

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

REGINALD G. MOORE, *et al.*

Plaintiffs,

v.

MICHAEL CHERTOFF
SECRETARY, U.S. DEPARTMENT OF
HOMELAND SECURITY,

Defendant.

Civ. No. 00-953 (RWR/DAR)

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR
PARTIAL DISMISSAL AND/OR FOR PARTIAL SUMMARY JUDGMENT
OF AMENDED COMPLAINT**

Defendant moves to dismiss the overwhelming majority of Plaintiffs' operative complaint by rehashing arguments that have been rejected by this Court on multiple occasions in this case. Specifically, Defendant seeks to have the Court revisit its October 2004 and March 2006 Orders which found that various named Plaintiffs vicariously exhausted non-promotion and "building block" claims. Moreover, in making his arguments, Defendant not only ignores the law of the case, but also ignores the well-established law of this Circuit and District and ignores key facts in the record. The Court should, once again, reject Defendant's specious arguments and allow this case to move forward towards completing discovery (which is just starting in earnest) and trial.

Defendant's motion for summary judgment on Plaintiffs' disparate treatment non-promotion claims easily fails because Plaintiffs have presented statistical and testimonial evidence of a pattern and practice of racial discrimination, which gives rise to a genuine issue of material fact for a jury to decide. In the alternative, Defendant's motion for

summary judgment should be denied because class merits discovery has begun only recently and a summary judgment motion at this stage is extraordinarily premature.

PROCEDURAL HISTORY

On May 3, 2000, Plaintiffs filed this class action against the United States Secret Service. The complaint alleged that from at least January 1, 1974, Defendant engaged in discriminatory personnel policies relating to, among other things, the selection of Special Agents for competitive positions of GS-14 and above, access to the building blocks of promotion, the maintenance of a racially hostile work environment, and retaliation against Special Agents seeking to pursue their rights under Title VII.

On July 5, 2000, Defendant filed his first Motion to Dismiss ("July, 2000 Motion to Dismiss"). Defendant argued in part, that (1) Plaintiffs' claims had not been administratively exhausted as the class administrative complaint had not pended before the EEOC for 180 days, and (2) that many of Plaintiffs' claims were untimely as Plaintiffs had not contacted an EEO counselor within forty-five days of each discriminatory act. On October 24, 2004, this Court found that one Plaintiff, Reginald Moore, had exhausted his claims with the EEOC and that the exhaustion of his claims also vicariously exhausted the non-promotion claims of Plaintiffs Turner, Summerour, Tyler, and Ivery. The Court further found that the Plaintiffs' claims that were based on their Second Amended Class Action Complaint to the EEOC ("Plaintiffs' Administrative Complaint") must be dismissed without prejudice because they had not completed the 180-day administrative exhaustion period before the action was filed in federal court.

In November 2004, Plaintiffs refiled their Administrative Complaint with the EEOC and allowed it to pend for 180 days. On May 31, 2005, Plaintiffs filed their Motion to Amend and Supplement Complaint to reintroduce the dismissed claims that

were now properly exhausted. In response, Defendant opposed Plaintiffs' motion to amend, arguing that the proposed amendment should be denied as futile based on many of the same arguments that he raises in his motion to dismiss.

On March 30, 2006, this Court ruled on Plaintiffs' Motion to Amend and Supplement Complaint, rejecting the Defendant's futility argument and finding that Plaintiffs' class claims concerning discriminatory non-promotion and discrimination with regard to the "building blocks" of promotion were now properly exhausted.

On May 1, 2006, Plaintiffs filed their First Amended and Supplemental Class Complaint, including only the non-promotion and "building block" claims that this Court specifically allowed in its March 30, 2006 Order. Plaintiffs did not plead, for example, hostile work environment claims that were included in Plaintiffs' May 2000 Complaint. And Plaintiffs only plead post-1998 non-promotion claims, removing several claims—and several Plaintiffs—included in Plaintiffs' May 2000 Complaint.

ARGUMENT

I. Defendant's Arguments Willfully Ignore this Court's Rulings on Vicarious Exhaustion.

Despite two Orders by this Court expressly rejecting his argument, Defendant is back in front of the Court urging that all but three of Plaintiffs' non-promotion claims are not exhausted and are therefore subject to dismissal. With regard to Plaintiffs' "building block" claims, Defendant goes further, arguing that no "building block" claims are in the case. Even if those prior Orders were not binding law of the case (and they are), Defendant's arguments are flat wrong on both the law and facts.

In this Court's October 24, 2004 Order on Defendant's July, 2000 Motion to Dismiss, Judge Roberts ruled that Plaintiff Moore's individual EEO complaint

vicariously exhausted the non-promotion claims of Plaintiffs Turner, Summerour, Ivery, and Tyler. Oct. 24, 2004 Mem. Op. & Order (“Oct. 24, 2004 Op.”) at 26, 29. Despite the fact that this Court expressly ruled that each of these Plaintiffs’ non-promotion claims *survives a motion to dismiss*, Defendant now moves to dismiss more than ninety-nine percent of these claims. Specifically, Defendant moves to dismiss all of Summerour’s 68 non-promotion claims, Ivery’s 98 non-promotion claims, and Tyler’s twelve non-promotion claims, 186 of Moore’s 187 non-promotion claims, and 52 of Turner’s 54 non-promotion claims.

Defendant’s motion also wholly disregards the Court’s March 30, 2006 Order on Plaintiffs’ Motion to Amend and Supplement Complaint. Defendant argued that Plaintiffs should not be allowed to amend their Complaint because their claims would be subject to dismissal. Def.’s Opp’n to Pls.’ Mot. to Amend [Docket No. 158] at 4 (urging that Plaintiffs’ motion to amend be denied on futility grounds). The Court rejected Defendant’s argument, ruling Plaintiffs were entitled to amend to add discriminatory non-promotion claims from 1999 to the present and claims of discrimination in the “building blocks” of promotion. Mar. 30, 2006 Mem. Op. & Order (“Mar. 30, 2006 Op.”) at 2-3, 12-13, 15-16. The Court rejected Defendant’s futility argument, ruling that Plaintiff Turner had vicariously exhausted class non-promotion and “building block” claims. *Id.*

The Court should not countenance Defendant’s attempt to continually relitigate issues that it has already decided. Because “[i]nconsistency is the antithesis of the rule of law,” “the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.” *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc); *see also Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (internal

quotations and citations omitted) (emphasis in original). The “law of the case” doctrine instructs that Defendant’s attempt to resuscitate arguments against vicarious exhaustion of non-promotion claims and “building blocks” must fail: this Court has ruled, on a motion to dismiss standard, that claims of discrimination in non-promotion and “building blocks” of promotion are vicariously exhausted.

A. Each of Defendant’s Arguments to Dismiss Non-Promotion Claims is Prevented by this Court’s Prior Rulings.

1. “MPP/Failure to Refer” Claims

This Court has twice previously ruled that Plaintiffs have vicariously exhausted non-promotion claims. Oct. 24, 2004 Op. at 26, 29; Mar. 30, 2006 Op. at 2-3; 12. In a transparent ploy to inappropriately avoid these rulings, Defendant attempts to create a false distinction between so-called “MPP/failure to refer” claims and “non-promotion” claims. In fact so-called “MPP/failure to refer” claims are actually non-promotion claims, twice ruled by this Court to be vicariously exhausted.

Faced with rulings that Plaintiffs Moore and Turner exhausted complaints about the promotion process, Defendant argues now that complaints about non-promotion should be put in two separate buckets: receipt of the “Merit Promotion Plan score” (“MPP score”) and non-selection from the “Merit Promotion Certificate” (or “best qualified list”). This is both contrary to this Court’s rulings on a motion to dismiss standard and unsupportable as a matter of law. Defendant’s argument is completely illogical. The “Merit Promotion Plan score” and “Merit Promotion Certificate” are merely two elements of a unified promotion system—the “Merit Promotion Plan.”

While Defendant’s arguments regarding Plaintiff Moore and Turner are wrong, there is a more fundamental problem with Defendant’s position: Plaintiff Summerour

complained about promotions she was denied solely on the basis of her MPP score in the now-exhausted Second Amended Class Action Complaint to the EEOC.

a. Plaintiff Summerour Exhausted Non-Promotion Claims Based on MPP Scores

Defendant ignores completely the fact that Plaintiff Summerour specifically exhausted the MPP scoring portion of the promotion process. Plaintiff Summerour contacted an EEO counselor and complained about her MPP score within forty-five days of being denied two promotions based solely on her MPP score. *Compare* Ex. A (Plaintiffs' Administrative Complaint) at ¶ 50 (indicating Plaintiff Summerour found out she was denied position numbers 99164 and 99177 on or about December 23, 1999; it is undisputed that Plaintiff Summerour contacted an EEO counselor on January 31, 2000) *with* Exhibit B (Excerpt of Def.'s Resp. to Pls.' Interrog. No. 5) at 28-29 (indicating that Plaintiff Summerour was not selected for these positions based solely on her MPP score). As there is no question that the Second Amended Class Action Complaint is now exhausted, *see* Mar. 30, 2006 Op. at 12, Plaintiff Summerour's non-promotion claim (which included a complaint specifically about MPP scores) is both timely and exhausted. As Defendant swears that Plaintiff Summerour was not chosen for two timely exhausted positions based solely on her MPP score, his argument that "MPP/failure to refer claims" are unexhausted fails on this ground alone.

b. Defendant's Argument is Directly Contrary to the Law of the Case

Defendant's argument is also contrary to Judge Robert's October 24, 2004 Order on Defendant's July, 2000 Motion to Dismiss. This Court has expressly ruled that Plaintiff Tyler's non-promotion claims were vicariously exhausted by Plaintiff Moore. *See* Oct. 24, 2004 Op. at 26. Plaintiff Moore's non-promotion claims in this case arise

from the Secret Service failing to select him from the Merit Promotion Certificate. Def.'s Mot. at 24. In contrast, Plaintiff Tyler was rejected for every GS-14 position for which she ever applied solely on the basis of her MPP score. *Id.* at 24. Thus, this Court rejected the false dichotomy between Merit Promotion Plan score and Merit Promotion Certificate claims, finding so-called "MPP/failure to refer claims" vicariously exhausted. Indeed, Defendant argued in his July, 2000 Motion to Dismiss that Plaintiffs who did not file an administrative complaint's non-promotion claims were not sufficiently similar to Plaintiff Moore's claim to be vicariously exhausted. Reply in Supp. of Def.'s July, 2000 Mot. to Dismiss [Docket No. 47] at 18-19. Obviously, this argument was rejected by this Court in its Order finding vicarious exhaustion – including for Plaintiff Tyler.

c. Defendant's Position Cannot Be Rationalized with the Legal Standard for Vicarious Exhaustion

Defendant stretches even further by arguing that Plaintiffs Moore and Turner's non-promotions based on race are not similar to the non-promotions on the bases of race suffered by other Agents. Specifically, Defendant argues that "MPP and/or failure to refer for promotion claims are plainly not similar to those filed by Plaintiffs Turner and Moore for the purposes of vicarious exhaustion." Def.'s Mot. at 21-22. In making his argument, Defendant glosses over the clear law that to be vicariously exhausted by Plaintiffs Moore or Turner's non-promotion claims, a claim must only be "like" or "reasonably related" to a non-promotion claim. *See, e.g., Mack v. Strauss*, 134 F.Supp. 2d 103, 109 (D.D.C. 2001). Defendant must gloss over the legal standard because challenges to the MPP scoring portion of the promotions system are not only "like" or "reasonably related" to non-promotion claims, they *are* non-promotion claims because a low MPP score, skewed by race, results in non-promotion.

**i. So-Called “MPP/Failure to Refer” Claims are
“Like or Reasonably Related” to Plaintiff Moore
and Turner’s Non-Promotion Claims**

The D.C. Circuit’s holding in *Cook v. Boorstin*, 763 F.2d 1462, 1464 (D.C. Cir. 1985) precludes Defendant’s argument because it holds that for a non-promotion claim to be vicariously exhausted, the specific circumstances of non-promotion need not be identical.¹ The D.C. Circuit found vicarious exhaustion for non-promotion claims ranging from allegations based on “unvalidated tests which disqualify a disproportionate number of minority and female employees” to “unchecked, unvalidated subjective recommendations of supervisory personnel,” reasoning:

Although the specific circumstances giving rise to the grievances of each of the plaintiffs and would-be intervenors in this case are distinguishable, each of the employees plans to prove his or her allegations by demonstrating the same thing: a pervasive ‘pattern and practice’ of racial discrimination in promotion and advancement of administrative and professional employees throughout the Library.

Cook, 763 F.2d at 1464, 1466 (internal quotations omitted).

Just like the plaintiffs in *Cook*, Plaintiffs in this case allege a “pervasive ‘pattern and practice’ of racial discrimination in promotion and advancement” of Special Agents throughout the Secret Service. *Id.* at 1466. The *Cook* plaintiffs’ exhausted administrative complaint of discriminatory non-promotion was ruled by this Circuit to include both disqualification for promotion based on a test and non-recommendation for promotion based on subjective recommendations of supervisors. *Id.* at 1464. D.C. Circuit precedent therefore requires that the Plaintiffs’ exhausted administrative complaints of discriminatory non-promotion include both discrimination in MPP scores that the Secret

¹ Defendant relies solely on *Mayfield v. Meese*, 669 F. Supp. 1123 (D.D.C. 1987) to support his argument. However, Judge Roberts considered and rejected the application of *Mayfield* in his October 24, 2004 Order, instead relying on *Cook* and finding Plaintiff Moore vicariously exhausted non-promotion claims. Oct. 24, 2004 Mem. Op. & Order at 24.

Service claims disqualifies Special Agents for promotion and non-selection from Merit Promotion Certificates based on the subjective recommendations of Assistant Directors.

Moreover, as explained in detail below, complaints about non-promotion are liberally construed and vicariously exhaust many “like or reasonably related” claims. For example, a plaintiff’s administrative complaint about discriminatory non-promotion has been held to vicariously exhaust non-promotion claims for subsequent positions to which the plaintiff had not applied at the time of the administrative complaint. *Gamble v. Birmingham S. R.R. Co.*, 514 F.2d 678, 687-89 (5th Cir. 1975). Likewise, claims regarding discriminatory “building blocks” of non-promotion are vicariously exhausted by non-promotion claims. *Contreras v. Ridge*, 305 F.Supp.2d 126, 133-134 (D.D.C. 2004). Given the broad scope of claims held “like or reasonably related to” a non-promotion claim, Defendant’s attempt to disaggregate the promotions process for the purposes of exhaustion is entirely unsupportable.

**ii. Defendant Has Been on Notice of So-Called
“MPP/Failure to Refer” Claims**

Defendant also complains disingenuously that non-promotions based on low MPP scores should be dismissed as non-exhausted because the Secret Service was not on notice of claims about MPP scores.² Def.’s Mot. at 25-26. But Plaintiffs’ Administrative Complaint expressly lays out allegations regarding problems with MPP scores:

The Secret Service uses [a] performance evaluation procedure that is excessively subjective. It lacks objective criteria, and supervisors are not

² In light of Defendant’s knowledge, by *at least* March, 2000, that Plaintiffs were challenging MPP scores, his argument that these claims might have been administratively settled, Def.’s Mot. at 26, is equally disingenuous. Defendant’s suggestion that because Plaintiffs Moore, Turner and Summerour had individually grieved their MPP scores in past years and had them raised, the possibility of administrative settlement was real, Def.’s Mot. at 26, misunderstands Plaintiffs’ allegations. Plaintiffs have always alleged a pattern and practice of discrimination on the basis of race with respect to MPP scores: a change to an individual score is not a resolution to that claim.

trained adequately in proper evaluation procedures. As a result, African American Special Agents are adversely affected compared with similarly situated white Special Agents. Even when African-American Special Agents receive high scores, these scores are not enough to secure their promotion because of the Secret Service's discriminatory 'good old boys' network.

The pattern of discrimination in the denial of promotions to the GS-14 level is furthered by the use of discriminatory evaluation procedures. Of the 100 total potential points that a Special Agent may receive in the job evaluation, 30 are assigned without the use of any objective criteria. These 30 points are assigned based solely on the subjective decision making of the Assistant Director ('AD'). This evaluation system is arbitrary [and] has been used to discriminate against African-American Special Agents on the basis of race. Furthermore, because the Secret Service relies, at least in part, upon performance evaluations in determining which agents will receive, among other things, awards, bonuses, promotions, and assignments, the lower evaluations received by African-American Special Agents adversely affects these agents in their ability to receive promotions, awards, bonus[es], quality step increases, assignment to high-profile and career-enhancing cases, as well as adversely affects their morale.

Ex. A at ¶¶ 14, 15; *see also id.* at ¶12.

1. GS-15 and SES Claims

Defendant next claims that because Plaintiffs Moore and Turner complained of discrimination in promotion to the GS-14 level in their administrative complaint, claims of discriminatory non-promotion to GS-15 and SES are not exhausted. Def.'s Mot. at 20-21. Defendant is legally wrong. Defendant provides no legal cite to support his argument because he cannot—the case law holds that when a plaintiff exhausts a non-promotion claim, he exhausts claims for non-promotions to subsequent positions.

One of the foundational cases defining the "like or reasonably related" test for the relationship of the administrative complaint to the claims in federal court considered the identical issue presented here. In *Gamble*, 514 F.2d at 687-89, the Fifth Circuit found that a plaintiff who complained of non-promotion to conductor also exhausted claims of

non-promotion to supervisor because supervisors are chosen from the ranks of conductor. The Court concluded that: “[t]he supervisor complaint is certainly ‘like or related to’ the conductor complaint and ... could reasonably be expected to grow from the original complaint.” 514 F.2d at 688. *Gamble* stands for – and is to be widely cited for – the proposition that a plaintiff who exhausts a non-promotion claim also exhausts claims of non-promotion to higher positions. *See, e.g., Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir. 2006); *Miller v. Bed, Bath & Beyond*, 185 F. Supp. 2d 1253, 1264 (N.D. Ala. 2002).

Therefore, Plaintiffs Moore and Turner’s exhaustion of non-promotion claims to GS-14—twice ratified by this Court—vicariously exhausts claims of promotion to GS-15 and SES. What’s more, Plaintiffs have *never* limited their claims to promotion to the GS-14 level. Because of Defendant’s discrimination, in May 2000 no Plaintiff was a GS-14 attempting to reach a GS-15: the Plaintiffs could not get to a GS-14 to experience discrimination at the next level. Just as the *Gamble* Court reasoned “[i]f blacks cannot be promoted to conductor, then a fortiori they cannot be promoted to supervisor,” *Gamble*, 514 F.2d at 689, if African-American Special Agents cannot be promoted to GS-14, then a fortiori they cannot be promoted to GS-15 or SES. Plaintiffs’ claims have always been about discrimination in promotion to all competitive positions: those at GS-14, GS-15, and SES. In Plaintiffs’ Administrative Complaint, Plaintiffs complained of “discriminatory selections to competitive positions, including but not limited to GS-14 positions.” Ex. A at ¶ 2. In Plaintiffs’ May 2000 federal Complaint, Plaintiffs alleged “discriminatory selections to competitive positions, including but not limited to, supervisory positions.” May 3, 2000 Compl. at ¶ 1. Today, Plaintiffs continue to plead GS-15 and SES claims: “the Secret Service has discriminated against African-American

Special Agents in its selection for competitive positions *to grades GS-14 and above.*”

Am. Compl. at ¶ 1 (emphasis added); *see also id.* at ¶¶ 15-16, 51, 53-54.

2. Defendant’s Limitation of Plaintiff Moore and Turner’s Non-Promotion Claims

Next, Defendant argues that Plaintiff Moore has only exhausted one of the 187 positions he applied for from 1999 until when he was promoted to GS-14, and that Plaintiff Turner has only exhausted two of the 54 positions he applied for from 1999 until when he was promoted to GS-14. This Court has twice rejected Defendant’s argument.

In his October 24, 2004 Order on Defendant’s Motion to Dismiss, Judge Roberts held that Plaintiff Moore’s administrative complaint vicariously exhausted all the non-promotion claims of Plaintiffs Turner, Summerour, Ivery, and Tyler. *See* Oct. 24, 2004 Op. 25-26. Yet Defendant would allow Plaintiff Moore to pursue a claim as to only a single non-selection. If Plaintiff Moore vicariously exhausted the claims of *other* Plaintiffs, surely he vicariously exhausted his *own* claims. Moreover, each of Plaintiff Moore’s 187 non-promotion claims are independently exhausted via the administrative complaint of Plaintiff Turner. Judge Robert’s March 30, 2006 Order held that Plaintiff Turner vicariously exhausted all post-1998 non-promotion claims. Thus, even if Plaintiff Moore’s claims had been limited by his own administrative filing—which they were not—they are not so limited after this Court’s March 30, 2006 Order.

The same logic applies to Plaintiff Turner’s non-promotion claims. In his October 24, 2004 ruling, Judge Roberts ruled that Plaintiff Moore’s administrative complaint vicariously exhausted Plaintiff Turner’s non-promotion claims. *Id.* At that point, Plaintiff Turner’s administrative complaint could not have limited his non-promotion claims before the Court, as it was ruled not to be exhausted. Defendant’s

suggestion that once Plaintiff Turner's re-filed administrative complaint was exhausted, his non-promotion claims became limited to two is simply unsupportable.

B. Judge Robert's Ruling that "Building Block" Claims Are Exhausted is Correct.

Defendant also flagrantly ignores this Court's considered ruling that "building block" claims are vicariously exhausted by Plaintiff Turner's exhausted class non-promotion claim under the law of this District. Having already moved to reconsider Judge Robert's Order, Defendant presents the identical arguments again in this motion to dismiss.³ Defendant's arguments are still wrong.

In his March 30, 2006 Order, Judge Roberts ruled that Plaintiff Turner vicariously exhausted all claims relating to discrimination in the "building blocks" of promotion: performance evaluations; transfers, assignments, and other career enhancing opportunities; assignment to undercover work; hiring practices; testing; discipline policies and practices; awards and bonuses. Mar. 30, 2006 Op.at 2, 12-13, 15-16. In so doing, Judge Roberts rejected Defendant's argument that these claims were "futile"—subject to a motion to dismiss—because they were not "like or reasonably related" to exhausted non-promotion claims. *See* Def.'s Opp'n to Pls.' Mot. to Amend [Docket No. 158] at 4 (arguing futility); Def.'s Sur-Reply in Opp'n to Pls.' Mot. to Amend [Docket No. 181] at 12-13 (arguing "building block" claims not "like or reasonably related" to non-promotion claims). On April 14, 2006, Defendant filed his Motion for Reconsideration in Part and for Clarification [Docket No. 314]. Now, Defendant

³ Defendant makes an obvious misrepresentation to the Court when saying his Motion is made "with the benefit of the substantial discovery which has been conducted in this case." Def.'s Mot. at 27. Pending before the Court are Defendant's attempts to stay or limit all discovery on "building block" claims. *See* Defendant's Motion for Reconsideration of Magistrate Judge Robinson's Oral Ruling on May 8, 2006 Regarding Further Discovery [Docket No. 328]; Defendant's Motion for Protective Order Regarding Class Plaintiffs' First Set of Request for Production of Documents [Docket No. 348].

attempts a third bite at the apple, moving to dismiss on the identical arguments (in almost identical text) made in his motion for reconsideration: that this Court's March 30, 2006 Order was wrong and that Plaintiff Turner cannot exhaust "building block" claims. Compare Def.'s Mot. for Recons. at 6-10 with Def.'s May 31, 2006 Mot. to Dismiss at 27-35. Defendant's argument was wrong in his opposition to Plaintiffs' motion to amend, was wrong in his motion for reconsideration, and is wrong now.

1. This Court has Correctly Ruled that Plaintiff Turner Vicariously Exhausted Building Block Claims Under *Contreras v. Ridge*

Simply stated, this Court's ruling that Plaintiff Turner vicariously exhausted "building block" claims is correct under the law of this District. Defendant's motion for reconsideration and motion to dismiss should be denied.

Under *Contreras v. Ridge*, Plaintiff Turner's administrative complaint is sufficient to vicariously exhaust "building block" claims. In *Contreras*, Judge Robertson held that:

I find that the claim of discriminatory denial of promotions was timely exhausted. The class claims that are related to the denial of promotions claim—concerning transfers, assignments, and other career-enhancing opportunities, undercover and other undesirable work, discipline, awards and bonuses, and training – are like or reasonably related to the timely exhausted promotions claim because they concern work opportunities that would credential or position Hispanic agents for promotions. Any EEOC investigation of the denial of promotions claim would necessarily involve investigation into the building blocks of promotion. Accordingly, because there is a reasonable relationship between the class claim of denial of promotions and the class claims of transfers, assignments, and other career-enhancing opportunities, undercover and other undesirable work, discipline, awards and bonuses, and training, these claims are also appropriate for adjudication.

Contreras, 305 F. Supp. 2d at 133-34. Plaintiff Turner, like the plaintiff in *Contreras*, timely contacted an EEO counselor regarding a class non-promotion claim and filed a class administrative complaint. Under the plain ruling of *Contreras*, Plaintiff Turner's

timely-filed and now-exhausted non-promotion administrative complaint exhausts the “building blocks” of promotion. There is no language in the *Contreras* opinion that suggests that Plaintiff Turner needs to have suffered discrimination in each “building block” of promotion in order to vicariously exhaust the same.⁴ Instead, the language of *Contreras* focuses not on the individual plaintiff, but on the experiences of the class. *Contreras* found the “building blocks” of promotion exhausted because “they concern work opportunities that would credential or position *Hispanic agents* for promotions.” *Id.* at 133 (emphasis added). Moreover, the *Contreras* court focused on the “reasonable relationship between the class claim of denial of promotions” and the “building block” claims, not on the plaintiff’s individual non-promotion claim. *Id.* at 134.

In his March 30, 2006 Order, Judge Roberts correctly interpreted *Contreras*, considering and rejecting Defendant’s argument that Plaintiff Turner could not exhaust “building block” claims because of his high MPP score.⁵ Def.’s Mot. at 27-29, 31, 33-35. Defendant argues that this Court’s ruling that Plaintiff Moore did not vicariously exhaust “building block” claims means that Plaintiff Turner, who had a similarly high MPP score, also could not vicariously exhaust “building block” claims. *See* Def.’s Mot. at 33-34. Judge Roberts expressly rejected this argument in his March 30, 2006 Opinion:

The facts of Reginald Moore’s non-promotion claim did not implicate the building blocks of promotion because his claim asserted non-promotion in spite of a high performance evaluation. An investigation of his complaint

⁴ In fact, even Defendant’s own recitation of the plaintiff in *Contreras*’ individual claims reveals that he did not suffer from discrimination in each “building block.” Defendant states that the plaintiff in *Contreras* contacted an EEO counselor regarding discriminatory “performance ratings, denial of training, and retaliation and discipline,” Def.’s Mot. at 30-31, and discrimination in “promotions, reassignments, details, job training and language skills, and the discriminatory allocation of work assignment to Hispanic agents.” *Id.* (citing *Contreras*, 305 F. Supp. 2d at 132). It is undisputable that the *Contreras* court found additional “building blocks,” including discrimination in awards and bonuses, not cited by the plaintiff in *Contreras*, to be vicariously exhausted. *Contreras*, 305 F. Supp. 2d at 133-34.

⁵ This Court, and the Court in *Contreras*, necessarily found that Plaintiff Turner, and the plaintiff in *Contreras*, had standing to vicariously exhaust “building block” claims.

would not necessarily have involved examining the building blocks of promotion. However, now, as in Contreras, plaintiffs' class complaint of non-promotion implicates the building blocks of promotion.

Mar. 30, 2006 Op. at 13-14.

2. Plaintiff Summerour Also Vicariously Exhausted "Building Block" Claims

Defendant's argument suffers an even more fundamental flaw. Defendant ignores that Plaintiff Summerour's claims—including in Plaintiffs' Administrative Complaint with Plaintiff Turner's—indisputably exhaust the class' "building block" claims.

a. Plaintiff Summerour Was Excluded From Some Positions Based Solely on her MPP Score.

As explained in Section I(A)(1)(a), *supra*, Plaintiff Summerour has met the administrative prerequisites for filing a claim of non-selection that implicates low MPP scores. Thus, Defendant's argument, Def.'s Mot. at 17-19, 27-35, that Plaintiff Turner's high MPP scores preclude Plaintiffs' "building block" claims fails. By Defendant's own logic, Plaintiff Summerour's claim implicates the "building blocks" of promotion, and vicarious exhaustion means that these claims are now exhausted for all class members.

b. Plaintiff Summerour Complained of Discriminatory Performance Evaluations.

Plaintiffs' Administrative Complaint expressly referenced discrimination against Plaintiff Summerour in performance evaluations. Ex. A at ¶ 46-47. What's more, any reasonable investigation of Plaintiff Summerour's administrative complaint would have raised her MPP score. Again, the Secret Service has sworn that Plaintiff Summerour's MPP score alone resulted in the Secret Service not considering her for promotion to several positions. Given the Secret Service's stated reason for Plaintiff Summerour's non-selection, there can be no question that discrimination in performance evaluations

meets the standard for vicarious exhaustion that the claim be “like or reasonably related to the allegations of the [EEO] charge and grow out of such allegations.” *Mack*, 134 F. Supp. 2d at 109 (internal quotes omitted).

c. Plaintiff Summerour Complained of Discriminatory Transfers, Assignments, and Other Career-Enhancing Opportunities.

In Plaintiffs’ Administrative Complaint, Plaintiff Summerour also complained of discrimination in transfers, assignments, and other career-enhancing opportunities. Plaintiff Summerour cited a number of lateral transfers which had the intent and effect of suppressing her MPP score and preventing her promotion to GS-14. *See* Ex. A at ¶ 45-47. Moreover, Plaintiff Summerour explained that she had been denied the prime assignment of “#1 Whip” on the Presidential Protective Detail.⁶ *See id.* at ¶ 46.

d. Plaintiff Summerour Complained of Discriminatory Hiring.

In the Plaintiffs’ Administrative Complaint, Plaintiff Summerour also expressly complained of discriminatory hiring.⁷ Exhibit A at ¶ 42.

e. Plaintiff Summerour’s Complaint Implicated Discriminatory Discipline.

In discovery in this matter, Defendant swore that Plaintiff Summerour’s previous discipline may have resulted in her not being selected for at least four GS-14 positions.⁸

⁶ In complaining about discrimination in assignments, such assignment to the non-career-enhancing Chelsea Clinton detail and her denial of the “#1 Whip” position, Plaintiff Summerour also exhausted Plaintiffs’ “discriminatory assignment to undercover work” “building block.” Each of these are simply examples of the same discriminatory practice of denying career enhancing opportunities to African-American Special Agents and assigning them, instead, to dead-end assignments.

⁷ In complaining about discrimination in hiring, Plaintiff Summerour also vicariously exhausted Plaintiffs’ claim of discriminatory testing, which is an element of hiring and therefore “reasonably related” to a discriminatory hiring claim. *See* Section II(B)(2), *infra*. Defendant was on notice of the testing claim, as it was included in Plaintiffs’ Administrative Complaint. *See* Ex. A at ¶ 22.

⁸ Three of these positions are those for which Plaintiff Summerour contacted an EEO counselor within forty-five days of her non-selection. *Compare* Ex. A at ¶ 50 (indicating Plaintiff Summerour found out she

See Ex. B at 33, 36-37. As Defendant swears that Plaintiff Summerour's discipline may have influenced her non-selection, any administrative investigation into her complaint necessarily implicated discriminatory discipline. Thus, there can be no question that discriminatory discipline claims are "like or reasonably related to the allegations" of Plaintiff Summerour's EEO charge "and grow out of such allegations."⁹

3. Plaintiff Moore and Turner's "Building Block" Claims Are Properly Before the Court.

Defendant claims that several "building block" claims of Plaintiffs Moore and Turner are subject to their motion to dismiss as unexhausted.¹⁰ Def.'s Mot. at 16-17. As this Court has ruled that claims as to each of the "building blocks" about which Plaintiffs Moore and Turner complain were vicariously exhausted by Plaintiff Turner's non-promotion administrative class complaint, these claims are *per se* exhausted.

Defendant separately argues that Plaintiff Moore's transfer claim is not properly before the Court. Def.'s Mot. at 14-15. Defendant notably does *not* argue that Plaintiff Moore did not exhaust this claim, nor could he. Instead, Defendant claims prejudice by the inclusion of this argument in Plaintiffs' First Amended and Supplemental Class Complaint, but not in Plaintiffs' May 3, 2000 Complaint. In fact, the procedural history

was denied position numbers 99170, 99172, and 99173 on or about December 23, 1999; Plaintiff Summerour contacted an EEO counselor on January 31, 2000) *with* Ex. B at 36-37 (indicating Plaintiff Summerour may not have been selected for these positions based on her prior discipline).

⁹ Plaintiffs' Administrative Complaint raises building block claims related to "discrimination in awards and bonuses," *see* Ex. A at 24, that do not directly refer to Plaintiff Summerour's experiences. As demonstrated by *Contreras*, Plaintiffs' Administrative Complaint, and Plaintiff Summerour's non-selection claim, sufficiently raises the awards and bonuses claim. Defendants note that, in *Contreras*, the plaintiff did not specifically complain about awards and bonuses discrimination to the EEO counselor, Def.'s Mot. at 30-31, yet the Court in *Contreras* found them vicariously exhausted as "reasonably related" to his non-promotion claim. *Contreras*, 305 F. Supp. 2d at 133-34. *See also* Section I(B)(4), *infra*.

¹⁰ Defendant's arguments that these claims are time-barred and his argument that because these claims were previously dismissed, they are subject to dismissal are addressed in Sections III(A) and I(C), *infra*, respectively.

of this case lays bare that Defendant could not have suffered prejudice. No discovery has been completed on “building block” claims—including discriminatory transfers—up to this date. The only discovery that has been completed has dealt with discriminatory non-promotions. Even if Plaintiff Moore’s discriminatory transfer claim had been included in the May 3, 2000 Complaint, *no discovery would have been conducted on that claim yet*. Moreover, Defendant was *immediately* on notice of Plaintiff Moore’s challenge to his transfer, as he raised it in the administrative process before it even took effect.

4. “Awards and Bonuses” Claims Are Properly Before this Court

Defendant’s argument that “awards and bonuses” are not a “building block” of promotion and therefore not properly before this Court is factually misleading.¹¹

The Merit Promotion Plan that governs promotions *requires* that applicants for promotion submit a “Special Agent Qualification Statement.” *See* Ex. C (1997 Merit Promotion Plan) at 7 (indicating that a Special Agent Qualification Statement must be submitted and is evaluated by the Peer Panel and Second Level Panel); 15 (“The peer panel teams will use evaluative criteria ... to rate each candidate’s experience based on the Special Agent Qualification Statement submitted.”); 16 (“[Second Level] Panel members rate each candidate on managerial competencies based on the information provided on the candidate’s qualification statement.”). These statements often include citations to awards and bonuses received by applicants. *See* Ex. D (Special Agent Qualification Statements) at bates numbers 075099 (Tyler), 075169 and 075171 (Turner), PL000709 and PL000788-9 (Ivery), PL00902-3 (Moore) (indicating receipt of awards or

¹¹ Again, Defendant’s implication that their argument is made with the benefit of “substantial discovery” on awards and bonuses, Def.’s Mot. at 35, is simply false. No discovery has been conducted on “awards and bonuses” claims. As these claims were not in the case during discovery on individual non-promotions, no discovery was specifically conducted on the relationship between awards and bonuses and promotion.

bonuses). Thus, the Merit Promotion Plan instructs that at several stages of consideration for promotion, decision-makers consider Special Agent Qualification Statements that commonly include information on awards and bonuses.

Moreover, sworn testimony indicates that decision-makers can consider any and all information in making promotions decisions. Former Deputy Director Spriggs testified that Assistant Directors, in determining who to recommend for promotion from the Merit Promotion Certificate, could request any information they wished to consider—including Special Agent Qualification Statements.¹² See Ex. E (Spriggs Dep., Jul. 20, 2005) at 64:17-65:4.

C. This Court Ruled that Previously Dismissed Claims Are Properly Before the Court

There is simply no question that Judge Robert's March 30, 2006 Opinion allowed Plaintiffs to pursue claims dismissed by his October 24, 2004 opinion. Yet, inexplicably, Defendant takes the position that all once-dismissed claims are forever lost. This is in contradiction to the law of this case and of the D.C. Circuit.

In his October 24, 2004 Order, Judge Roberts dismissed without prejudice all claims dependent on exhaustion by Plaintiff Turner or Summerour's administrative complaints as unexhausted. See Oct. 24, 2004 Op. at 20-21. Plaintiffs followed the procedure for re-filing of an administrative complaint with the EEOC after dismissal for failure to exhaust set out by the D.C. Circuit in *Martini v. Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1338 (D.C. Cir. 1999). In his March 30, 2006 Order, Judge Roberts approved Plaintiffs' re-filing pursuant to *Martini*, Mar. 30, 2006 Op. at 7, and found

¹² In addition, former Deputy Director Riggs testified that she considered Plaintiff Ivery's inspection because she independently knew about it. Ex. F (Riggs Dep., Jun. 30, 2005) at 90:18-92:6. Decision-makers could similarly consider independent knowledge of awards and bonuses, or lack thereof.

Plaintiffs' Second Amended Class Action Complaint to the EEOC exhausted, *id.* at 12. Judge Roberts therefore allowed claims previously dismissed as unexhausted—including class non-promotion claims and all “building block” claims—to be included in an amended complaint to be filed by Plaintiffs. *Id.* at 16.

At the hearing on Plaintiffs' Motion to Amend and Supplement Complaint, Plaintiffs' Counsel explained to the Court the procedure that Plaintiffs followed after Judge Roberts' October 24, 2004 dismissal to revive the dismissed claims—refiling pursuant to *Martini*:

What our position on that was – that we wanted to refile the second amended complaint because it's our view that with the Turner complaint, which was consolidated with the Moore complaint, with the Summerour complaint that was consolidated, which we refiled, that then, through vicarious exhaustion, we are permitted then to proceed with a class action that covers all of the claims that are contained in the class action complaint that would then be exhausted and properly before the Court.

Ex. G (Excerpt of Feb. 22, 2006 Mot. Hr'g Tr.) at 7. In response to the Court's question of whether Plaintiffs' counsel refiled individual claims, Plaintiffs' counsel explained that Plaintiffs did not file any *new* complaints with the EEOC, but simply refiled Plaintiffs' Second Amended Class Action Complaint with the EEOC—and that refiling the administrative complaint of Plaintiffs Moore, Turner, and Summerour was sufficient to vicariously exhaust all claims. *Id.* at 7-14. Plaintiffs' counsel never suggested that Plaintiffs did not pursue any claim or conceded that any claim was subject to dismissal.

D. Plaintiffs Need Not Independently Exhaust their Claims

This Court has ruled that Plaintiff Turner vicariously exhausted discrimination in promotion and the “building blocks” of promotion. Thus, it is definitional that Plaintiffs and class members need not independently exhaust their claims. However, Defendant argues that several Plaintiffs' claims should be dismissed because they either filed no

administrative complaint, Def.'s Mot. at 7 (Section II.B.), or their individual exhaustion was somehow flawed, *id.* at 7-12 (Sections II.C-D¹³). This is a red-herring. This Court's ruling on the scope of Plaintiff Turner's vicarious exhaustion means that *no other Plaintiff or class member* needs to have individually exhausted his or her claims.

1. Plaintiff Robertson

Defendant claims that because Plaintiff Robertson withdrew her EEO complaint, her claim must be dismissed. *Id.* at 7 (Section II.C.). This is wrong. Because this Court ruled that Plaintiff Turner vicariously exhausted the "building block" of "discriminatory disciplinary policies or practices," Mar. 30, 2006 Op. at 2, 13, 15, Plaintiff Robertson—and any class member with a claim of discriminatory discipline—need not have individually exhausted an EEO complaint.¹⁴ Indeed, Plaintiff Robertson need not have filed an EEO complaint *at all*, as Plaintiff Turner vicariously exhausted her claim.

2. Plaintiff Harris

Defendant claims that Plaintiff Harris' non-selection claims to GS-14 and GS-15 must be dismissed for lack of exhaustion. *Id.* at 10-11 (Section II.D.). Defendant is wrong on both accounts.

Plaintiff Harris complains of discriminatory non-promotion to GS-14 during 1999. Plaintiffs are at a loss to understand how Defendant can argue that these claims are not exhausted when this Court has twice issued crystal clear rulings that non-promotion claims are vicariously exhausted, both by Plaintiff Moore and by Plaintiff Turner.

Plaintiff Harris did not have to file an EEO complaint *at all* in order to bring these claims

¹³ Defendant labels two discrete sections, relating to Plaintiffs Summerour and Harris, II.D.

¹⁴ Defendant's argument that Plaintiff Robertson's claim does not constitute "discipline" is addressed *infra* at Section II(C).

in federal court. That he withdrew his *entirely unnecessary* EEO claim is inapposite.

Plaintiff Harris also complains of discriminatory non-promotion to GS-15.

Defendant's attempt to use Plaintiff Harris' administrative complaint to limit his claims and class claims fails. Again, while Defendant does not question that Plaintiff Harris exhausted an EEO complaint regarding promotion to GS-15, his filing of such a complaint *at all* was superfluous. All claims regarding promotion to the GS-15 level were exhausted by Plaintiffs' Administrative Complaint. No further filing was necessary.

3. Plaintiff Summerour

Defendant argues that while Plaintiff Summerour contacted an EEO counselor and joined Plaintiffs Moore and Turner in filing the Second Amended Class Action Complaint with the EEOC (ruled exhausted by this Court's March 30, 2006 Order), that Plaintiff Summerour exhausted *nothing*. Def.'s Mot. at 8-10 (Section II.D.).

This is both inapposite and incorrect. It is inapposite because this Court ruled that Plaintiff Turner vicariously exhausted each of Plaintiff Summerour's claims. Plaintiff Summerour has claims of discrimination in: promotions; performance evaluations; discipline; transfers, assignments, and other career-enhancing opportunities; hiring; and undercover work. Judge Roberts found that each of these claims was vicariously exhausted by Plaintiff Turner. Mar. 30, 2006 Op. at 2-3, 12-13, 15-16. It is incorrect because Plaintiff Summerour both exhausted her own claims and vicariously exhausted the non-promotion and "building block" claims of all other Plaintiffs and class members. *See* Section I(B)(2), *supra*.

Defendant insists that Plaintiff Summerour did not properly exhaust her claims because by Defendant's own argument regarding why Plaintiffs Moore and Turner

cannot vicariously exhaust “building block” claims, Plaintiff Summerour’s exhaustion does so. Defendant first complains that Plaintiff Summerour’s complaint regarding her Merit Promotion Plan score was untimely. Def.’s Mot. at 9. Defendant is incorrect. By Defendant’s own admission, Plaintiff Summerour was denied a promotion based solely on her MPP score within forty-five days of her initial contact with an EEO counselor. *Compare* Ex. A at ¶ 50 (indicating Plaintiff Summerour found out she was denied positions numbers 99164 and 99177 on or about December 23, 1999; she contacted an EEO counselor on January 31, 2000) *with* Ex. B at 28-29 (indicating Plaintiff Summerour was not selected for these positions based solely on her MPP score). Because Defendant used Plaintiff Summerour’s discriminatory MPP score to deny her a promotion within forty-five days of her contact with an EEO counselor, she had a timely claim with respect to her discriminatory score – a part of the promotion process – and her discriminatory non-promotion.

Next Defendant suggests that Plaintiff Summerour did not properly file a formal administrative complaint. This is incorrect. Within fifteen days of receiving her “Notice of Right to File a Discrimination Complaint” on March 6, 2000, Plaintiff Summerour filed, with Plaintiffs Moore and Turner, Plaintiffs’ Second Amended Class Action Complaint. *See* Def.’s Mot., Ex. 15 at Tab F (return receipt indicating receipt of “Notice of Right to File a Discrimination Complaint” on March 6, 2000); Ex. A (filed March 21, 2000). Defendant’s suggestion that Plaintiff Summerour’s formal administrative complaint somehow does not “count” because it was filed with those of Plaintiff Moore and Turner is entirely unsupported and unsupportable.

Thus, Plaintiff Summerour fulfilled every administrative prerequisite for filing a federal lawsuit as a federal employee under Title VII. Defendant's final suggestion that in Plaintiff Summerour's initial contact with an EEO counselor, she did not sufficiently explain her claims is, again, incorrect. It is well-settled that EEOC charges are to be liberally construed. *See, e.g. Caldwell v. Servicemaster Corp.*, 966 F. Supp. 33, 49 (D.D.C. 1997) ("Although a complaint in some manner or in some form must be made administratively, it is well settled that a vaguely worded charge is not fatal to a Title VII plaintiff's case. EEOC complaints are to be liberally construed, because they are often drafted by persons unschooled in technical pleading.") (internal quotations, citations omitted). But Defendant does not claim that Plaintiff Summerour's *charge* (Plaintiff's Second Amended Class Action Complaint) did not provide sufficient notice of Plaintiff Summerour's claims against Defendant. Rather, they claim only that her conversation with an EEO counselor was insufficient. If the EEOC charge, the only administrative pleading giving notice to a defendant in a Title VII action, is to be liberally construed, certainly a plaintiff's verbal complaint to an EEO counselor without the assistance of an attorney is to be liberally construed. Plaintiff Summerour complained to an EEO counselor about her MPP score within forty-five days of being denied promotions solely on the basis of that score; liberally construed, she complained about the promotions process to the EEO counselor. She then timely filed her formal administrative complaint, in which her complaint about the promotion process was made crystal clear.

II. Defendant's Other Arguments as to Standing and Mootness Fail

Like their other arguments, Defendant's arguments as to standing and mootness of Plaintiffs' claims rely on incomplete facts or incomplete (indeed, absent) precedent.

When confronted with complete facts and accurate precedent, each argument fails.

Moreover, each of Defendant's arguments on standing and mootness assume that only post-1998 "building block" claims are properly before the Court. Plaintiffs and Defendant disagree on this issue. *See* Section III(B). As pre-1999 "building block" claims are properly before the Court, Defendant's arguments are wholly inapposite: multiple named Plaintiffs experienced discrimination in each "building block," some of whom do not suffer from Defendant's incorrectly perceived legal defects.

A. Plaintiff Simms has Standing to Challenge Discriminatory Assignment to Undercover Work.

Defendant argues that Plaintiffs' claims concerning unequal distribution of undercover assignments should be dismissed because Plaintiffs fail to produce a Plaintiff who complains of assignment to undercover work. Def.'s Mot. at 40. While Defendant's failure to cite any legal authority renders his argument far from clear, Plaintiffs assume he is arguing that Plaintiff Simms lacks standing to bring this claim because she did not suffer an "injury in fact" as she was "merely asked" to work an undercover assignment. *Id.* Defendant's argument cannot withstand legal analysis.

Defendant's argument must be denied because Plaintiff Simms is clearly an "aggrieved" party under the liberal threshold standing requirement of Title VII. *See* 42 U.S.C. § 2000(e-5)(f)(1)(2006); *see, e.g., Gray v. Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976) ("The use. . . of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.") (quoting *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). A plaintiff satisfies Title VII's standing requirement when it demonstrates that "(1) it has suffered an 'injury in fact' . . . ; (2) the injury is fairly traceable to the

challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *E.g.*, *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 523-24 (6th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000)). Defendant appears only to challenge the first element of standing, that Plaintiff Simms did not have an “injury in fact” because she did not complete the undercover assignment.¹⁵

Plaintiff Simms’ emotional injury resulting from Defendant’s discrimination clearly constitutes an injury in fact. Plaintiff Simms suffered emotional injury, as she knew she received this dangerous assignment while seven months pregnant because of her race. Am. Compl. at ¶¶ 102, 117. Plaintiff Simms knew that the only other pregnant woman in Chicago Field Office history was white and in stark contrast to Simms’ treatment, received accommodation during her pregnancy. *Id.* at ¶ 102. Plaintiff Simms’ injury is both “(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *E.g.*, *Parma*, 263 F.3d at 523; *see also Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970); *Zivotofsky*, 444 F.3d at 619 (noting that the “violation of an individual right conferred on a person by statute” can itself meet the injury requirement); *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (finding that

¹⁵ Plaintiff Simms clearly also meets the second and third elements of Title VII standing. With respect to the second element, Plaintiff Simms’ injury is fairly traceable to the challenged action of the defendant. *See Zivotofsky ex. rel. Ariz. v. Sec’y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006) (finding that when plaintiff is the object of government action himself, “there is ordinarily little question that the action . . . has caused him injury”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). With respect to the final element, Plaintiff Simms is able to demonstrate that “it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision,” *Parma*, 263 F.3d at 524 (citations omitted), that encourages Defendant to “discontinue current violations” and deters him from “committing future ones.” *Laidlaw*, 528 U.S. at 186. Plaintiff Simms’ emotional distress would be lifted if the court bars Defendant from engaging in the unequal treatment of African-American Special Agents. She would then be able to work in an “environment free of racial intimidation” and the other injuries that accompany discrimination. *See Gray*, 545 F.2d at 176 (internal quotations and citations omitted).

“discrimination itself, . . . by stigmatizing members of the disfavored group as ‘innately inferior’ . . . can cause serious non-economic injuries” for purposes of the standing requirement). Plaintiff Simms’ emotional injury presents a more direct, actual, and concrete example of injury than the “psychological injury” African-American plaintiffs suffered in *Gray* as a result of the employer’s discrimination against *other* African-Americans. *See, e.g., Gray*, 545 F.2d at 173-76 (recognizing injury resulting from “the effects of Greyhound’s allegedly discriminatory hiring policies on his treatment at work and on his own psychological well-being” even though Gray was in fact hired).

Moreover, Defendant’s suggestion that “Plaintiffs should not be allowed to raise a claim of class-wide discrimination in undercover assignments around the fact that someone was merely asked to work an undercover assignment,” Def.’s Mot. at 40, is misleading. Plaintiffs allege a pattern of discrimination in assignment to undercover work affecting seven of the ten named Plaintiffs. Am. Compl. at ¶¶ 96-101. Plaintiffs were placed in dangerous situations without adequate training—sometimes without even a weapon—on the discriminatory assumption that they would fit in solely on their race. *Id.* at ¶ 101. Even on Defendant’s incorrect legal standard, Plaintiffs’ allegations are sufficient: Plaintiffs allege that they were assigned to and completed a disproportionate amount of non-career-enhancing undercover assignments on the basis of race and did not receive credit for promotion for successful undercover work. *Id.* at ¶¶ 96, 98, 100.

B. Plaintiffs’ Hiring and Testing Claims are Properly Before the Court.

1. Plaintiff Simms’ Hiring Claim is Not “Moot.”

Defendant states that Plaintiff Simms’ hiring claim is “moot” because her “situation was resolved in 2003,” and thus there is “nothing to remedy here.” Def.’s Mot.

at 39. Defendant's factual statement is blatantly misleading: Plaintiff Simms' ongoing experience of financial and psychological injury resulting from hiring discrimination demonstrates that her situation is far from "resolved."

Plaintiff Simms has ongoing financial and psychological injuries resulting from Defendant's discriminatory hiring practices. Defendant misleads the court by failing to disclose two facts. First, after filing four separate grievances and receiving four separate decisions, more than a year after her hire Defendant admits that Plaintiff Simms was granted her GS-9 retroactive to September 22, 2002, not her date of hire, August 26, 2002. *See* Def.'s Statement of Material Facts at ¶ 144; Ex. H (Correspondence between C. Simms and the Secret Service regarding her hiring grade). Even Defendant admits she is still owed approximately one month of back-pay.

Second and similarly, Defendant admits that Plaintiff Simms' time-in-grade for eligibility for career-ladder and competitive promotions is calculated from September 21, 2002, instead of August 26, 2002. Def.'s Statement of Material Facts at ¶ 144. Thus, she is always approximately one month behind in her annual promotions, and the accompanying increase in compensation. Her eligibility for competitive promotions will also be delayed.

Defendant lacks any basis to argue mootness when the issues remain "live," and Plaintiff Simms retains a "legally cognizable interest" in being free from discriminatory hiring decisions and her ongoing financial and psychological injuries. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571-72 (1984) (rejecting mootness when the employees "have not been made whole" and the

challenged action “continues to have adverse effects”); *In re Curry*, 470 F.2d 368, 371 (D.C. Cir. 1972) (denying mootness when plaintiff suffers “continuing collateral consequences which should be dispelled if . . . unlawful”); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir.1968) (rejecting mootness when plaintiff is offered and accepts a promotion subsequent to filing suit because of the suit’s “heavy overtones of public interest” and the need for an “injunction as a protection against a repetition of such conduct in the future”). Plaintiff Simms’ incomplete promotion to GS-9 clearly does not meet the “heavy burden” of proving the conditions necessary to moot a claim by voluntary cessation of illegal conduct. *E.g., Davis*, 440 U.S. at 631. No “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Id.* Rather, Defendant’s discriminatory practices and the resulting injuries persist while Plaintiffs have no guarantee that the discrimination will cease without a favorable decision from the court. As stated above, Plaintiff Simms’ injury has not ceased. Second, it is far from “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *See, e.g., Laidlaw*, 528 U.S. at 189 (citation omitted). This is especially true where it took countless letters, calls, and in-person conversations for Plaintiff Simms to get her GS-9 *at all*.

Defendant assumes that Plaintiff Simms stands alone in her discriminatory hiring claim. To the contrary, Plaintiffs’ claims illustrate the Secret Service’s dramatic pattern of dissuading African-American applicants from applying and then only reluctantly hiring African-American Special Agents into lower civil service grades than their credentials warrant. Special Agent Harris was told the Secret Service was not hiring while it was indeed hiring white applicants. Am. Compl. at ¶ 84. He was also told that

his passing TEA exam score was too low to be hired while in fact only a passing score was required. *Id.* at ¶ 84. Four years later, after Special Agent Harris unnecessarily took an additional test and was still rejected for employment, he was only hired after filing an EEO complaint. *Id.* Similarly, Special Agent Summerour was falsely told she needed law enforcement experience following college in order to gain employment with the Secret Service. *Id.* at ¶ 86. After six years of gaining experience, she was finally hired, only to learn that white applicants were hired directly from college. *Id.* Further, Special Agents Harris, Hendrix, Turner, Ivery, and Rooks, *id.* at ¶ 85, 87, 89-91, were all hired at grades lower than their credentials warranted and lower than those of similarly situated white Special Agent. The Plaintiffs' experience of discriminatory hiring practices also adversely affected their ability to seek promotion and other career enhancing opportunities once employed. *Id.* at ¶ 83. Plaintiffs' claims demonstrate a pervasive, persistent, ongoing pattern of discriminatory hiring practices that must be remedied.

2. Testing Claims Are Part of Hiring Claims.

Plaintiffs' testing "building block" claim relates to the TEA, which is the entrance examination to the Secret Service. As one integral element of being hired into the Secret Service, Plaintiffs' testing claim is part and parcel of Plaintiffs' hiring claim. In their one paragraph argument to dismiss Plaintiffs' testing claim, Defendant provides no rationale—much less legal argument—why this is not the case.

On the contrary, Defendant admits elsewhere that the TEA is an essential component of the Secret Service's hiring process, explaining that disparate impact at the TEA stage is directly relevant to whether minority applicants experience disparate impact in hiring. *See* Ex. I (Fiscal Year 2002 Annual Affirmative Employment Program

Accomplishment Report for Minorities and Women and FY 2003 Plan Update) at 12-13 (examining adverse impact of TEA to determine adverse impacts in ultimate selection rates of minorities). Indeed, in its own analysis, Defendant has labeled the TEA as a “barrier in employee *selection*” because the test had a disparate impact on minorities. *See id.* at 12 (emphasis added). Thus, even on Defendant’s own reasoning, it is illogical to isolate Plaintiffs’ testing claims from Plaintiffs’ hiring claims.

Moreover, discriminatory testing results in the same injury as discrimination in Defendant’s other hiring processes. Defendant appears to forget why “building block” claims are before this Court. In *Contreras*, Judge Robertson explained that “building block” claims were exhausted because they “credential or position Hispanic agents for promotions.” *Contreras*, 305 F. Supp. 2d at 133. Discrimination in the testing building block operates identically to the hiring “building block” as a whole: each delays an African-American Special Agent’s eligibility for promotion. As Plaintiffs’ allegations in this case concern only successful candidates for hiring, discrimination in hiring—the discriminatory TEA, discriminatory initial refusal to hire, and discriminatory hiring grade—all cause the same harm: delay in advancement to supervisory grades. Differentiating between the aspects of a hiring claim that each cause the same harm with respect to promotion is both illogical and without legal support.

Moreover, two Plaintiffs failed the TEA, delaying their hiring and eligibility for promotion. Plaintiff Hendrix took the TEA three times before passing, delaying his entry to the Secret Service by eighteen months. Am. Compl. at ¶88. Plaintiff Tyler failed the TEA on her first attempt, delaying her entry to the Secret Service by six months. *Id.* at

¶92. Defendant assumes that these claims are time-barred, but Plaintiffs dispute this interpretation and the issue is currently before the Court. *See* Section III(B), *infra*.

C. Plaintiff Robertson was Subject to Discriminatory Discipline.

Defendant admits that Plaintiff Ivery was not selected for several promotions based in at least part on an allegation of wrongdoing that did not result in “discipline” by the Secret Service. *See, e.g.*, Ex. B at 37-8, 42, 45, 47-48. At the same time, Defendant claims that Plaintiff Robertson cannot make a “building block” claim of “discriminatory discipline” because her discriminatory placement on administrative leave does not fit the Secret Service’s formal definition of “discipline.” Def.’s Mot. at 37-38. Defendant cannot have it both ways. If allegations of misconduct that are not characterized by the Secret Service as “discipline” may disqualify a Special Agent for promotion, such allegations are, by definition, “building blocks” of promotion.

It is irrelevant how the Secret Service characterizes “administrative leave.” What is relevant is how they utilize allegations of misconduct in the promotions process. After an investigation of Plaintiff Ivery’s alleged misconduct was conducted—while he was placed on “administrative leave”—with no resulting action characterized by the Secret Service as “discipline,” this allegation of misconduct was used against Plaintiff Ivery in the promotions process as “discipline.” The allegation of misconduct against Plaintiff Robertson—holding a National Organization of Black Law Enforcement Executives “meet and greet” during her initial Secret Service training—could identically be used against her in the promotions process. Yet, Defendant claims this is not actionable.

Again, Plaintiffs other than Robertson and Ivery allege discriminatory discipline. Plaintiffs Summerour, Hendrix, and Harris each allege discriminatory suspensions. Am.

Compl. at ¶¶ 60, 64, 65. Each Plaintiff can identify white Special Agents who received lesser – or no – punishment, for the same conduct. *Id.*

III. Defendant's Position that Only Claims Between 1999 and May 3, 2000 are Actionable is Legally Wrong.

A. Post-Filing Claims.

Defendant argues that claims of discrimination that occurred after the initial Complaint was filed in this action on May 3, 2000 are unexhausted and therefore subject to dismissal. Defendant made the same argument in his April 14, 2006 motion for reconsideration and Plaintiffs provided several cites standing for the opposite proposition—that Plaintiffs need not file a separate administrative complaint to exhaust post-filing claims. Defendant has provided no response to this legal authority because he cannot: Defendant's argument is legally wrong.

While Defendant provides no case in support of its specific position in its Motion, Defendant has previously suggested that *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), disallows post-filing claims.¹⁶ See Def.'s Opp'n to Pls.' Mot. for Clarification (Docket No. 294) at 20-22. *Morgan* does not apply to pattern or practice cases like this one. See *Morgan*, 536 U.S. at 115 n.9. Courts in this and other districts have allowed post-filing claims in pattern or practice cases post-*Morgan*. See, e.g., *McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 5 n.1 (D.D.C. 2004) (noting the class period ran until June 2001 when the complaint was filed in March 2001); *EEOC v. Custom Companies, Inc.*, No. 02-c3768, 03-C2293, 2004 WL 765891, at *11-12 (N.D. Ill. Apr. 7, 2004). Because *Morgan* does not apply to pattern or practice cases, pre-*Morgan* caselaw allowing post-filing claims remains applicable. See, e.g.,

¹⁶ Defendant cites only to cases concerning the general importance of exhaustion, which are completely uninformative about the specific issue raised.

Domingo v. New England Fish Co., 727 F.2d 1429, 1443-44 (9th Cir. 1984); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 945 (10th Cir. 1979); *cf. McKenzie v. Kennickell*, 645 F. Supp. 427, 430-31 (D.D.C. 1986) (allowing employees to obtain remedies for discrimination that occurred after entry of judgment). *Morgan*'s exclusion of pattern or practice cases makes perfect sense. *Morgan* concerns the administrative filing requirements for "discrete discriminatory acts"; in a pattern or practice case, the plaintiffs do not challenge "discrete" discriminatory employment decisions, but instead challenge systemic discrimination. *See generally Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Second, even if *Morgan* did control this matter—which it does not—Defendant's interpretation of *Morgan* has been expressly rejected by several Circuits. *See, e.g., Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 672-75 (8th Cir. 2006); *Delisle v. Brimfield Twp. Police Dep't*, 94 F. App'x 247, at 252-54 (6th Cir. 2004) (both rejecting the identical argument that *Morgan* disallows consideration of post-filing claims and finding that such claims are properly considered if they are "reasonably related" to the claims in the administrative charge). The reasoning of *Wedow* is illustrative of why allowing post-filing claims in this instance is correct. The Eighth Circuit ruled that because the plaintiffs' post-filing claims were "like or reasonably related" to those alleged in the timely-filed administrative complaint, "to force a plaintiff to file a new administrative charge with each continuing incident of discrimination would create needless procedural barriers." *Wedow*, 442 F.3d at 674 (citations and internal quotations omitted). The court elaborated that it allowed the plaintiffs' post-filing claims because the claims "were not based on separate, distinct, or unrelated theories" and the defendant

“continued to deny the plaintiffs the same type of work experiences and opportunities alleged in the EEOC charges.” *Id.* Here as in *Wedow*, Plaintiffs include only post-filing claims that are identical to their pre-filing claims: both Plaintiffs’ legal theories and the work experiences and opportunities Plaintiffs and the class they represent were denied are identical pre- and post-filing of the Complaint.¹⁷ As such, even if *Morgan* applied here, it would present no barrier to Plaintiffs’ post-filing claims.

B. Pre-1999 “Building Block” Claims.

The parties disagree on their reading of this Court’s March 30, 2006 Order. Defendant believes that this Court found all pre-1999 claims unexhausted (and therefore subject to dismissal), while Plaintiffs read the Order to exclude only pre-1999 non-promotion claims. This issue is currently before the Court on Defendant’s Motion for Reconsideration in Part and For Clarification [Docket No. 314]. In their Opposition to the same, Plaintiffs requested that this Court clarify this point for the parties. Without the benefit of a ruling on Defendant’s motion for clarification, Plaintiffs necessarily pled in accordance with their understanding on this Court’s Order.

Plaintiffs maintain that their reading is correct. *Contreras* found that an exhausted administrative class complaint regarding discriminatory non-promotion exhausts “building blocks” of promotion because they “credential or position [] agents for promotions.” *Contreras*, 305 F. Supp. 2d at 133. *Contreras*, to be meaningful, must not only allow *other* African-American Special Agents to challenge discrimination in “building blocks” of promotion, but must also allow Plaintiffs with non-promotion claims to challenge “building block” discrimination *against themselves*. Discrimination in

¹⁷ Like the plaintiffs in *Wedow*, Plaintiffs Moore, Turner and Summerour alleged in their administrative complaint that the discriminatory practices of which they complained were continuing. *See id.*; Exhibit A at ¶ 12.

“building blocks,” by definition, occurs *before* a Plaintiff is denied a promotion. Thus, Defendant’s argument that Plaintiffs with non-promotion claims cannot bring “building block” claims before 1999 is incorrect and unfair. Discrimination in “building blocks” must be actionable twice: first when the discrimination in the “building block” occurs and then again when the discriminatory denial of the “building block” results in the denial of promotion. Defendant’s position—that pre-1999 “building block” claims are excluded—would lead to inequitable results: for example, as explained above, Defendant admits that Plaintiff Summerour’s discipline (which Plaintiffs allege was discriminatory) was a reason for her post-1999 non-selections, but would disallow her claim of discriminatory discipline as time-barred despite the fact that she timely contacted an EEO counselor within 45 days of the denial of these promotions. This cannot be right.

IV. Defendant’s Motion for Summary Judgment on Plaintiffs’ Pattern and Practice Claims Should Be Denied.

Eager to avoid a jury hearing the significant evidence of racial discrimination visited on black Secret Service Agents, Defendant argues that he is entitled to summary judgment on Plaintiffs’ pattern and practice of discrimination claims insofar as they relate to promotions to the GS-14 level, principally because his expert says so. Def.’s Mot. at 40-41. Defendant is patently wrong. As discussed below, Defendant’s motion for summary judgment fails on its merits, because Plaintiffs already have come forward with statistical and other evidence of a pattern and practice of racial discrimination, which means there is—at a minimum—a genuine issue of material fact for a jury to decide. In the alternative, Defendant’s motion for summary judgment should be denied, because class merits discovery is just beginning and the motion is extraordinarily premature.

A. Defendant's Motion Fails on the Merits.

Defendant's motion for summary judgment should be denied because Plaintiffs have set forth prima facie evidence of a pattern and practice of discrimination by the Secret Service in promotions to the GS-14 level.¹⁸ Under long-standing Title VII law, a plaintiff who alleges disparate treatment in a class action such as this one may prove his claims by showing evidence of a "pattern and practice" of discrimination. *See Teamsters*, 431 U.S. 360 (1977); *Segar v. Smith*, 738 F.2d 1249, 1266 (D.C. Cir. 1984) ("Such class-wide allegations of discrimination are commonly referred to as 'pattern or practice' cases."). To establish a pattern and practice of discrimination, Plaintiffs may use "statistical evidence regarding the defendant's treatment of the class as a whole and anecdotal testimony from individual class members regarding specific acts of discrimination." *Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43, 46 (D.D.C. 2002) (citation omitted); *see also Palmer v. Shultz*, 815 F.2d 84, 96 (D.C. Cir. 1987) (noting that plaintiffs in Title VII pattern and practice cases need not rely on statistical evidence alone and "plaintiffs may introduce any additional evidence which is probative on this issue"). In the seminal case, *Hazelwood v. United States*, the Supreme Court held that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. 299, 307-08 (1977) (citation omitted); *see also Segar*, 738 F.2d at 1272. Under *Hazelwood*, disparities observed in the statistical data are statistically significant if the "difference

¹⁸ Plaintiffs have received discovery relating to promotions to the GS-14 level that occurred between 1998 and 2002, but they have not received discovery relating to post-2002 promotions to the GS-14 level or to any promotions to the GS-15 or SES levels, all of which is relevant to the amended class action complaint that Plaintiffs' filed on May 1, 2006. *See infra* at Section IV(B).

between the expected value and the observed number is greater than two or three standard deviations.” *Id.* at 308 n. 14 (internal quotations and citations omitted).

Plaintiffs have more than satisfied the *Hazelwood* standard by providing evidence of a statistically significant adverse impact on African-American Special Agents in GS-14 promotions. Plaintiffs’ statistical expert found that there were “fewer Black promotions than were expected [between 1998 and 2000, the pre-litigation period]” and that the “difference is statistically significant at . . . more than 2.3 standard deviations” Ex. J (Statistical Report of C. Mann) at 2. Defendant’s argument with Plaintiffs’ expert’s conclusions merely goes to the weight of the evidence on a disputed issue of fact and does not entitle Defendant to summary judgment. *See McReynolds*, 349 F. Supp. 2d at 27 (D.D.C. 2004) (“While each side may well have valid criticisms of how the opposing expert executed various methodologies, these highly-credentialed statisticians have reached starkly different conclusions based on re-runs of each other’s multiple regression analyses, and the propriety of these different approaches cannot be resolved at the summary judgment stage because they involve issues of credibility and disputed issues of fact.”). Because Plaintiffs have presented evidence demonstrating a genuinely disputed issue of material fact about whether Defendant has engaged in a pattern and practice of discrimination, the jury ultimately must decide that issue. *See, e.g., id.* at 20-21 (denying defendant’s motion for summary judgment on plaintiff’s pattern and practice claims because “plaintiffs have offered sufficient evidence to carry their burden of establishing a prima facie case of a pattern or practice discrimination claim”).¹⁹

¹⁹ Defendant argues that Plaintiffs cannot meet their burden of proof on their pattern and practice claims because “during the years 1998 through 2002, fifty-two African American GS-13 Special Agents bid for promotion to the GS-14 level, . . . [o]f those fifty-two, forty-seven have since been promoted to the GS-14 level,” and “of those forty-seven individuals who were promoted to the GS-14 level, fourteen are now at

Even if Plaintiffs could not satisfy *Hazelwood's* standard for statistical significance of adverse impact – and they certainly can and have – Defendant still would not be entitled to summary judgment. Where substantial non-statistical evidence is combined with statistical evidence of discrimination, courts have considered the statistics probative even though the statistical significance is less than two standard deviations. *See, e.g., Palmer*, 815 F.2d at 97 n.10 (holding that less than two standard deviations in an “intermediate zone” between 1.65 to 1.96 standard deviations should be considered “in conjunction with all the other relevant evidence in determining whether the discrepancies were due to unlawful discrimination”) (internal quotations omitted).²⁰

the GS-15 level, six are SES candidates, and one has been promoted into the SES.” Def.’s Mot. at 42. Regardless of whether these “statistics” are accurate, they reflect *post*-litigation employment decisions and do not rectify Defendant’s *pre*-litigation pattern and practice of discrimination in the competitive promotion process. Under well-established case law, a defendant in an employment discrimination lawsuit may not rely on purported “improvements” in the challenged system to avoid liability for past discrimination. *See, e.g., Bishopp v. District of Columbia*, 788 F.2d 781, 788 & n.10 (D.C. Cir. 1986) (stating that “if the District’s motivation in promoting [the plaintiff] was based on racial preference it matters not if subsequent appointments were made without discriminatory motivation. Moreover, . . . presumably one would bear in mind [] that [the subsequent appointments] were made after appellants filed their charges with the EEOC”); *Townsend v. Wash. Metro. Area Transit Auth.*, 746 F. Supp. 178, 186 & n.8 (D.D.C. 1990) (stating that examples of defendant’s more recent progress in hiring and promoting women are “irrelevant because they all occurred *after* WMATA first refused the plaintiff’s application in 1984” and that “[u]nder these circumstances, the plaintiff has shown by a preponderance of the evidence that, *at the time of the selection process*, [defendant] did not fairly and objectively compare the plaintiff’s qualifications for the . . . position with those of [the two male selectees]”); *Donnell v. Gen. Motors Corp.*, 576 F.2d 1292, 1298 n.11 (8th Cir. 1978) (citation omitted) (“subsequent employment practices . . . are not relevant to the determination of whether the employer had previously violated Title VII”); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 346 (10th Cir. 1975) (rejecting the use of employment statistics after the charge had been filed because “it does not constitute cogent evidence of lack of prefiling discrimination If post filing conduct is to be taken into account at all, it might tend to show the existence of prior discrimination and an effort to repair the harm after discovery.”).

²⁰ *See also McReynolds*, 349 F. Supp. 2d at 26 (stating that D.C. Circuit recognizes that less than two standard deviations, in conjunction with other relevant evidence, may create issue of fact regarding existence of discrimination); *Stewart v. Rubin*, 948 F. Supp. 1077, 1094 (D.D.C. 1996) (noting that even when statistical evidence shows less than 1.96 standard deviations, under D.C. Circuit law a *prima facie* case of discrimination can be made relying on anecdotal evidence supporting statistical showing); *In re PEPCO Employment Litigation*, 1992 WL 442759, at *9 (D.D.C. 1992) (finding that statistical evidence is not only method of proving discriminatory conduct and if plaintiffs’ statistical evidence is not greater than two standard deviations, the court will look to plaintiffs’ other evidence to determine if “such alternative forms of proof supplement plaintiffs’ statistical evidence enough to raise an inference of discrimination”).

Here, there is significant non-statistical evidence to support Plaintiffs' pattern and practice claims based on promotions to GS-14. A tiny sample of such evidence follows:

- When Plaintiff Moore filed his administrative complaint in 1999 and his federal Complaint in 2000, the Secret Service's own records indisputably show that he had the highest MPP scores of any African-American Special Agent: 97.03 and 98.57 (respectively). By the Secret Service's own measure, he was the best qualified African-American GS-14 candidate. Nonetheless, Plaintiff Moore bid for 187 GS-14 positions and filed the instant federal lawsuit before he was finally promoted in 2002. Even when Plaintiff Moore was assigned as an acting GS-14 on the President's Protective Detail in the White House Joint Operations Center and was recommended by the African-American Special Agent in Charge for promotion to the GS-14 position in which he was acting, a lesser-qualified white Special Agent, ultimately received the promotion. *See, e.g.*, Ex. K (Decl. of L. Cockell) at bates numbers 030263, 030265; Ex. L (Moore Dep., Jul. 15, 2005) at 256:19-257:13. Plaintiff Moore was forced to train that white Special Agent for the position. *Id.* at 257:14-18. White Special Agents promoted above Plaintiff Moore for other positions had, for example, lower MPP scores, less time on the job, and less relevant experience. *See, e.g., id.* at 73:11-23, 75:21-76:19 (indicating that Plaintiff Moore had a higher MPP score, five more years on the job, and more experience on PPD than the selectee for position 99029).
- Plaintiff Tyler was the first African-American female Special Agent in the Atlanta Field Office, the New York Field Office, the Presidential Protective Detail, the Technical Security Division, and the Training Division. *See* Ex. M (Decl. of C.

Tyler, July 27, 2000) at ¶¶ 6, 18, 21, 24, 28. Despite her achievements, Plaintiff Tyler was assigned an MPP score that the Secret Service claims disqualified her for promotion. Ex. B at 28-29; Ex. D at bates numbers 075096-075101. Plaintiff Tyler was told that the Secret Service was not “ready” for an African-American female supervisor. Ex. M at ¶ 34. When this lawsuit was filed, the Secret Service had *never* promoted an African-American female Special Agent to a GS-14 position. *See* Ex. N (Summerour Dep., Jul. 8, 2005) at 244: 8-25. After fifteen years of service, then the longest-serving African-American female Special Agent, Plaintiff Tyler resigned from the Secret Service without promotion. *See* Ex. M at ¶ 4.

Every Plaintiff and class member can provide similar evidence. In view of such anecdotal evidence and the statistical evidence supporting Plaintiffs’ pattern and practice claims, there is a genuine issue of material fact on those claims, and Defendant’s motion for partial summary judgment should be denied.

B. Defendant’s Motion for Summary Judgment Should Be Denied as Premature.

Even if the Court does not deny Defendant’s motion for summary judgment on the merits, the Court nevertheless should deny the motion because it is extremely premature. Premature summary judgment motions are governed by Rule 56(f) of the Federal Rules of Civil Procedure,²¹ which provides, in relevant part, that “the court may refuse the application for judgment” as premature if based on “the affidavits of a party

²¹ The party invoking Rule 56(f) must submit an affidavit with its opposition that explains why the party was unable to offer material facts in opposition to the motion. *See Gen. Elec. v. Johnson*, 362 F. Supp. 2d 327, 337 (D.D.C. 2005) (recognizing affidavit submitted under Rule 56(f) identifying factual issues plaintiff believed must be resolved through discovery before Court can consider summary judgment motion).

opposing the motion [it is shown] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f).²²

Consistent with Rule 56(f), courts should provide for "a reasonable opportunity to complete discovery before grappling with a summary judgment motion." *Martin v. Malhoyt*, 830 F.2d 237, 256 (D.C. Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-37 (1986)).²³ Where plaintiffs have not had the opportunity to develop evidence to support their pattern and practice claims, summary judgment motions should be denied as premature. *See, e.g., Mueller v. CBS, Inc.*, 200 F.R.D. 242, 244 (W.D. Pa. 2001) (holding that partial summary judgment motion in ADEA action alleging pattern or practice of discrimination was premature, as the parties had not yet completed class merits discovery).

Here, it is clear that Plaintiffs have not had sufficient discovery to fully develop all of the germane evidence on their pattern and practice of discrimination claims relating to competitive promotions. Although Defendant claims that "[t]he statistical and factual evidence developed in this case shows that plaintiffs cannot meet their burden of proof to show a pattern and practice of discrimination in regard to the selection of Special Agents for promotion to the GS-14 level," Def.'s Mot. at 41, Defendant completely ignores the fact that class merits discovery has just begun and that Plaintiffs have not had the opportunity to conduct any statistical analysis – and have not even obtained discovery –

²² *See also Hudert v. Alion Sci. & Tech. Corp.*, No. 05-545, 2006 WL 1028945 at *8 (D.D.C. Apr. 18, 2006) ("[I]f there has been insufficient discovery conducted in a case at the time a summary judgment motion is filed, the Court can deny the motion as premature."); *City of Rome v. United States*, 450 F. Supp. 378, 384 (D.D.C. 1978) ("[S]ummary judgment motions [are] premature until all discovery has been completed.").

²³ *See also Khan v. Parsons Global Servs.*, 428 F.3d 1079, 1087 (D.C. Cir. 2005) ("The court has long recognized that a party opposing summary judgment needs a 'reasonable opportunity' to complete discovery before responding to a summary judgment motion and that 'insufficient time or opportunity to engage in discovery' is cause to defer decision on the motion.")

on non-promotions to the GS-14 level (or higher) that occurred after 2002 – a time period that is directly relevant to the recently-filed class action complaint. *See* Ex. O (Decl. of Jennifer I. Klar, Esq.) at ¶¶ 9, 16.²⁴ Furthermore, Plaintiffs have not yet had the opportunity to fully explore non-statistical evidence, such as anecdotal testimonial evidence, which they are allowed to present in support of their pattern and practice claims. *Id.* at ¶¶ 14, 17-18. The class complaint was filed less than two months ago, and class discovery remains in its nascent stages. No depositions have been taken since the class complaint was filed, and five of the ten named plaintiffs have never been deposed. *Id.* at ¶ 17. Plaintiffs have issued interrogatories and two sets of requests for production of documents relating to competitive promotions, but they have received responses only to one set of requests for production. *Id.* at ¶¶ 13, 14-15. In those responses, Defendant states that he will either produce or make available for inspection certain documents relating to the bids and selections for GS-14 and GS-15 positions from 1997 through 2005. *Id.* at ¶ 15. Thus, Defendant has admitted that a great deal of discovery on competitive promotions has not yet been produced or completed. Until Plaintiffs complete class merits discovery on non-selections to competitive promotions, they cannot be expected to establish a pattern and practice of discrimination in connection with those non-selections. Thus, in the absence of a complete statistical and factual record, Defendant's motion for summary judgment is entirely inappropriate at this stage in the proceedings, and it should be denied as premature. *See, e.g., Velikonja v. Mueller*, 315 F.

²⁴ Defendant also completely fails to inform the Court that statistical expert discovery on non-promotions to the GS-14 level that occurred before 2002 has not yet been completed. *See* Ex. N at ¶ 12. In fact, the parties agreed to postpone the depositions of the statistical experts after they received the Court's March 30, 2006 Order granting Plaintiffs' motion for leave to amend the complaint. *Id.* At that point, the parties agreed that it would be more efficient to conduct the statistical expert depositions after class discovery was underway, recognizing that additional statistical analysis may need to occur. *Id.* Those depositions have not yet been rescheduled. *Id.*

Supp. 2d 66, 80 (D.D.C. 2004) (denying motion for summary judgment as premature “[b]ecause it is unclear based on the undeveloped record whether plaintiff will be able to proffer evidence of similarly situated individuals or otherwise demonstrate disparate discipline”). *See also Mueller*, 200 F.R.D. at 244.

Instead of briefing a premature and meritless motion for partial summary judgment, the parties should be engaging in discovery on the recently-filed class claims. Consistent with Supreme Court law, Plaintiffs should be allowed to discover and present anecdotal, comparative, and statistical evidence to support their claims that racial discrimination in the competitive promotions process is the Secret Service’s standard operating procedure. *See Teamsters v. U.S.*, 431 U.S. 324, 336-338 (1977).

CONCLUSION

For the above-stated reasons, Defendant’s Motion for Partial Dismissal and/or for Partial Summary Judgment of Amended Complaint should be denied in whole.

Respectfully submitted,

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