UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	**Civil No. 00-953 (RWR/DAR)**
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	)	
MICHAEL CHERTOFF, Secretary U.S. Department of Homeland Security,	)	
	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND/OR FOR PARTIAL SUMMARY JUDGMENT OF SECOND AMENDED COMPLAINT

Defendant Michael Chertoff, Secretary, United States Department of Homeland Security, respectfully moves, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss in part the Second Amended and Supplemental Class Complaint [Second Amended Complaint] on the grounds that (1) certain of plaintiffs' claims fail to state a claim on which relief can be based; and (2) plaintiffs lack standing to bring claims for which they have suffered no harm.

In the alternative, and additionally, pursuant to Fed. R. Civ. P. 56, the Court should enter partial summary judgment in favor of defendant, because there is no genuine issue as to any material fact regarding plaintiffs' claims concerning discriminatory testing, hiring, discipline, and undercover assignments; and certain claims which are moot and/or withdrawn.

Additionally, one plaintiff, whose only claim is subject to dismissal, should be dismissed.

In support of this motion, the Court is respectfully referred to the accompanying statement of material facts not in dispute, memorandum of points and authorities, declarations and exhibits.

A proposed order consistent with the relief sought is also attached.

Respectfully submitted,

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United States Attorney

RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

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Of Counsel:

Edith Shine, Esq.
U.S. Secret Service
Office of Chief Counsel

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DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rule 7.1(h), defendant hereby submits his statement of material facts as to which there is no genuine issue:

Allegations of Discrimination in Testing

1. None of the ten plaintiffs allege that from 1999 on he or she failed the Treasury Enforcement Agents Examination (TEA) or were adversely affected by any score received on that examination. See generally 2d Am. Compl.

Allegations of Discrimination for Entry Level Grade at Time of Hiring

2. Plaintiff Simms was hired by the Secret Service in 2002 as a GS-7. Ex. 4.[1]

[1] When Simms was hired her name was Camilla Shepard. Exhibits 3-9 refer to Simms by the name she used at the time she was hired.

3. In 2003, Simms's grade was raised to a GS-9, and then to a GS-11, Ex. 9, p. 2, made retroactive to September 2002, and 2003, respectively. Ex. 9, p. 4.

Allegations of Discrimination in Discipline

4. Defendant's disciplinary policy includes letters of reprimand, suspensions, demotions, and removals. Ex. 1, p. 2.

5. None of the ten plaintiffs allege that since 1999 he or she was the subject of a disciplinary action. See generally 2d Am. Compl.

6. Plaintiff Lisa Robertson "was placed on administrative leave" in 2002. 2d Am. Compl. ¶ 67.

7. Plaintiff Robertson "was taken off administrative leave" without receiving a reprimand, suspension, demotion or a notice of termination. See id.

8. Plaintiff Robertson does not know whether being placed on administrative leave "during training [would] adversely affect her in the competitive promotion process." Id.

9. The last time a Secret Service employee attended the "Good Ol' Boys Roundup" was in 1995. See Docket No. 221, Ex. 1 at 3 (PL-0004).

Allegations of Discrimination in Undercover Work

10. None of the ten plaintiffs allege that from 1999 on he or she was discriminated against by being assigned to perform, and required to perform, undercover work. See generally 2d Am.

Compl.

11. In 2005, Plaintiff Simms was asked to complete an undercover assignment. 2d Am. Compl. ¶ 89; Ex. 2, ¶ 2.

12. Plaintiff Simms never worked the undercover assignment referenced in paragraph 89 of the Second Amended Complaint. Ex. 2, ¶ 3.

Allegations of Discrimination in Promotion to the SES

13. None of the plaintiffs allege that he or she applied for and was denied a promotion to the SES level. See generally 2d Am. Compl.

14. The SES promotion process is different that the promotion process used for GS-14 and GS-15 promotions. Ex. 14.

Plaintiff Robertson Has No Viable Claims

15. Plaintiff Lisa Robertson contacted an Equal Employment Opportunity (EEO) Counselor on or about January 21, 2003, alleging discrimination in regard to the same matter which is presented in the Second Amended Complaint at paragraph 67. Compare Ex. 10 with 2d Am. Compl. ¶ 67.

16. Plaintiff Robertson withdrew her EEO complaint concerning the matter presented in the Second Amended Complaint at paragraph 67 on or about February 27, 2003. Ex. 11.

Plaintiff Harris' Withdrawn GS-14 Claims

17. Plaintiff Andrew Harris first bid for promotion to the GS-14 level in 1999. 2d Am. Compl. ¶ 57.

18. On October 5, 1999, Harris contacted an EEO Counselor alleging discrimination in regard to non-selection for promotion to the GS-14 level. Ex. 12, ¶ 3.

19. Harris withdrew his 1999 EEO complaint concerning discrimination in regard to promotion to the GS-14 level. Id.

20. Plaintiff Harris was promoted to the GS-14 in 1999. 2d Am. Compl. ¶ 57.

Plaintiff Moore's Withdrawn Promotion Claims

21. On October 12, 1999, Plaintiff Moore filed a formal complaint of discrimination. Ex. 15, ¶ 2.

22. In November 1999 MaryAnn Hageline, an EEO Specialist, asked Plaintiff Moore and his attorney whether he was seeking to file an EEO complaint concerning his non-selection for a vacancy which had been announced on June 16, 1999, vacancy number 99-073. Ex. 15, ¶¶ 3-8, and notes attached to that declaration.

23. Ms. Hageline also asked Plaintiff Moore and his attorney whether he was seeking to file a claim concerning other "non promotions to positions for which he had applied." Id.

24. Plaintiff Moore and his attorney advised Ms. Hageline that, in regard to non-selection for promotion, Plaintiff Moore was only seeking to complain in regard to vacancy number 99-089. Id.

25. By letter dated November 16, 1999, Plaintiff Moore and his attorney were advised of the accepted issues in the formal

complaint. Id. at ¶ 9; Ex. 16.

26. The only non-promotion at issue as set forth in the November 16, 1999 letter was the non-selection for vacancy 99-089. Ex. 16.

27. Through the November 16, 1999, letter Plaintiff Moore and his attorney were advised that if they disagreed with the accepted issues they had the right to contest the issues within five days of the receipt of that letter. Ex. 16.

28. Neither Plaintiff Moore nor his attorney contested the issues as set forth in the November 16, 1999, letter. Ex. 13, admission request/response # 7.

Respectfully submitted,

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United States Attorney

RUDOLPH CONTRERAS, D.C. BAR # 434122
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Of Counsel:

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MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR PARTIAL DISMISSAL
AND/OR FOR PARTIAL SUMMARY JUDGMENT OF SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs, ten African-American Special Agents currently or formerly employed by the United States Secret Service ("Secret Service" or "defendant"), allege that since 1993 they have suffered from a pattern and practice of discrimination based on race regarding the terms and conditions of their employment. On March 30, 2006, and July 7, 2006, this Court issued decisions clarifying the claims which could be pled in this case. These decisions specifically provided that plaintiffs could seek to plead non-promotion claims "dating back to 1993" and "building block claims" dating back to 1999. See Memorandum Opinion and Order, July 7, 2006 [Docket # 358], ("July 2006 Mem.") at 2, 12; Memorandum Opinion and Order, March 30, 2006 [Docket # 312], ("Mar. 2006 Mem.") at 3, 16. Consistent with these decisions,

the Court ordered plaintiffs to submit a second amended complaint.[2]

On August 7, 2006, plaintiffs filed their Second Amended and Supplemental Class Complaint, individually and on behalf of a putative class of Secret Service African-American Special Agents. Second Amended and Supplemental Class Complaint ("Second Amended Complaint" or "2d Am. Compl.") [Docket # 362]. This Complaint, however, suffers from a number of defects which render significant portions of it subject to dismissal.

First, the Second Amended Complaint alleges that discrimination exists in regard to testing applicants for hire to the Secret Service, the entry grade level at which new agents are hired, discipline imposed, and assignment to undercover work. See 2d Am. Compl. ¶¶ 2, 82, 84 (testing); ¶¶ 2, 10, 13, 83-86, 97(c), 108, 114 (hiring); ¶¶ 2, 62-66 (discipline); ¶¶ 2, 87-90 (undercover assignments). In regard to each of these claims, however, plaintiffs fail to present a pleader entitled to relief. Thus, these portions of the Second Amended Complaint are defective and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failing to state a claim and/or lack of standing.

Second, the Second Amended Complaint presents this Court

[2] Among the enumerated claims which this Court said could be pled dating back to 1999 were claims concerning hiring, testing, discipline, and assignments, including undercover assignments. July 2006 Mem. at 3, 13-14.

with claims which are moot or were withdrawn during the administrative process. Third, plaintiff Robertson raises only one claim, which is subject to dismissal.

The foregoing claims should be dismissed or, alternatively, defendant is entitled to summary judgment on these claims. Additionally, plaintiff Robertson should be dismissed form the case.

ARGUMENT

I. Claims for Which No Plaintiff Alleges Injury Should Be Dismissed.

On July 7, 2006, this Court ordered plaintiffs to file an amended complaint consistent with its ruling regarding exhausted and vicariously exhausted claims. With respect to certain "building blocks" for promotion, such as testing, entry level grade at time of hiring, discipline, and undercover work, this Court stated that "[t]hese alleged practices are reasonably related to a non-promotion class claim and **may** be vicariously exhausted." Id. at 16 (emphasis added). However, this Court recognized that the doctrine of vicarious exhaustion must be invoked by a plaintiff. Id. at 12. This doctrine does not exist in the abstract to allow a group of plaintiffs to raise claims, even in a class action, for which none of them suffered an injury.

With respect to the Second Amended Complaint, there is **no**

plaintiff for several claims this Court has allowed to be pled. Although plaintiff John Turner's class complaint raises claims concerning testing, entry level grade at time of hiring, discipline, and undercover work, July 2006 Mem. at 16, he did not allege, either administratively or in the Second Amended Complaint, that he had suffered any injury in any of these areas during the permissible time period. Defendant is aware of no authority for the untenable proposition that plaintiff Turner can vicariously exhaust claims for which no plaintiff is identified. Lacking a named plaintiff who has been harmed in these areas, these claims, which the Court said it would allow plaintiffs to plead, should now be dismissed under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim. These same claims should also be dismissed under Federal Rule of Civil Procedure 12(b)(1), as the plaintiffs in this case lack standing to bring claims concerning matters about which none of them have suffered a harm.

A. Legal Standards

Pursuant to Federal Rule of Civil Procedure Rule 8(a), a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. A claim which fails to show that the pleader is entitled to relief may be dismissed for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

Additionally, a plaintiff who brings a claim must have standing to invoke the jurisdiction of the federal courts. Standing requires a plaintiff to show that he "(1) has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (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." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

Standing rules are equally applicable in putative class actions. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982); East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). Both Falcon and Rodriguez clearly establish that the "class representative [must] be part of the class and possess the same interest and suffer the same injury as the class members." Falcon, 457 U.S. at 156; Rodriguez, 431 U.S. at 403. Under Falcon and Rodriguez, it is well settled that an individual plaintiff who seeks to bring a class claim of discrimination **must** make a factual showing that he was harmed by the practices complained of in the class claim portion of the complaint. See generally, Holsey v. Armour and Co., 743 F.2d 199 (4th Cir. 1984) cert. denied, 470 U.S. 1028

(1985). As the Supreme Court made clear, the fact that:

> a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 40, n.20 (1976) (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)). "It is not enough that the conduct of which the plaintiff complains will injure *someone*." Blum v. Yaretsky, 457 U.S. 991, 999 (1982) (emphasis in original). Rather, the complaining party must have been concretely injured by the conduct alleged to have been wrongful. Id.

B. Claims Concerning Testing

In the Second Amended Complaint, plaintiffs allege that "[t]hroughout the class period, the Secret Service has discriminated against African-Americans by administering an invalidated civil service exam called the Treasury Enforcement Exam ("TEA") . . . ."[3] 2d Am. Comp., Section D, ¶ 82. Under this Court's July 2006 decision, claims concerning testing can be pled only "dating back to 1999." Id. at 2-3. However, not one of the ten plaintiffs in this case claims that from 1999 forward he or she was discriminated against in connection with the TEA. See 2d

[3] The correct name for this examination is the "Treasury Enforcement Agents Examination," generally referred to as the "TEA".

Am. Comp., Section D.

Recognizing the defect in their pleading in regard to the TEA -- the lack of a plaintiff -- plaintiffs refer to claims which they admit are time-barred. 2d Am. Comp. ¶ 84. For example, plaintiffs' discussion of plaintiff Harris's time-barred alleged experience with the TEA cannot cure this defect.[4] The recitation of claims which this Court has said may not be pled changes nothing. Not one plaintiff claims that from 1999 on he or she has been the victim of discrimination in regard to the TEA. This omission is fatal, and thus plaintiffs have failed to state a claim upon which relief may be granted with respect to the TEA.

Plaintiffs also lack standing to bring a claim concerning the TEA or to represent a supposed class of others who were allegedly harmed through any purported discrimination in regard to the TEA. As discussed above, named plaintiffs have no standing to allege injury on behalf of "other, unidentified members of the class" if they have not suffered any personal injury from the claim advanced. Warth, 422 U.S. at 502. Because no plaintiff claims that from 1999 on he or she has been harmed in regard to the TEA, there is no relief to grant, and the claim

[4] Plaintiffs also refer to plaintiffs Hendrix and Tyler failing the TEA but do not allege that this result was the product of discrimination. 2d Am. Compl., ¶ 84. Plaintiffs also do not claim that these events are within the permissible time period for raising claims. Id.

concerning discrimination in regard to the TEA should be dismissed.

C. Claims Concerning Grade at Time of Hiring

Plaintiffs claim that defendant allegedly hired African-American Special Agents at a lower grade level than "their white counterparts." 2d Am. Compl., Section D, ¶¶ 82-86. However, the only claim concerning this allegation which is said to have occurred from 1999 on is moot.[5]

Plaintiff Simms alleges that in 2002 she was hired as a GS-5 when she should have been hired as a GS-9. 2d Am. Compl., ¶ 85. Actually, Simms was offered a GS-5 based on her initial application with the Secret Service, but she was informed in that offer that she could take advantage of one opportunity to provide additional information if she believed that the grade level proposed was incorrect. Ex. 3. Simms provided additional information regarding her qualifications, and she was appointed as a GS-7 based on this additional documentation.[6] Ex. 4. After her appointment Simms further challenged her grade level at hire,

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[5] Plaintiffs allege that "[s]ix of the ten named Plaintiffs were discriminated against in their initial hire to the Secret service." 2d Am. Compl., ¶ 84. Plaintiffs then concede that the claims of those six -- plaintiffs Harris, Summerour, Hendrix, Turner, Ivery and Rooks – are time barred under this Court's decisions. Id.

[6] Simms' allegation that she received her GS-7 as a result of filing a grievance is simply wrong. Compare 2d Am. Compl., ¶ 85 with Exs. 4 and 8, block 6.

and she was informed by the Personnel Division that any additional request for a higher grade had to be submitted as a grievance. Ex. 7.

On March 8, 2003, Simms submitted a grievance regarding her appointment at GS-7. Ex. 8, p. 1. As a result of additional documentation that Simms submitted with her grievance, which she did not submit at the time of her appointment, her grade level was changed to GS-9. As relief for the grievance, Simms was promoted to the GS-9 level retroactive to the first day of the first pay period after she filed her grievance. Ex. 8, p. 2. Following the filing of another grievance, the effective date of this retroactive promotion was subsequently changed to September 22, 2002, the first day of the first pay period after she submitted the additional information. Ex. 9, p. 4. Simms was also granted a retroactive promotion to GS-11 effective September 21, 2003. Id.

The foregoing demonstrates that Simms' situation was resolved in 2003; therefore, this claim of discrimination is moot and should be dismissed. Plaintiff Simms has no harm to be remedied, since she was provided relief retroactive to the earliest possible effective date on which the information was available to the Secret Service. There is nothing left here for the Court to fix because defendant resolved the situation on its own in 2003. E.g., Southern Co. Services, Inc. v. FERC, 416 F.3d

39, 43 (D.C. Cir. 2005) ("mootness [] is a 'threshold jurisdictional issue.'"); Beethoven.Com LLC v. Librarian of Congress, 394 F.3d 939, 950 (D.C. Cir. 2005) (court not empowered to decide moot issues which cannot affect the matter at issue in the case before it).

Consequently, plaintiffs' claims concerning the grade level at time of hiring should be dismissed because there is no pleader with any actual unresolved complaint of alleged discrimination concerning the grade level at hiring with a claim dating back no earlier than 1999.

D. Claims Concerning Discriminatory Discipline

Plaintiffs allege that they have been subjected to discrimination in regard to disciplinary action in that "African-American Special Agents are selected for discipline more frequently than their white counterparts. When selected for discipline African-American Special Agents are punished more harshly than similarly situated white Special Agents." 2d Am. Compl., Section B, ¶ 64. Having made this allegation, however, plaintiffs do not present this Court with even one allegation of discrimination in disciplinary action which is said to have occurred from 1999 forward. See 2d Am. Compl., Section B, ¶¶ 62-67.

Federal law provides that disciplinary actions include suspensions, demotions and removals. See 5 U.S.C. § 75; 5 C.F.R.

§ 752. Defendant's disciplinary policy expands this definition to include letters of reprimand. Ex. 1, p. 2.

Although the ten plaintiffs in this case claim that there is discrimination in regard to the selection for and imposition of discipline, not one of the ten plaintiffs complain that they have been the subject of a disciplinary action -- a letter of reprimand, suspension, demotion or removal -- dating back to no earlier than 1999. Rather, they discuss the suspensions of plaintiffs' Hendrix and Harris but concede that these actions occurred "prior to the liability period of this litigation." 2d Am. Compl., ¶ 64.

In paragraph 65 plaintiffs also allege that the Secret Service failed to adequately discipline white Special Agents who attended the "Good Ol' Boys Roundup." It is undisputed, however, that the Good Ol' Boy Roundup was an annual event held from 1980 through 1995. See Docket No. 221, Ex. 1 at 3 (PL-0004). Thus, any claims concerning discipline with respect to this event clearly predate the liability time-frame established by this Court and should be dismissed.

The only plaintiff to attempt to raise a claim connected to discipline is plaintiff Robertson, who alleges that she was the victim of discrimination when she was placed on administrative leave and thought that she might be proposed for removal from employment with the Secret Service. 2d Am. Compl., ¶ 67. Such

action, however, does not qualify as discipline. See 5 U.S.C. § 75; 5 C.F.R. § 752; Ex. 1, p. 2. Thus, plaintiff Robertson's claims cannot fulfill plaintiffs' obligation to identify a plaintiff who has suffered an injury in regard to discipline during the permissible time frame.

Because plaintiffs have presented no claims of discriminatory discipline from 1999 forward, their allegation concerning discrimination in regard to discipline should be dismissed for failure to state a claim and for lack of standing. Certainly a class could not form around a claim without a claimant. See supra at 5-7.

E. Claims Concerning Assignments to Undercover Work

Plaintiffs allege discrimination in regard to assignments in general and, in particular, assignments to undercover work. 2d Am. Compl. Section E, ¶¶ 2, 87-91. Defendant moves to dismiss the claims concerning assignments to undercover work.

According to plaintiffs, African-Americans are assigned to undercover work more frequently than other Special Agents, and these undercover assignments slow the progress of African-American Special Agents toward promotion to the supervisory ranks. 2d Am. Compl., Section E, ¶ 88. However, despite plaintiffs' statements that there is discrimination in regard to assignment to undercover work, plaintiffs have been unable to produce even one African-American Special Agent who complains

about discrimination in connection with having to perform undercover work dating back to no earlier than 1999.[7] 2d Am. Compl. ¶¶ 87-91.

Rather, in a weak attempt to address this defect, plaintiff Camilla Simms alleges that in 2005 she was "asked to complete an undercover assignment" even though she was pregnant. Id. at ¶ 89. Tellingly, Simms does not allege that she was assigned to the undercover duty about which she complains, nor does she allege that she in fact worked that undercover assignment. Id. In fact, she did not. Ex. 2, ¶ 3. Simms also does not allege any adverse consequences from her declining the request. 2d Am. Compl., ¶ 89. A mere request to work a particular assignment is not an adverse action under Title VII when no objective tangible harm is associated with such a request. Brown v. Brody, 199 F.3d at 457. Thus, Simms' claim regarding undercover work fails to state a claim under Title VII and cannot serve as a springboard for any unidentified class members to complain about undercover assignments actually performed.

In short, and once again, not one of the ten plaintiffs is complaining that he or she was personally "assigned" to perform undercover work during the allowable time period, and thus there is no allegation that assignment to undercover work during the

[7] Plaintiffs cite to claims by Moore, Summerour and Ivery regarding undercover assignments but do not allege that these assignments occurred within the time-frame of possible liability set by this Court. See 2d Am. Compl., ¶ 88.

relevant time-frame slowed any plaintiff's progress to promotion. Accordingly, plaintiffs have failed to state a claim of discrimination in regard to assignment to undercover work and lack standing to bring any such claim.

F. Claims Concerning Discrimination in Regard to Promotion to the SES

At paragraph 16 of the Second Amended Complaint, plaintiffs allege that "[f]rom 1993, continuing ... the named Plaintiffs and the Plaintiff class have been discriminated against in selections for competitive promotions ranked GS-14, GS-15, and SES." Yet, not one plaintiff in this case alleges discrimination in regard to non-selection into the SES. See 2d Am. Comp., ¶¶ 16-61.

In addition, plaintiffs repeatedly refer to discrimination in regard to promotions made through the Merit Promotion Process (MPP). 2d Am. Comp. ¶¶ 16-61. SES promotions, however, are not made through the MPP, and MPP scores are not used in the process. Exh. 14, ¶ 5. Rather, the selection process for the SES is separate, apart and unrelated to the MPP process. Id. at ¶¶ 2-5. Therefore, it cannot be said that timely filed claims in regard to GS-14 and or GS-15 selections made through the MPP process are like or related to SES promotion claims. As the same process is not in play with respect to SES claims, such claims cannot be said to have been vicariously exhausted by any of plaintiffs' claims in this case.

Again, as there is no plaintiff claiming that he or she was

harmed by not being promoted to the SES, there is nothing to remedy. The claim in regard to SES promotions fails to state a claim, and these plaintiffs lack standing to bring such a claim.

III. Any Claims Withdrawn in the Administrative Process Must Be Dismissed.

Plaintiffs Robertson, Harris and Moore seek, years later, to challenge claims they pursued administratively but withdrew before the administrative process had been completed. A clearer case of "gotcha" is hard to imagine. Having led defendant to believe that these claims were no longer at issue by withdrawing them, these plaintiffs now seek to pursue those abandoned claims. This should not be permitted, and the claims listed below should be dismissed.

A. Plaintiff Harris's GS-14 Claims

Plaintiff Andrew Harris alleges discrimination in regard to non-selection to the GS-14 level from January 1999 through October 1999. 2d Am. Compl. ¶¶ 59-61. Harris contacted an EEO Counselor in regard to this same matter in or about October of 1999. Harris, however, withdrew this claim during the same time period. Ex. 12, ¶ 3. As Harris withdrew his complaint, id., and was promoted to a GS-14 in 1999, 2d Am. Compl. ¶ 57, he should not now, **seven** years later in 2006, be allowed to change his mind and revive this stale claim through the theory of vicarious exhaustion. For this reason, plaintiff Harris's GS-14 claims should be dismissed.

B. Plaintiff Robertson

Plaintiff Robertson's only complaint concerns being placed on administrative leave for a period of time. See supra at 12. Not only does this claim fail to state a claim, but it also was withdrawn in the administrative process.

Robertson contacted an EEO Counselor on or about January 21, 2003, concerning this same matter and "withdrew" her EEO complaint in writing on February 27, 2003. Exs. 10 & 11. She should not be allowed, **three** years later, to revive this abandoned claim through the theory of vicarious exhaustion. For this reason, in addition to the reasons previously given, plaintiff Robertson's claim should be dismissed.

C. Plaintiff Moore

Plaintiff Moore filed an administrative complaint concerning a single non-promotion to the GS-14 level, vacancy number 99-089. Ex. 16. In the administrative process, Plaintiff Moore specifically withdrew all other promotion claims which he might have sought to bring. Ex. 15 ¶¶ 5-9 & attached notes to that declaration.

Upon receipt of his formal administrative complaint, the EEO Specialist assigned to Plaintiff Moore's case asked him if he were seeking to contest other non-promotions beyond vacancy 99-089. Id. Plaintiff Moore said that he was not. Id. at ¶ 7.

By letter dated November 16, 1999, Plaintiff Moore and his

attorney were advised that the issue accepted for investigation was whether Plaintiff Moore was discriminated against when:

> On July 16, 1999 the complainant was not selected for the position of Assistant to the Special Agent in Charge, GS-1811-14, announced under vacancy announcement #99-089.
>
> The letter further stated:
>
> If you disagree with the issue(s), please notify me in writing within five days of receipt of this letter. Please be clear and concise in your response. If no response is received, I will assume that you agree with the issue(s) and will proceed with the investigation of the complaint.

Ex. 15 at ¶¶ 7 and 9; and Ex. 16. Plaintiff Moore did not disagree with the accepted issues.

Yet now, almost **seven** years later, Plaintiff Moore seeks to challenge his non-promotion to all positions for which he bid for promotion from 1999 through 2002, the date of his promotion to the GS-14 level. 2d Am. Compl. ¶ 29. As with plaintiff Harris, having led defendant to believe that no other non-promotion claims were at issue, when Plaintiff Moore withdrew any such claims at the time of his administrative complaint, Exh. 15 at ¶ 7, Plaintiff Moore now seeks to pursue those abandoned claims. This should not be permitted, and the unexhausted abandoned non-promotion claims should be dismissed.

IV. Plaintiff Robertson Should be Dismissed as a Plaintiff.

This Court allowed plaintiffs to plead claims concerning non-promotion, and the "building blocks" to promotion, consisting of discipline, assignments, awards and bonuses, training,

testing, and hiring. However, plaintiff Robertson's only claim concerning placement on administrative leave, and fear that she would be fired, does not match any of these categories. Robertson has never applied for promotion to the GS-14 level; therefore she does not have a claim of non-promotion. She does not allege that she suffered from any barriers at the time of hiring, including the TEA or entry level grade; and, she does not complain of unfairness in receipt or non-receipt of assignments. See generally 2d Am. Compl.

In short, Robertson has no viable claim, exhausted vicariously or otherwise, that can come before this Court. Her only individual complaint is her placement on administrative leave, and she withdrew this complaint in the administrative process. Ex. 11. Her placement on administrative leave is not one of the subject types of claims that this Court said could be pled as a vicariously exhausted claim, and even if it were, Robertson has not alleged any concrete or even speculative harm that has befallen her from this action. See 2d Am. Compl., ¶ 67 (she "does not know" whether the action she complains about "will adversely affect her in the competitive promotion process."). Thus, Robertson should be dismissed as a plaintiff in this case.

CONCLUSION

For the foregoing reasons, defendant respectfully submits that this motion to dismiss in part or, in the alternative, for partial summary judgment be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	)	
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v.	)	**Civil No. 00-953 (RWR/DAR)**
	)	
	)	
MICHAEL CHERTOFF, Secretary U.S. Department of Homeland Security,	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of defendant's partial motion to dismiss or, in the alternative, for partial summary judgment, plaintiffs' opposition, and the entire record, and it appearing to the Court that the grant of defendant's motion would be just and proper, it is hereby

ORDERED that defendant's partial motion to dismiss or, in the alternative, for partial summary judgment be, and it is, granted; and it is further

ORDERED that plaintiffs' claims concerning testing, grade at time of hiring, discipline, assignments to undercover work and non-promotion to the SES shall be, and are, dismissed with prejudice; and it is further

ORDERED that plaintiff Harris's GS-14 claims shall be, and are, dismissed with prejudice; and it is further

ORDERED that plaintiff Moore's non-promotion claims other

than the claim concerning vacancy announcement 99-089 shall be, and are, dismissed with prejudice; and it is further

ORDERED that plaintiff Robertson shall be dismissed from the case.

UNITED STATES DISTRICT JUDGE

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