1977). However, "[p]roving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case" of disparate treatment. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984).

Disparate impact claims "do not require intent to discriminate." *Munoz*, 200 F.3d at 299, quoting, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *accord Moore v. Summers*, 113 F.Supp.2d 5, 19 (D.D.C. 2000). Rather, under this theory, "it is enough for [the employee] to show that the challenged employment practices, though 'facially neutral in their treatment of different groups. . .in fact fall more harshly on one group than another and cannot be justified by

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[6]In *Teneyck*, the District of Columbia Circuit noted that, given the Supreme Court's emphasis in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), that the prima facie case is not intended to be "rigid, mechanized, or ritualistic," the District of Columbia Circuit in *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002), articulated an alternative formulation of the Title VII prima facie case, i.e, a plaintiff to establish such must demonstrate that (1) he was a member of a protected group, (2) an adverse employment action took place, and (3) the unfavorable action gives rise to an inference of discrimination. *Teneyck*, 365 F.3d at 1150. The District of Columbia Circuit explained that this "alternative formulation is designed to accommodate the wide variety of employment discrimination claims that extend beyond the typical 'failure-to-hire' situations of the sort confronted in McDonnell Douglas." *Id.* However, relevant for this case, in *Teneyck*, the District of Columbia Circuit stressed that "*McDonnell Douglas*'s formulation of the required elements of a prima facie case remains the standard in typical failure-to-hire cases." *Id.*, *citin*g, *Morgan v. Fed. Home Loan Mortgage Corp.*, 328 F.3d 647, 650 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 881 (2003).

business necessity.'" *Id*, quoting, *Teamsters*, 431 U.S. 335 n. 15. An employee "*must identify specific practices* as being responsible for any observed disparities, . . .and must conduct a systemic analysis of those employment practices in order to establish their case." *Munoz*, 200 F.3d at 299 (citation omitted)(emphasis added).

a. Plaintiffs' Failure to Establish a *Prima Facie* Case of Discrimination on Their Promotion/Failure to Hire Claims

In this suit, Plaintiffs have pled disparate treatment and impact claims. Pls.' Second Am. Class Action Compl., ¶¶ 4 and 28. Under either theory, however, Plaintiffs' claims based on failure to promote/hire must be dismissed. Plaintiffs' disparate treatment claims fail because, as detailed above, none of the Plaintiffs, with the exception of Knight, applied for a position prior to the sixty day period before filing their administrative complaint. *See*, Def.'s Statement of Facts Not In Dispute, ¶¶ 1-3. And even Knight fails to identify which positions can and do serve as the basis for a timely filed administrative claim. *See generally* R. 120-3, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls. (Knight). Accordingly, having not sought any positions for purposes of a timely-filed administrative complaint (or in the case of Knight, identified such positions), the Plaintiffs' disparate treatment class claims based on or the Library's promotion and selection procedures and policies must be dismissed for failure to state a claim upon which relief may be granted. *See, e.g. Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 -160 (2d Cir. 2001), quoting, *Teamsters,* 431 U.S. at 362 ("a class member at the remedial stage of a pattern-or-practice claim [must] show that he or she suffered an adverse employment decision 'and therefore was a potential victim of the proved [class-wide] discrimination.'"); *Housley v. Boeing Co.*, 177 F.Supp.2d 1209,

1222 (D.Kan. 2001)("In the failure-to-promote and failure-to-hire context, every Circuit that has addressed this issue has required a plaintiff, as part of that plaintiff's prima facie case, to come forward with evidence of a specific vacant position for which the plaintiff was qualified and on which the plaintiff's claim is based."); *McKnight v. Graphic Controls Corp.*, No. 98-CV-0662E(H), 2000 WL 1887824, *6 (W.D.N.Y. 2000) (Court noted that the plaintiff had failed to "reveal[] the existence of any position for which he had, or would have, applied and was, or expected to be, subsequently rejected." The Court added that "because [the] plaintiff ha[d] not revealed the existence of any position for which he had, or would have, applied, it [was] impossible for [the] Court to ascertain whether he would have been qualified for such position and whether he suffered an adverse employment decision in the form of a rejection." The Court thus concluded that the plaintiff had "not met his burden of establishing an inference of impermissible discrimination with respect to his claim of failure to promote.").

Plaintiff's disparate impact claims must also fail. Plaintiffs have not identified and described any *specific* Library practices or policies responsible for any purported disparities disadvantaging African Americans in promotion and selection determinations. Accordingly, Plaintiffs' disparate impact claims based on the Library's promotion and selection policies and practices must be dismissed. *Munoz*, 299 F.3d at 299; *see also Prince v. Rice*, 453 F.Supp.2d 14, 27 (D.D.C. 2006)(In dismissing the plaintiff's disparate impact claim, the Court stated, "not even the most generous reading of [the plaintiff's] factual allegations unearths any identification of a specific employment practice that is generally applicable and facially-neutral, but has functioned disproportionately with respect to plaintiff or members of her protected class."); *O'Brien v. City of Philadelphia*, 837 F.Supp. 692, 698 (E.D.Pa. 1993)("To make out a prima facie case on

[disparate] impact, a plaintiff must first demonstrate that it is the application of *a specific or particular employment practice* that has created the disparate impact under attack.")(emphasis added).

b. Plaintiffs' Failure to Identify A Cognizable Adverse Action Regarding Their Claims Related to Discipline, Training, Telework and Performance Evaluations

As it applies to the federal government, Title VII proscribes discriminatory "personnel actions affecting employees. . ." 42 U.S.C. § 2000e-16(a). The Supreme Court has said that, to be subject to Title VII, a personnel action is a "tangible employment action" that is "a significant change in the employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1988). To determine whether a claim relates to a tangible adverse employment action under the Supreme Court's description, the D.C. Circuit has examined whether there is an "objectively tangible harm," *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999), "that is adverse in an absolute sense," *id.*, at 458, and has an immediate effect on employment." *Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001), quoting, *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997).

None of the Plaintiffs have alleged any specific disciplinary action taken against them, nor have they alleged how they have been materially injured by their performance evaluations or denial of training or telework requests (assuming such requests were timely made for purposes of suit). *See generally*, Pls.' Second Am. Class Action Compl.; Def.'s Statement of Facts Not In Dispute, ¶¶ 4, 5, 8 and 9. Indeed, to the extent that any of the Plaintiffs even bothered to provide facts (albeit, sketchy ones) as relates to their evaluations, they have stated that the evaluations

have been positive. *Id.* ¶ 5. However, the District of Columbia Circuit has held that a performance evaluation, negative or otherwise, is not an adverse action absent effect on terms, conditions, or privileges of an employee's employment. Plaintiffs have presented no such effect as relates to their performance evaluations (or training, telework or disciplinary claim). *Russell v. Principi*, 257 F.3d 815, 819 (D.C. Cir. 2002)(negative performance evaluations are not adverse actions absent some effect on terms, conditions or privileges of employment); *Dorns v. Geithner*, --- F.Supp.2d ----, 2010 WL 882649 (D.D.C. March 12, 2010)(decreased performance appraisals and denial of training requests are not adverse employment actions); *Manuel v. Potter*, --- F.Supp.2d ----, 2010 WL 565192 (D.D.C. Feb. 17, 2010)(non-receipt of training opportunities is not adverse action); *Brookens v. Solis*, 616 F.Supp.2d 81, 91 (D.D.C. 2009)(denials of desk audits and details do not constitute adverse employment actions for purposes of establishing a prima facie case of discrimination or retaliation.); *Sewell v. Chao*, 532 F.Supp.2d 126, 137 (D.D.C. 2008)(denial of training and transfer to another department do not constitute adverse employment actions); *Reynolds v. Service America Corp*., No. 95 C 7413, 1998 WL 30700, *11 (N.D.Ill. Jan. 21, 1998)(Receipt of negative performance evaluations *alone*, even if undeserved, cannot constitute an adverse employment action.); *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 847 (7th Cir. 1992)("There is nothing to complain about until a poor [performance] rating carries or directly portends a loss of job or pay."); *Hagan v. Walker*, 1998 WL 830641, *3 (E.D. La. 1998)("denial of training, non-selection for a detail and adverse performance appraisals. . .fail to amount to adverse personnel actions that Title VII was created to address."); *Smith v. ASC, Inc.*, 148 F.Supp.2d 302, 313 (S.D.N.Y. 2001)(concluding that "not allowing [the plaintiff] to work from home. . .[did] not constitute adverse employment action []

as a matter of law"): *Hornberg v. UPS*, 2006 WL 2092457, at *9 (D. Kan. July 27, 2006)(telecommuting is a personal preference, denial of request was not an adverse employment action); *Daniels v. FRB of Chi.*, No. 98 C 1186, 2006 WL 861969, at *12 (N.D. Ill. March 31, 2009)(refusal of request to permit telecommuting is not adverse employment action).

In *Aliotta v. Blair*, 576 F.Supp.2d 113 (D.D.C. 2008), a class action suit, the Court, as an initial matter, reviewed whether the alleged wrongdoing at issue was an adverse employment action "sufficient to sustain a disparate treatment or disparate impact claim." *Id.* at 120. The Court then dismissed the plaintiffs' claims concluding that the alleged wrongdoing failed to meet this standard. Plaintiffs' claims in this suit based on performance evaluations, telework, training and discipline should be similarly dismissed – i.e, they fail to allege an adverse employment action.

4. The *Cook* Order Establishes the Library's Non-Discriminatory Reason.

The ultimate issue in an employment discrimination case is whether the employee has met his burden of proving that an adverse employment action was motivated at least in part by intentional discrimination. If the employee succeeds in establishing a prima facie case of discrimination, the employer then must introduce evidence of a legitimate, nondiscriminatory reason for its action. *See McDonnell Douglas*, 411 U.S. at 802. The burden on the employer is one of production, not persuasion - "it can involve no credibility determination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 144 (2000), *quoting*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). Once it is established that both parties have met their respective burdens, the burden shifting scheme becomes irrelevant, *Hicks*, 509 U.S. at 510, and

"the sole remaining issue is discrimination *vel non*." *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003).

As indicated above, Plaintiffs have not established a *prima facie* case of discrimination for their non-promotion and recruitment claims – none have identified any position which they sought and which can serve as the basis for a timely filed administrative complaint for purposes of challenging the Library's promotion and selection procedures. Def.'s Statement of Facts Not In Dispute, ¶¶ 2 and 3. They have thus not met the threshold requirement for a suit based on non-selection under Title VII.

Further, the Library has an irrefutable reason for using the promotion and selection procedures at issue – it was bound to do so by Court Order. *Cook v. Billington*, Civil Action No. 82-0400(GK)(Docket Entry No. 836, Order). The Court Order in *Cook v. Billington* made the parties' Joint Report part of the record and defined the Library's obligations as relates to the selection process. *Id.* Further, the Court described the Library's selection process - the very one used by the Library during the relevant period of this suit - as a "validated" hiring process comporting with the Uniform Guidelines on Employee Selection procedures. *Cook v. Billington*, 2003 WL 24868169, *2. Notably, the "validated" selection process was one agreed to by both parties in *Cook*, *Cook v. Billington*, Civil Action No. 82-0400(GK)(Docket Entry No. 836, Order), and it bears reiterating that nine out of the ten Plaintiffs in this matter were part of the *Cook* class. The Library's use of this Court-ordered selection process is unarguably a legitimate basis for its actions as relates to promotions and selection, and any challenge to use of this process must be rejected.

5. Plaintiffs Cannot Satisfy the Requirements of Class Certification.

Plaintiffs' proposed class action fails for two independent reasons. First, Plaintiffs fail to propose a properly defined class whose members can be identified without an inquiry into the merits of this case. Second, the proposed class does not satisfy Rule 23 requirements – subsection (a) or subsection (b).

a. Proposed Class Not Sufficiently Defined or Ascertainable

A class action must be brought on behalf of some identified, defined class. *See Board of Sch. Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128, 130 (1975). A class action would be unworkable unless there is some administratively feasible way for the Court to determine who the members of the class are. The proposed class definition in this suit fails to meet this standard. Here, the class consists of minority employees of the Library – professional and nonprofessional as well as current, former and retired employees – who have suffered from race discrimination in terms of pensions, unfair performance appraisals, job classifications, wage grades, training, mentoring, and promotions.[7] R. 28, Pls.' Second Am. Class Action Compl. ¶¶ 11, 15-24. To determine class membership under this definition, the Court would have to resolve the merits of the case by deciding which employees have been subjected to discrimination under each one of these claim categories. *See, e.g. Williams v. Glickman*, No.Civ.A., 95-1149(TAF), 1997 WL 33772612, *4 (D.D.C. Feb. 14, 1997)(The Court stated that "[b]ecause [it] must

[7]As noted above, in their Second Amended Complaint, Plaintiffs also allege class claims based on hostile work environment and retaliation, R. 28, Pls.' Second Am. Class Action Compl., ¶ 24, but their counsel averred at the September 17, 2009 Meet and Confer that his clients were not pursuing these claims. Defendants briefly note, however, that the arguments raised herein would apply with equal force to these claims – i.e., failure to satisfy the prerequisites to suit under Title VII and failure to satisfy the requirements of class certification.

answer numerous fact-intensive questions [including determining whether a proposed class member was in fact subjected to discrimination] before determining if an individual may join the class, the proposed class [was] not clearly defined."). Further, in order to determine whether an individual is a member of the class, the court would have to make a legal determination as to whether that individual is entitled to relief.

"Because the Court must answer numerous fact-intensive questions before determining if an individual may join the class, the proposed class is not clearly defined." *Id.*; *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)(Courts should not conduct "a preliminary inquiry into the merits" to determine whether to satisfy a class). The class definition, as presented in the Second Amended Complaint, is therefore inappropriate.

b. Plaintiffs' Failure to Satisfy the Prerequisites for a Class Action Under Fed. R. Civ. P. 23

Individual litigants seeking to maintain a class action must meet the prerequisites of Fed. R. Civ. P. 23(a), which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Class actions "may only be certified if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982). The named plaintiffs bear the heavy burden of establishing that the action may be maintained as a class action, *id.* at 161, and failure to meet any one of Rule

23(a)'s requirements precludes certification, *see, e.g., Love v. Johanns*, 439 F.3d 723, 728 (D.C. Cir. 2006).

A party seeking class certification also must demonstrate that the proposed class action satisfies one of the categories set forth in Fed. R. Civ. P. 23(b). Certification under Rule 23(b) is appropriate only where (1) the prosecution of separate actions would create a risk of inconsistent adjudications and incompatible standards of conduct for the defendant, or a risk of individual adjudications that as a practical matter would be dispositive of the interests of other class members; (2) the defendant "has acted or refused to act on grounds generally applicable to the class" and injunctive or declaratory relief would therefore predominate; or (3) common issues predominate and a class action is the "superior" means to handle the litigation.

i. Fed. R. Civ. P. 23(a)

In the instant matter, and as indicated above, Plaintiffs allege a broad range of unrelated employment actions that supposedly adversely affect all "minority job applicants" and "past, present and future minority employees at the Library" including, but not limited to: compensation, training, promotions, selections, wage classifications, job assignments, recruitment, disciplinary actions, and performance evaluations. *See* R. 28, Pls.'Second Am. Compl. at ¶¶ 2, 11, 15-22. Plaintiffs' complaint of discrimination which refers to a litany of unrelated policies as a basis to establish a class action - is simply not cohesive or narrow enough to satisfy the commonality and typicality requirements of the Federal Rules. In fact, courts in this Circuit have repeatedly denied class certification sought by individuals alleging similarly overly broad and vague claims. *See e.g., Williams v. Glickman*, 1997 WL 33772612 (an overly broad proposed class with a bare allegation of a 'common thread of discrimination' does not satisfy the

requirement to identify the common questions of law); *Wagner v. Taylor*, 836 F.2d 578, 587 (D.C. Cir. 1987) (framing problems particular to one individual as a common threat of discrimination towards African-American employees as a group does not satisfy the 'specific presentation' requirement to identify the questions of law or fact common to the class representative and the members of the proposed class); *Sperling v. Donovan*, 104 F.R.D. 4, 5 (D.D.C. 1984) (alleging across-the-board racial discrimination against a group unified solely by race ("the all white class") is not sufficient to satisfy Rule 23 requirements).

More important, many if not all of the named Plaintiffs cannot demonstrate claims that are "typical" or "common" because, as discussed above, they cannot show that they actually suffered the supposed adverse actions that they alleged in their complaint. Specifically, a review of their interrogatory "responses" reveals that during the relevant time period as identified by the Plaintiffs in their Complaint (January 1, 2003-May 28, 2004), only one of the named Plaintiffs ever actually applied for positions at the Library; none of the named Plaintiffs were disciplined; none of the named Plaintiffs received negative performance evaluations; none of the named Plaintiffs sought and were denied training (in fact, several of the named Plaintiffs admit that they received training); and none of them were classified differently than their non-minority counter-parts. *See* R. 120-2 to R. 120-11, Supplemental Responses to Interrogatories; Def.'s Statement of Facts Not In Dispute, ¶¶ 1-15. Therefore, considering that Plaintiffs cannot demonstrate that their claims are typical or common (or indeed, that anything adverse even happened to them), Plaintiffs cannot satisfy the requirements of Fed. R. Civ. P. 23(a)(2) and (3).[8]

[8]Plaintiffs may argue that they cannot demonstrate the certification requirements of Fed. R. Civ. P. 23(a), because the Defendant has not yet provided "applicant flow data" on the (continued...)

Further, the failure of some, if not all, of the named Plaintiffs to exhaust their administrative remedies also precludes class certification. As noted above, Plaintiffs have failed to identify any position or training sought by them and denied by the Library, or any discipline directed personally against them occurring within the 60 day period prior to the filing of their May 28, 2004 administrative complaint. They also failed to identify how any Library practice or policy materially affected them within the prescribed filing period. Identifying the purported adverse action is key because "[any] inquiry into the propriety of class certification [starts] with an analysis of the claims presented by the named plaintiffs." *Harris v. Marsh*, 100 F.R.D. 315, 319 (D.C.N.C. 1983). "[C]lass claims are limited by the individual claims, [*East Texas Motor Freight Systems Inc. v.*] *Rodriguez*, 431 U.S. [395, 403 (1977)], which in turn are limited by the

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[8](...continued)
selections that occur at the Library. Defendant respectfully urges the Court to reject this red herring and non-sensical argument. Importantly, a review of Plaintiffs' interrogatory responses demonstrates that they have produced no evidence to satisfy any of the factors required to maintain a class action. *See* R. 120-2 to R. 120-11, Supplemental Responses to Interrogatories; *see also* Def.'s Statement of Facts Not In Dispute, ¶¶ 1-15. Furthermore, there is no basis that access to "applicant flow data" would in any way verify that the Library's hiring system results in a disparate impact to minority applicant. This is particularly dubious because in September 2003, less than nine months before the Mills' Plaintiffs' filed their administrative EEO Complaint, Judge Kessler issued an order denying Plaintiffs' in the *Cook* case (the identical Plaintiffs in this action) request for extension of the Court's oversight period. In that opinion, Judge Kessler opined that the "Library's three-stage competitive selection procedure is a "validated" hiring process and comports with the Uniform Guidelines on Employee Selection Procedures. *Cook v. Billington*, 2003 WL 24868169, *2. It simply does not make sense that within months after Judge Kessler's decision - finding that the Library's merit selection process is valid and in conformance with the Uniform Guidelines - Plaintiffs (most of whom did not even apply for any positions after Judge Kessler's decision) could have any basis (which they are required to have under the Federal Rules before filing a complaint) that the Library's Court-sanctioned merit process has a disparate impact on African-American applicants for employment. Plaintiffs' filing is thus nothing more than an attempt to circumvent Judge Kessler's prior order and resuscitate claims that were also disposed of by settlement agreement. As explained above, Plaintiffs' attempt in this regard should be rejected on res judicata and collateral estoppel grounds.

administrative procedures outlined in Title VII." *Id.*, citing, *Chisholm v. United States Postal Service*, 665 F.2d 482, 490 (4th Cir. 1981)." Unless class remedies have been exhausted[9], the Court lacks subject matter jurisdiction (or alternatively, Plaintiffs have failed to state a claim), and the named plaintiffs cannot establish the requisite typicality. *See generally Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962)(plaintiffs "cannot represent a class of whom they are not a part").

Plaintiffs also cannot demonstrate that they "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Given Plaintiffs' failure to meet the commonality and typicality requirements of Fed. R. Civ. P. 23(a)[10], they cannot establish that they will fairly and adequately represent the class "in that the proposed [p]laintiff class representatives cannot adequately represent the interests of other [p]laintiff members of the class with atypical claims." *Badillo v. American Tobacco*, 202 F.R.D. 261, 265 (D.Nev. 2001). Further, Plaintiffs' many missteps throughout five years of litigation of this case also demonstrate that these Plaintiffs are inadequate class representatives. Such missteps include repetitious filings of complaints yet still no clear demonstration of the threshold jurisdictional requirement of standing (R. 1, R. 24 and R. 28) and their bungling of discovery which has been so egregious that the Court has issued three

[9]It is surprising that Plaintiffs have maintained this suit for almost six years, filing three complaints in this Court, yet failing to establish - or ignoring - the prerequisites to suit for purposes of bringing their Title VII class claims in this Court. *See* Fed. R. Civ. P. 11(b)(2).

[10]As indicated above, only one of the named Plaintiffs actually applied for positions at the Library during the relevant period, and none were disciplined, none received negative performance evaluations, none sought and was denied training, and none demonstrated that they were classified differently than their non-minority counterparts. R. 120-2 to R. 120-11, Pls.' Supplementary Responses to Def.'s First Set of Interrogatories Re. the Second Am. Compl. of Pls.(Mills, Balondemu, Duncan, Hubbard, Ijeomah-Mills, Knight, Mwalimu, Perry, Taylor, and Rowland).

discovery orders against the Plaintiffs (*see* R. 44, 73, and 114, orders granting Defendant's motions to compel and/or for sanctions). Further, their discovery responses evidence lack of any Title VII claim whatsoever on the part of any of the Plaintiffs which also reveals the inadequacy of Plaintiffs as class representatives.

Because Plaintiffs do not satisfy the requirements for certification under Rule 23(a), the Court need not consider whether they have satisfied Rule 23(b). Should the Court nevertheless undertake this task, it will find additional reasons to deny class certification.

ii. Fed. R. Civ. P. 23(b)

The same deficiencies discussed above with respect to Rule 23(a) apply with equal, or even greater, force with respect to 23(b). Because each of the proposed class member's claims will succeed or fail based on the particular factual circumstances presented, there is no risk of inconsistent adjudications or incompatible standards of conduct. For example, assuming solely for the sake of argument that plaintiff Knight has a meritorious non-promotion claim, a judicial determination to that effect would have no bearing on the claim of another named plaintiff or class member. This is especially so given the broad range of positions at issue (indeed, both professional and nonprofessional positions, *see, e.g.* Compl. ¶ 6.a and 6.f). Accordingly, Plaintiffs' proposed class cannot be certified under Rule 23(b)(1).

Under Rule 23(b)(2), a plaintiff must show that a defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). As noted above, Plaintiffs failed to identify any discriminatory policy or practice that is generally applicable to the class. Instead, the Plaintiffs are a group of professional and non-professional

employees asserting a laundry list of claims of discrimination – certain of which do not apply to all Plaintiffs (e.g., discipline, performance evaluations, telework). Thus, Plaintiffs' class cannot be certified under Rule 23(b)(2).

As to Rule 23(b)(3), a class complaint cannot be certified in the absence of a showing by the plaintiffs "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b). Here, because Plaintiffs fail to demonstrate commonality, they certainly cannot meet the more demanding standard that questions of law or fact common to all class members must "predominate" over any questions affecting only individual members.

Finally, a class action here would not be superior to individual trials. The class action device is not appropriate when it cannot achieve sufficient "economies of time, effort, and expense." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). The individual determinations required in this matter will preclude such economies. Individual lawsuits, on the other hand, would not be a waste of judicial resources particularly here where the threshold issue of exhaustion is in significant doubt across the board.

D. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiffs' complaint, including denying class certification. Alternatively, Defendant requests that the Court grant Defendant summary judgment in its favor.

Date: April 9, 2010

Respectfully submitted,

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