IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, *et al.*	)	
Plaintiffs,	)	
v.	)	Civ. No. 00-953 (RWR/DAR)
MICHAEL CHERTOFF SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND/OR FOR PARTIAL SUMMARY JUDGMENT OF THE SECOND AMENDED COMPLAINT [DOCKET NO. 370]

Plaintiffs hereby oppose the third motion to dismiss Defendant has filed in this matter. Defendant makes two categories of argument, both of which easily fail.

First, Defendant argues that claims that this Court has ruled over and over again are vicariously exhausted should be dismissed for failure to exhaust if the Plaintiffs' entirely unnecessary administrative filing was flawed or withdrawn. Defendant provides no legal support for this argument, and there is none: the law is clear that Plaintiffs have administratively exhausted all their claims.

Second, Defendant argues that several of Plaintiffs' claims are subject to dismissal because no Plaintiff alleges injury resulting from the discriminatory conduct. Defendant's positions cannot withstand legal analysis. Defendant confuses and conflates the legal concepts of standing, mootness, and adequacy of class representatives – and gets none of them right. In making his arguments, Defendant ignores the well-established law

of the Supreme Court, this Circuit and this District and ignores key facts in the record. Each of Defendant's arguments fail.

The Court should reject Defendant's specious arguments and allow this case to move forward toward the completion of discovery and trial.

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.

Defendant filed his first motion to dismiss on July 5, 2000 ("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 45 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 because many of the claims would be subject to a motion to dismiss as unexhausted.

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.

The parties filed cross motions to reconsider. On April 14, 2006, Defendant filed his Motion for Reconsideration in Part and for Clarification, arguing that this Court's March 30, 2006 Order was wrongly decided and all "building block" claims were not exhausted. Defendant asked for "clarification" that non-promotion claims could only be pled from September 11, 1999[1] to May 3, 2000. On April 17, 2006, Plaintiffs filed their Motion to Reconsider a Portion of the Court's March 31, 2006 Order on Plaintiffs' Motion to Amend and Supplement Complaint, arguing that Plaintiffs had properly pled a continuing violation and could bring non-promotion claims dating back to 1993.

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. Plaintiffs only pled post-1998 non-promotion claims, removing several claims—and

[1] In his Reply, Defendant changed this date to July 2, 1999.

several Plaintiffs—included in Plaintiffs' May 2000 Complaint. Defendant filed his motion to dismiss the First Amended and Supplemental Complaint on May 31, 2006 ("May, 2006 Motion to Dismiss").

On July 7, 2006, this Court ruled on the parties' cross motions to reconsider the Court's March 30, 2006 Order. With respect to promotions, the Court granted Plaintiffs' motion to reconsider and ruled that Plaintiffs had properly pled a continuing violation and could plead claims of non-selection dating from 1993 and subsequent. The Court once again ruled that Plaintiffs had exhausted "building block" claims, and ruled that Plaintiffs could plead such claims from 1999 and subsequent. The Court denied Defendant's May, 2006 Motion to Dismiss without prejudice and ordered Plaintiffs to file a Second Amended Complaint by August 7, 2006.

On August 7, 2006, Plaintiffs filed their Second Amended and Supplemental Class Complaint. The only substantive changes from the First Amended and Supplemental Class Complaint were as follows: (1) Plaintiffs pled non-promotion claims from 1993 to the present, rather than from 1999 to the present; and (2) Plaintiffs removed all "building block" claims prior to 1999.

Defendant filed the instant Motion for Partial Dismissal and/or for Partial Summary Judgment[2]. of the Second Amended Complaint on September 20, 2006 ("September, 2006 Motion to Dismiss," or "Defendant's Motion").

[2] Defendant does not distinguish between his motion to dismiss and motion for summary judgment. Defendant's motion for summary judgment is made prematurely. Defendant requested of Plaintiffs an extension of the discovery period, and non-expert discovery now ends February 2, 2007. Defendant has not finished producing discovery requested in May and June, 2006 on claims on which he now moves for summary judgment.

ARGUMENT

I. Defendant Offers No Support for His Position that "Any Claims Withdrawn in the Administrative Process Must Be Dismissed."

This Court has twice ruled that Plaintiff Turner vicariously exhausted claims of discrimination in promotion and the "building blocks" of promotion. Thus, by definition Plaintiffs and class members need not independently exhaust their claims, because Plaintiff Turner already has exhausted their claims for them. This Court's rulings 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.

Yet, inexplicably, Defendant argues that "any claims withdrawn in the administrative process must be dismissed." Def.'s Mem. at 15-17. Defendant appears to suggest that a claim ruled vicariously exhausted is not viable if the Plaintiff filed, but did not independently exhaust the claim. Defendant, however, does not offer a single shred of legal support – no regulation, no case law – for his position because he *cannot*: Defendant's position is unsupportable.

A. Plaintiff Harris' GS-14 Non-Selection Claim.

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 three times issued crystal clear rulings that non-promotion claims are vicariously exhausted, both by Plaintiff Moore and by Plaintiff Turner. *See* Oct. 24, 2004 Op. at 25-26; Mar. 30, 2006 Op. at 12; July 7, 2006 Op. at 15. Plaintiff Harris did not have to file an EEO complaint *at all* in order to bring these claims in federal court. That he withdrew his *entirely unnecessary* EEO claim is inapposite.

B. Plaintiff Robertson's Discipline Claim

Defendant claims that because Plaintiff Robertson withdrew her EEO complaint, her claim must be dismissed. Def.'s Mem. at 16. 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; July 7, 2006 Op. at 2, 16, 18, Plaintiff Robertson—and any class member with a claim of discriminatory discipline—need not have individually exhausted an EEO complaint.[3] Indeed, Plaintiff Robertson need not have filed an EEO complaint *at all*, as Plaintiff Turner vicariously exhausted her claim.

C. Plaintiff Moore's 1999 Non-Selection Claims.

Next, Defendant argues that Plaintiff Moore has only exhausted one of the 47 positions he applied for before filing his EEO complaint in 1999.[4] This Court has three times 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

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

[4] Defendant cannot suggest that any purported limitation of Plaintiff Moore's EEO complaint affected non-selections occurring thereafter.

Turner vicariously exhausted all post-1998 non-promotion claims and his July 7, 2006 Order held that Plaintiff Turner vicariously exhausted all non-promotion claims from 1993 to the present. *See* Mar. 30, 2006 Op. at 12, 14; July 7, 2006 Op. at 12. 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.

II. Defendant's Arguments as to "Lack of Injury" Fail.

A. Plaintiff Simms May Bring a Claim of Discriminatory Assignment to Undercover Work.

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

In order to suggest that Plaintiff Simms does not have standing to challenge discriminatory assignment to undercover work, Defendant must ignore applicable Supreme Court and D.C. Circuit precedent. Defendant argues that Plaintiffs' claims of discriminatory undercover assignments should be dismissed because Plaintiffs failed to produce a Plaintiff who complains of discriminatory assignment to undercover work. Def.'s Mem. at 12-14. While Defendant's failure to cite any legal authority renders his argument far from clear, Defendant appears to argue that Plaintiff Simms lacks standing to challenge discriminatory assignment to undercover work because she did not suffer an "injury in fact" as she was subject to a "mere request" to work an undercover assignment. *Id.* at 13. 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, E.*, 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 Bros.*, 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, Ohio*, 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)) (citation and internal quotation marks omitted). 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.[5]

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. 2d. Am. Compl. at ¶¶ 89, 104; Ex. A (Simms Decl.). 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 ¶ 89; Ex. A (Simms Decl.) at ¶ 5. Plaintiff Simms' injury is both "(a) concrete and

[5] 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. Ari Z. 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 merely 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 addressed 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 (citations and internal quotation marks omitted).

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 ex. rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 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, 729 (1984) (finding that "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).

2. Plaintiffs' Claim of Discriminatory Assignment to Undercover Work is Not Subject to *Brown v. Brody*.

Defendant's reliance on *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999) ignores the plain language of the case: by its own terms *Brody* does not apply to pattern and practice cases such as this one. Relying on *Brown v. Brody*, Defendant suggests that Defendant's racially discriminatory request that Plaintiff Simms conduct an undercover assignment while pregnant "is not an adverse action under Title VII" and therefore "fails to state a claim under Title VII and cannot serve as a springboard for any unidentified

class members." Def.'s Mem. at 13. The fact that this is a pattern and practice case renders Defendant's argument legally incorrect.[6, 7]

By its own terms, *Brody* does not govern pattern and practice cases. In *Brody*, the plaintiff argued that any sort of personnel action that is undertaken by a federal employer for a discriminatory reason is actionable under Title VII. For support, the Plaintiff pointed to the following passage in *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987):

> A plaintiff may bring a Title VII claim for alleged discrimination with respect to any employment decision . . . of the federal government. [Title VII covers] 'all personnel actions' [based on race, color, religion, sex, or national origin] regardless of whether the personnel action affects promotions or causes other tangible or economic loss.

Id. at 97-98 (citation omitted). Recognizing that *Palmer*'s language appeared to conflict with *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985), *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984) and other cases in the Circuit, the court reconciled *Palmer* with those decisions. *Brody*, 199 F.3d at 453-54. The court explained that unlike the *Palmer* plaintiffs, the plaintiffs in *Brody*, *Mitchell*, and *McKenna* alleged individual disparate treatment claims, not a pattern and practice claim. *Id.* at 454. Because individual disparate treatment claims and

[6] While Defendant has previously insisted that this is not a pattern and practice case, the Court expressly rejected Defendant's contention in its July 7, 2006 Order. July 7, 2006 Op. at 7-8.

[7] In addition, Defendant has waived this argument because it was not raised in Defendant's May, 2006 Motion to Dismiss. Plaintiff pled no new claims of discriminatory assignment to undercover work in the Second Amended and Supplemental Class Complaint, as compared to the First Amended and Supplemental Class Complaint. *Compare* Am. Compl. 95-102 *with* 2d Am. Compl. 87-89. However, Defendant did not raise his *Brown v. Brody* argument in moving to dismiss the discriminatory assignment to undercover work claim in his May, 2006 Motion to Dismiss, relying exclusively on his standing argument. *See* Def.'s May, 2006 Mot. to Dismiss at 39-40. Thus, Defendant's *Brown v. Brody* argument should be deemed waived. *See, e.g., Gilmore v. Shearson/Am. Express, Inc.*, 811 F.2d 108, 112 (2d Cir. 1987), *overruled on other grounds by McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988); *SEC v. Lucent*, No. 04-CV-2315, 2006 WL 2168789, at *4 n.2 (D.N.J. June 20, 2006); *Sears Petroleum & Transp. Corp. v. Ice Ban Am. Inc.*, 217 F.R.D. 305, 307 (N.D.N.Y. 2003); *Abbell Credit Corp. v. Bank of Am. Corp.*, No 01 C 2227, 2002 WL 335320, at *7 (N.D. Ill. Mar. 1, 2002); *U.S. Fid. & Guar. Co. v. Jepsen*, No. 90 C 6931, 1991 WL 249706, at *2 (N.D. Ill. Nov. 14. 1991); *Keefe v. Derounian*, 6 F.R.D. 11, 13-14 (N.D. Ill. 1946). *But see El-Hadad v. Embassy of U.A.E.*, 69 F. Supp. 2d 69, 77 (D.D.C. 1999), *rev'd on other grounds by El-Hadad v. U.A.E*, 216 F.3d 29 (D.C. Cir. 2000).

pattern and practice claims are "very different," the *Palmer* holding that "'all personnel actions . . . regardless of whether the personnel action affects promotions or causes other tangible or economic loss'" was not inconsistent with its holding or the *Mitchell* and *McKenna* holdings. *Id* (citation omitted). Accordingly, the *Brody* Court carefully limited its holding to cases alleging individual disparate treatment, expressly distinguishing pattern and practice cases.

Thus, Defendant's argument that claims of discrimination in undercover assignments should be dismissed under *Brody* is wrong, because *Brody* does not apply to this putative class action in which Plaintiffs allege a pattern and practice of discrimination.

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

1. Plaintiff Simms' Hiring Claim is Not "Moot."

Defendant's argument that Plaintiff Simms' hiring claim is "moot" ignores key facts in the record and well-established precedent. Defendant states that Plaintiff Simms' hiring claim is "moot" because her "situation was resolved in 2003," and thus there is "nothing left here for the Court to fix." Def.'s Mem. at 9. Defendant's factual statement is blatantly misleading: Plaintiff Simms' ongoing experience of financial and emotional injury resulting from hiring discrimination demonstrates that her situation is far from "resolved."

Plaintiff Simms has ongoing financial and emotional injuries resulting from Defendant's discriminatory hiring practices. Defendant misleads the court by failing to disclose two facts. First, after filing four separate grievances[8] and receiving four separate

[8] Defendant quibbles that Plaintiff Simms' first letter appealing her initial hiring grade did not constitute a "grievance." Def.'s Mem. at 8 n.6. The fact is that Plaintiff Simms was hired as a GS-5 and only by her

decisions, Defendant admits that Plaintiff Simms was granted, more than a year after she was hired, her GS-9 retroactive to September 22, 2002, not her date of hire, August 26, 2002. *See* Ex. B (Def.'s Statement of Material Facts filed May 31, 2006) at ¶ 144[9]; Def.'s Mot. to Dismiss Exs. 5-9; Ex. C (Aug. 6, 2003 Letter from C. Shepard[10]). Even Defendant admits Plaintiff Simms 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. Ex. B (Def.'s Statement of Material Facts filed May 31, 2006) 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 emotional 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)) (internal quotations omitted); *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*

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own advocacy was that grade raised to a GS-7. Defendant's semantic game does not change the substance of the facts.

[9] Plaintiff relies on Defendant's previous Statement of Material Facts because Defendant notably excluded this fact from the Statement of Material Facts he filed with the instant Motion.

[10] "Simms" is Plaintiff Simms' matrimonial surname. Her previous last name was "Shepard."

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*. (citations omitted) 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*.[11]

2. Testing Claims Are Part of Hiring Claims.

As one integral element of being hired into the Secret Service, Plaintiffs' testing claim is part and parcel of Plaintiffs' hiring claim. Defendant provides no rationale why this is not the case.

On the contrary, Defendant admits elsewhere that the entrance examination into the Secret Service, the TEA, is an essential component of the Secret Service's hiring

[11] While it is inapposite to Defendant's claim of mootness, Defendant appears to argue that he did not discriminate against Plaintiff Simms with respect to her hiring grade but, instead, did not have the relevant information at the time of Plaintiffs Simms's hire. Def.'s Mem. at 8-9. Plaintiffs dispute this fact. *See* Ex. A (Simms Decl.) at ¶ 3. Moreover, as Plaintiffs have not yet had the opportunity to conduct discovery on Plaintiff Simms' hiring claims, any consideration of what was and was not known by Defendant at the time of Plaintiff Simms' hiring is premature.

process, explaining that disparate impact at the TEA stage is directly relevant to whether minority applicants experience disparate impact in hiring. *See* Ex. D (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 v. Ridge*, 305 F. Supp. 2d 126, 133 (D.D.C. 2004). 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. This is exactly the harm that Plaintiff Simms experienced as a result of discrimination in hiring.[12] *See* Section II(B)(1), *supra*. Differentiating between the

[12] While Plaintiffs Harris, Hendrix, and Tyler suffered from the discriminatory TEA, these claims are time barred and the underlying facts were pled as background evidence only.

aspects of a hiring claim that each cause the same harm with respect to promotion is both illogical and without legal support.

C. Plaintiff Robertson May Bring a Claim of Discriminatory Discipline.

Defendant's claim that "plaintiffs do not present this Court with even one allegation of discrimination in disciplinary action which is said to have occurred from 1999 forward," Def.'s Mem. at 10, is flat wrong. Plaintiff Robertson presents exactly such a claim.[13]

Defendant's semantic game of claiming the Secret Service's discriminatory placement of Plaintiff Robertson on administrative leave does not constitute "discipline" fails. Defendant seeks to rely on 5 U.S.C. § 75 and 5 C.F.R. § 752 to limit the definition of "discipline." *See* Def.'s Mem. at 10, 11-12. However, by its own admission, the Secret Service can—and has—expanded the definition of discipline contained in 5 U.S.C. § 75 and 5 C.F.R. § 752. *Id*. at 10-11 ("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*.") (emphasis added). Therefore, again by Defendant's own admission, federal law provides no limitation on what constitutes discipline in the Secret Service.[14]

The Secret Service uses as discipline punishments that are not included in its formal definition of "discipline." In the Department of Treasury Office of Inspector

[13] Plaintiffs plead independent claims neither based on the discriminatory discipline against Plaintiffs Hendrix and Harris nor the failure to adequately discipline white Special Agents who attended the Good Ol' Boys Roundup. Rather, these facts serve as background evidence of discrimination in the discriminatory discipline claims of Plaintiff Robertson and the class.

[14] What's more, Defendant's reliance on 5 U.S.C. § 75 and 5 C.F.R. § 752 is affirmatively misleading. While these sections of the United States Code and Code of Federal Regulations govern "suspensions, demotions and removals," Def.'s Mem. at 10, of federal employees, they suggest no limitation on what constitutes "discipline" of a federal employee.

General Office on Investigations' February, 2001 Integrity Oversight Review of the United States Secret Service Inspection Division, the Secret Service's parent agency recognized that discipline used in the Secret Service was not limited to the Secret Service's formal definition. In finding "discipline administered not always consistent with similar penalties for like offenses," the Oversight Review specifically identified the use of memoranda of counseling, verbal counseling, leave restriction, denial of a within-grade increase, and a "Last Chance/Firm Choice Agreement" as discipline imposed in the sample of 75 discipline files reviewed. Ex. E (Department of Treasury Office of Inspector General Office on Investigations' February, 2001 Integrity Oversight Review of the United States Secret Service Inspection Division) at 11-13. The Oversight Review recognized the Secret Service's formal limitation of discipline to letters of reprimand, suspensions, demotions, and removals, *id*. at 9-10, but went on to discuss the *actual* implementation of discipline (termed "informal" to reconcile the Secret Service's formal definition and reality), including the categories of discipline identified above. *Id.* at 11-13. To suggest that a Plaintiff cannot challenge as discriminatory discipline that even the Secret Service's parent agency recognizes as discipline (and inconsistently applied discipline at that) is legally wrong and fundamentally unfair.

Moreover, discipline not falling within the Secret Service's formal definition is considered in the promotion process. For example, in a recent 30(b)(6) deposition, the Defendant's designee admitted that informal counseling and attendance at mandatory diversity training was included in an Employee Relations Database used to vet selectees

for promotion's disciplinary histories.[15] Ex. F (Dep. of D. Pupillo, Aug. 24, 2006) at 143 (also terming counseling and diversity training as "disciplinary"); *see also id.* at 81-82 (terming counseling and diversity training as "punishment"). Again, while these punishments are clearly *used* as discipline, they do not fall within the Secret Service's formal definition of "discipline." Similarly, 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. G (Def.'s Resp. to Pls.' Interrog. No. 5) at 37-38, 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 Mem. at 10-12. 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 promotion 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 promotion process as "discipline." The allegation of misconduct against Plaintiff Robertson—holding a National Organization of Black Law Enforcement Executives

[15] As Defendant has yet to produce the Employee Relations Database, requested in May, 2006, Plaintiffs cannot provide an exhaustive list of categories of discipline actually imposed but not falling within the Secret Service's formal definition.

"meet and greet" during her initial Secret Service training—could identically be used against her in the promotion process. Yet, Defendant claims this is not actionable.

Defendant's suggestion that Plaintiff Robertson has not suffered harm from her discriminatory discipline, Def.'s Mem. at 18, is flat wrong. As a result of Defendant's discriminatory discipline of Plaintiff Robertson, her career-ladder (non-competitive) promotions and eligibility for competitive promotion are both delayed by several months. *See* Ex. H (Pls.' Resp. to Def.'s Interrog. No. 23) at 28-29. Moreover, Plaintiff Robertson has already suffered emotional injury as a result of Defendant's imposition of discriminatory discipline. *See* 2d Am. Compl. at ¶ 104; Ex. H (Pls.' Resp. to Def.'s Interrog. No. 23) at 28-29. As elaborated in Section II(A), *supra*, emotional injury is sufficient to satisfy standing requirements. *See, e.g.*, *Heckler*, 465 U.S. at 739; *Gray*, 545 F.2d at 173-76.

Because Plaintiff Robertson has a viable claim of discriminatory discipline, she is not subject to dismissal as a Plaintiff as suggested by Defendant.

D. Plaintiffs' SES Non-Selection Class Claim is Not Subject to Dismissal.

Defendant claims that Plaintiffs' class claim of non-selection to SES is not exhausted and that Plaintiffs do not have standing to bring the claim. Defendant's exhaustion argument relies on a purposeful ignorance of established law on this precise issue.[16] Defendant's "standing" argument relies on a misunderstanding of the law; Defendant actually makes an argument that Plaintiffs are inadequate class representatives for the SES claim. As such, this argument is premature and appropriately made in response to Plaintiffs' class certification motion, due February 23, 2007.

[16] As Plaintiffs presented this law in their opposition to Defendant's May, 2006 Motion to Dismiss, Defendant was aware of this precedent when he filed the instant Motion.

1. The SES Class Claim is Vicariously Exhausted.

Defendant claims that non-selection claims to SES are not "like or related" to non-selection claims to GS-14 and GS-15. Def.'s Mem. at 14. Defendant is wrong as a matter of law. 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 v. Birmingham S. R.R.*, 514 F.2d 678, 687-89 (5th Cir. 1975), 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).

Under *Gamble*, Defendant's attempt to distinguish between the selection process for promotion to GS-14 and GS-15 and promotion to SES is inapposite. The *Gamble* Court did not rely on a comparison between the selection processes for conductor and supervisor to find that claims of non-selection to conductor and supervisor are "like or related" and a comparison between the GS-14/15 and SES selection processes is not in

order here. 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 SES.

Therefore, Plaintiffs Moore and Turner's exhaustion of non-promotion claims to GS-14—three times ratified by this Court—vicariously exhausts claims of promotion to SES.

2. Defendant's Argument that Plaintiffs are Not Adequate Class Representatives for the SES Claim is Premature.

Defendant argues that because no named Plaintiff pleads discriminatory denial of promotion to the SES-level, Plaintiffs' class claim of discrimination in promotion to SES must be dismissed. Def.'s Mem. at 14-15. Defendant is wrong.

It is beyond question—Defendant has not questioned—that Plaintiffs Moore, Turner, Summerour, Ivery, Tyler, Hendrix, Harris, and Rooks all have standing to bring non-promotion claims. Plaintiffs seek to represent a class of individuals who have been discriminatorily denied promotions to the GS-14, GS-15, and SES levels. The question of whether Plaintiffs Moore, Turner, Summerour, Ivery, Tyler, Hendrix, Harris, and Rooks are adequate class representatives to represent class members who have experienced discrimination with respect to promotion to the SES level is a class certification inquiry that is premature.

Defendant's suggestion that Plaintiffs lack "standing" to bring suit on behalf of putative class members confuses the concepts of standing and adequacy of the named plaintiff to maintain a class action. "Though the concepts [of standing and adequacy of status to maintain a class action] appear related, in that they both seek to measure

whether the proper party is before the court to tender the issues for litigation, they are in fact independent criteria." Alba Conte & Herbert B. Newberg, *Newberg On Class Actions,* § 2.9 (4th ed. 2006). "Once [a plaintiff's] standing has been established, whether [that] plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23 of the Federal Rules of Civil Procedure." *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998) (citing *Cooper v. Univ. of Tex. at Dallas,* 482 F. Supp. 187 (N.D. Tex.1979). *See also Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (evaluating plaintiff's individual standing before considering her ability to fairly and adequately protect the interests of the class).

Defendant's implication that the question of adequacy can be decided for Defendant at this juncture is wrong.[17] In *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994), the D.C. Circuit held with reference to Plaintiffs seeking to challenge discrimination in entirely different positions:

> [W]here a plaintiff charges that subjective employment decisions have allowed the employer systematically to discriminate on the basis of gender in choosing among the minimally qualified applicants, the potential for common issues of law and fact among applicants for different positions clearly exists regardless of individual differences in job descriptions or minimal qualifications. *Id.* (citation omitted.

In reaching its holding, the D.C. Circuit expressly considered the unfairness of distinguishing between high-level government positions:

> In other words, we are unwilling to hold as a matter of law, that a named plaintiff who unsuccessfully applied for one job can never represent an employee who unsuccessfully applied for another job simply because the

[17] While Plaintiff insists that this argument is inappropriate at the motion to dismiss stage, Defendant has waived the argument for the purpose of a motion to dismiss. Defendant relied exclusively on its exhaustion argument in moving to dismiss SES claims in its May, 2006 Motion to Dismiss. *See* May, 2006 Motion to Dismiss at 20-21. As such, the argument is waived. *See, supra*, at 9 n.6.

> application process for the second job included a separate and different element. Indeed such a restriction would permit an employer to defeat the broad enforcement of Title VII simply by administering different objective tests as part of the application process. *See Cook* [*v. Boorstin*]. 763 F.2d [1462], 1469 ("the plethora of job categories at the higher levels of the federal bureaucracy and in many other white collar organizations suggests that adopting [the agency]'s approach to proof of discrimination [which would have limited each proof of discrimination to evidence regarding only one job category] could well preclude the effective use of statistics in combating race discrimination in many if not most areas of high-level employment") (alteration in original) (internal quotation marks omitted).

Id. Plaintiffs have alleged exactly what *Duffey* requires: excessive subjectivity in all levels of competitive promotion. 2d. Am. Compl. at ¶ 16. Plaintiffs are entitled to develop facts in discovery that support an argument that the same excessive subjectivity in promotions to the GS-14 and GS-15 level infects promotions to the SES level and results in common issues of law and fact allowing certification under *Duffey*. Defendant agreed to a scheduling order whereby non-expert discovery ends February 2, 2006 and Plaintiffs' class certification motion is due February 23, 2006. For Defendant to now suggest that Plaintiffs must immediately proffer enough evidence to support a class certification decision is demonstrably unfair.[18]

[18] What's more, the *Duffey* showing (for which Plaintiffs are certainly entitled to develop and present evidence), is only necessary when Plaintiffs seek to challenge *different jobs*. Here, Plaintiffs challenge promotions to different levels within the *same job* (a Series 1811 Special Agent of the United States Secret Service). This is hardly the across the board class action conceived by *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158-59 (1982), in which the Supreme Court held it would not "presume" a plaintiff who complained of discriminatory non-promotion could adequately represent of class of individuals complaining of discriminatory hiring.

CONCLUSION

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

Respectfully submitted,

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