UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RENAE MARABLE, et al., **Plaintiffs,** **v.** **DISTRICT HOSPITAL PARTNERS, L.P.,** **Defendant.**	**Civil Action 01cv02361 (HHK)**

MEMORANDUM OPINION AND ORDER

Plaintiffs are six African-American persons, who were employed by George Washington University Hospital ("GWUH") as Nursing Assistants, prior to their termination on November 15, 1998.[1] Plaintiffs were terminated when GWUH eliminated its Nursing Assistant position and replaced it with a new position, that of Multi-skilled Technician ("MST"). During this transition, Nursing Assistants were invited to apply to become MSTs, although to actually become MSTs, they had to satisfy a number of requirements. These requirements are challenged here. Plaintiffs bring this action on their own behalf, and on behalf of all similarly situated persons, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. and the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

This matter comes before the court on defendant's motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(6). Defendant claims that this action should be dismissed

[1] The District Hospital Partners, L.P. does business as George Washington University Hospital ("GWUH").

because: (1) plaintiffs fail to properly state a disparate impact claim under Title VII, and (2) plaintiffs have not appropriately exhausted their administrative remedies.[2] Upon consideration of defendant's motion, plaintiffs' opposition thereto, and the record of this case, the court concludes that defendant's motion must be granted in part and denied in part.

I. BACKGROUND

Prior to November 1998, GWUH employed approximately 125 Nursing Assistants, approximately 95% of whom were African-American.[3] These Nursing Assistants performed basic nursing skills, such as bathing patients, recording patient intakes and outputs, and taking vital signs, all under the direct supervision of registered nurses.

Citing financial difficulties, GWUH decided to abolish the Nursing Assistant position in 1998. GWUH notified plaintiffs of this decision on July 24th of that year. At that time, plaintiffs were also notified that GWUH was creating a new job category, that of Multi-skilled Technician. Plaintiffs were told they could become MSTs, provided they met the following four requirements. First, applicants had to complete a "Request to Transfer" form within two weeks.

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[2] Pursuant to Fed. R. Civ. P. 12(f), defendant also asks this court to strike plaintiffs' request for a jury trial and for compensatory and punitive damages because such relief is limited to circumstances when plaintiffs allege intentional discrimination. *See* 42 U.S.C. § 1981a. Plaintiffs have since withdrawn this request, recognizing that such relief is not provided when a plaintiff makes only a disparate impact claim. *See* Pls.' Opp. at 1 n. 1. In addition, defendant's motion to dismiss further provides that plaintiffs' complaint must be dismissed as untimely. Defendant has since withdrawn that portion of its motion, recognizing that plaintiffs' complaint was, in fact, filed within the applicable limitations period. *See* Def.'s Partial Withdrawal of Mot. to Dismiss.

[3] Plaintiffs claim that approximately 95% of the Nursing Assistants were African-American, and virtually all of the remaining 5% were minorities. Plaintiffs contend that "only a couple of Nursing Assistants were Caucasian." Am. Compl. ¶ 27.

Second, each applicant had to pass three written examinations, which tested the applicant's mathematical competence and reading and writing ability. Third, each was required to attend a MST training course, consisting of ten one-hour classes, and, as a fourth requirement, each class period ended with a written test, which applicants were required to take and pass. Am. Compl. ¶ 28.

Few Nursing Assistants were able to successfully clear these hurdles. According to plaintiffs, almost all of the Nursing Assistants took the math, reading, and writing tests, yet only one-quarter of the Assistants passed. *Id.* ¶ 32. Moreover, of those who passed these initial screening tests, only three-quarters passed all ten weekly examinations. *Id.* ¶ 34. The experiences of the six plaintiffs presently before this court appear to be somewhat representative. That is, plaintiff Carolyn Murphy declined to take the three screening tests because she was afraid she would not pass and she deemed the tests to be unfair. Plaintiffs Nancy Price, Kathleen McDonald, and Jeanette Adams, took, but did not pass, the three screening tests. Plaintiffs Renae Marable and Zahiyyah Muhammad passed the screening tests and attended the training course, but failed examinations administered thereunder.

Plaintiffs challenge the requirements, not just because they imposed a formidable hurdle. Rather, plaintiffs claim the requirements were arbitrary in nature and application and "had a disparate impact on African-American candidates." Am. Compl. ¶ 31. The requirements were arbitrary in nature, according to plaintiffs, because they were unrelated to MST's actual job responsibilities. Moreover, the requirements were reportedly arbitrary in application because: (1) those who had not previously been Nursing Assistants at GWUH were not forced to satisfy these conditions, and (2) GWUH has continued to employ many of the previously-employed full

time Nursing Assistants who failed to qualify as MSTs as part-time Nursing Assistants, a position without fringe benefits or fixed hours.

II. ANALYSIS

A. Legal Standard for a Motion to Dismiss

This matter comes before the court on defendant's motion to dismiss. "A motion to dismiss should not be granted 'unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.'" *Beverly Enterprises, Inc. v. Herman*, 50 F. Supp. 2d 7, 11 (D.D.C. 1999) (quoting *Kowal v. MCI Communications, Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). To that end, the complaint must be construed liberally in the plaintiffs' favor and plaintiffs should receive the benefit of all favorable inferences that can be drawn from the alleged facts. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1334-35 (D.C. Cir. 1985).[4]

In this motion to dismiss, defendant claims that plaintiffs (1) fail to state a cognizable Title VII disparate impact claim, and (2) failed to exhaust their administrative remedies. To these claims the court now turns.

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[4] In reaching its decision, the court considered plaintiffs' EEOC charge, which was specifically referenced in, and central to, plaintiffs' complaint as well as the record of the EEOC investigation which ensued. The court's consideration of such material does not convert defendant's motion into one for summary judgment. *See EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Baker v. Henderson*, 150 F. Supp. 2d 13, 15 (D.D.C. 2001).

B. Disparate Impact Claim

Defendant first contends that plaintiffs' complaint should be dismissed because plaintiffs fail to state a disparate impact claim. Defendant argues that plaintiffs' allegations fail because the complaint only states, in a conclusory manner, that plaintiffs suffered disparate impact discrimination without alleging sufficient facts to support the conclusion that African-Americans fared worse than did non-African-Americans during GMUH's staff reorganization. Such conclusory statements, according to defendant, are insufficient as a matter of law.

Plaintiffs counter by arguing that the complaint provides all that is necessary because it states: "The Defendant's own validation study established that some of this testing had a disparate impact on African-American candidates." Am. Compl. ¶ 31. The complaint further provides that the tests and other requirements were neither job related nor consistent with business necessity. *Id*. ¶¶ 30, 35. Plaintiffs state that under Federal Rule of Civil Procedure 8(a), no more is required.

In order to make out a prima facie case of disparate impact discrimination, defendant is correct that plaintiffs must eventually show that defendant's policies or practices have resulted in decreased minority employment. *See Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (plaintiffs must show a "disparity between the minority and majority groups in an employer's workforce"); *EEOC v. Joe's Stone Crab. Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (providing that, in order to make a disparate impact claim, the plaintiff must be able to point to a statistical disparity between the proportion of a statutorily protected group in the relevant labor pool and the proportion of that group hired). Defendant is again correct in noting that plaintiffs' complaint does not clearly allege that minorities fared worse than did non-minorities during GMUH's staff

reorganization. Defendant is mistaken, however, in asserting that plaintiffs' complaint must be dismissed because it lacks such specific contentions.

This Circuit has clearly established that while a plaintiff ultimately has the burden of proving the elements of prima facie employment discrimination, she "need not set forth the elements of a prima facie case at the initial pleading stage." *Sparrow v. United Air Lines*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). *Accord Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1086 (D.C. Cir.1998) ("[A] plaintiff need not allege all the facts necessary to prove its claim."); *Atchinson v. Dist. of Columbia*, 73 F.3d 418, 421-22 (D.C. Cir. 1996) ("A complaint . . . need not allege all that a plaintiff must eventually prove."); *Johnson-Tanner v. First Cash Fin. Services*, 2003 WL 99431 (D.D.C. Jan. 2, 2003) (quoting *Glymph v. Dist. of Columbia*, 180 F. Supp. 2d 111, 114 (D.D.C. 2001)); *Woodruff v. DiMario*, 197 F.R.D. 191, 193-94 (D.D.C. 2000).

As plaintiffs recognize, Fed. R. Civ. P. 8(a)(2) requires only that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court recently affirmed, under this Rule, a plaintiff need not plead facts beyond those which would "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (quoting *Conley*, 355 U.S. at 47). *See generally Nat'l Fair Housing Alliance, Inc. v. Prudential*, 208 F. Supp. 2d 46 (D.D.C. 2002).

Plaintiffs have cleared this low threshold. Racial discrimination, disparate impact claims are, of course, claims "upon which relief can be granted," and plaintiffs' statement that defendant's four requirements "have had a disparate impact on African-American employees of

GWUH" gives defendant ample notice of plaintiffs' claim. Am. Compl. ¶ 40; *see Woodruff*, 197 F.R.D. at 195. Plaintiffs' complaint, therefore, states a cognizable claim. Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is accordingly denied. *See generally Saunders v. Caldera*, 193 F. Supp. 2d 1, 4 (D.D.C. 2001) (finding that the plaintiff's complaint which merely provided that the plaintiff was denied a promotion as a result of the Army's equal opportunity policy "squarely" stated a cognizable claim).

C. EEOC Exhaustion

Defendant next claims that plaintiffs' claim must be dismissed because plaintiffs have failed to exhaust their administrative remedies.

Plaintiffs' complaint provides that "Plaintiff Marable filed a timely charge of discrimination on her own behalf and on behalf of all remaining named Plaintiffs with the United States Equal Employment Opportunity Commission on or about April 2, 1999, complaining of the acts which give rise to this lawsuit." Am. Compl. ¶ 6. Defendant contests this assertion mightily, claiming that plaintiffs' EEOC charge failed in two respects. First, defendant contends that plaintiffs did not adequately exhaust their administrative remedies with respect to the three initial screening tests (the math, reading, and writing tests). Plaintiffs fell short, according to defendant, because "Ms. Marable is the only Plaintiff to have filed a charge with the Equal Employment Opportunity Commission" and since she passed those three screening tests, she had no ability to complain about them. Def.'s Mot. to Dismiss at 2. Second, defendant argues that while plaintiffs' EEOC charge may have complained of the three initial screening tests–that was the extent of it. Thus, according to defendant, plaintiffs may not challenge the other three hurdles the Nursing Assistants had to clear, (i.e., defendant's requirements that Nursing

Assistants: (1) file a "Request to Transfer" form within two weeks; (2) attend training courses; and (3) pass examinations administered thereunder), because these requirements, as beyond the scope of the filed EEOC charge, were never properly exhausted.

1. Legal Framework

Before delving into these particular matters, a brief word on Title VII's administrative framework is warranted. Title VII requires that a person complaining of a violation file an administrative charge with the EEOC. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995). Once the charge is filed, a person cannot file suit until the EEOC has had an opportunity to review the claim. *Park*, 71 F.3d at 907. Moreover, if a person does opt to file suit after completing the EEOC charging process, the plaintiff's claims are limited to those claims that were asserted in the administrative complaint or that are "like or reasonably related to the allegations of the charge and [which grow] out of such allegations." *Id.* (internal citation omitted). This requirement advances three salutary interests. The requirement: (1) gives the EEOC an opportunity to investigate the charge; (2) puts the charged party on notice; and (3) narrows the issues for prompt adjudication. *See id.*; *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429, 472 n. 325 (D.C. Cir. 1976); *Christopher v. Billington*, 43 F. Supp. 2d 39, 47 (D.D.C. 1999).

In this case, defendant claims that plaintiffs failed to exhaust their administrative remedies. "In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations," and so defendant has the burden of showing the insufficiency of plaintiffs' EEOC charge. *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *accord Downey v. Runyon,* 160 F.3d 139, 146 (2d Cir. 1998); *Bowden v. United States*, 106 F.3d

433, 437 (D.C. Cir. 1997); *Armstrong v. Reno*, 172 F. Supp. 2d 11, 20-21 (D.D.C. 2001).

2. Charge was Filed on Behalf of All Plaintiffs.

Defendant's first argument rests on its factual assertion that plaintiff "Marable is the only Plaintiff to have filed a charge with the Equal Employment Opportunity Commission." Def.'s Mot. to Dismiss at 2. If that statement is accepted, then consequences may flow. Plaintiffs contest this assertion, however. Plaintiffs claim that 42 U.S.C. § 2000e-5(b) allows filing "on behalf of a person claiming to be aggrieved" and contend that Marable, in fact, quite clearly filed the EEOC charge on her own behalf as well as on behalf of others.

First, it is quite clear that an EEOC charge may be filed on behalf of another. *See* 42 U.S.C. § 2000e-5(b) (allowing filing "on behalf of a person claiming to be aggrieved"); 29 C.F.R. § 1601.7 (establishing procedures whereby a claimant may file charges on another's behalf). *See also Eichman v. Indiana St. Univ. Bd. of Trustees*, 597 F.2d 1104-1107-08 (7th Cir. 1979) (finding that an EEOC charge that briefly mentioned the plaintiff as a person aggrieved by the defendant's actions satisfied the charge requirement); *Antonopulos v. Aerojet-General Corp.*, 295 F. Supp. 1390, 1393 (E.D. Cal. 1968) ("where . . . someone has filed a charge with the EEOC containing the names of other persons similarly aggrieved, it is not necessary that those persons named file separate charges as a prerequisite to bringing a civil suit").

After finding that a charge may legally be filed on behalf of others, the court must determine whether the instant EEOC charge was, in fact, so filed. First, the court must determine whether plaintiffs complied with the applicable regulation concerning representative filing, and second whether the charge was clear enough, on its face, that it was being filed on behalf of Marable as well as others.

Turning to the first question–whether plaintiffs complied with the applicable regulation–the regulation at issue, 29 C.F.R. § 1601.7(a), states in pertinent part:

> A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII . . . may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name, address and telephone of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization of such charge by the person on whose behalf the charge is made. Any such person may request that the Commission shall keep his or her identity confidential . . . .

29 C.F.R. § 1601.7(a).

In support of its argument that plaintiffs failed to comply with this regulation, defendant first contends that plaintiffs failed to verify the charge.[5] Def.'s Reply at 12. That is, according to defendant, "[t]here is no allegation or evidence in this case that any plaintiff other than Marable ever verified to the EEOC her desire to be treated as a charging party, or even authorized Marable to file charges on her behalf." *Id*.

Defendant's verification argument is premature. As the very case defendant cites in support of this proposition makes plain, the resolution of such a question requires fact-finding,

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[5] There is a factual dispute regarding whether a list of persons was actually attached to the EEOC charge, as required by 29 C.F.R. § 1601.7(a). Plaintiffs claim that such a list (which included twenty-one names, including the names of all plaintiffs to this action) was appended. Plaintiffs further provide that "EEOC records and plaintiffs' counsel's records clearly indicate that the list of other charging parties was attached to the Charge." Pls.' Opp. at 9 n. 4. Defendant disputes this fact and claims that no list of persons was ever included, and even that "undersigned counsel was expressly told by an EEOC agent in 1999 that no list of signatures was included with the Charge." Def.'s Reply at 11-12. Defendant concedes, however, that "for purposes of this motion, the Court must assume that the list was appended to Marable's charge when filed with the EEOC." *Id*. at 12.

the time for which has not yet come. *See Alfred v. Centex Corp.*, 2002 WL 226340, * 6 (N.D. Tex. Feb. 13, 2002) (citing extensive deposition testimony in support of the court's eventual conclusion that the EEOC charge was filed with the third parties' authorization).

In further support of its argument that the charge was procedurally inadequate, defendant next highlights the "dispositive fact" that the EEOC treated Marable's charge as if it were filed on her behalf only. Def.'s Reply at 12. Defendant provides that: (1) in the "notice of charge," the box intended to signal that a charge is filed "on behalf of another," was left blank, and (2) at the end of its investigation, the EEOC sent a right to sue letter to Marable only. Defendant argues that the EEOC's "failure to issue [a right to sue] letter to any Plaintiff other than Marable is conclusive proof that the EEOC deemed the charge to be filed on Marable's behalf only." Def.'s Reply at 13.

While the above facts are somewhat persuasive, they are insufficient to satisfy defendant's burden of proof regarding plaintiffs' failure to exhaust. Here again, the court relies on *Alfred v. Centex Corp*. In *Alfred*, the question was whether six plaintiffs satisfied the exhaustion requirement–whether they were included in the charge filed by plaintiff Bynum on their behalf. Defendant argued they were not, relying on the fact that "when the EEOC ultimately issued a notice of right to sue, it did not draft it as a proper third-party notice and did not forward it, as EEOC regulations require, to the aggrieved parties, but only to Bynum and her counsel." *Alfred*, at *3. The court did not find this fact determinative, however. Relying, in part, on the fact that the six plaintiffs, in their affidavits, noted that they were made aware of the notice and understood its import, the court overlooked this procedural error and denied the defendant's motion for summary judgment as to this claim. *Id*., at *7. Here, given the heightened motion to

dismiss standard, the court finds this failure similarly non-determinative.[6] Defendant has not demonstrated that plaintiffs' charge was procedurally flawed in violation of 29 C.F.R. § 1601.7(a).

After determining that the charge was procedurally adequate, the court must determine whether the charge provided defendant with adequate notice that it was filed on behalf of Marable as well as others. The charge provided:

> Charges are herewith filed by Ms. Renae Marable . . . on her own behalf and on behalf of the attached list of persons who were also employed as Assistant Nurses and subjected to the same acts of a [sic] discriminatory discharge and have authorized Ms. Marable to file charges on their behalf.

Def.'s Ex. A. ¶ 4. The charge went on to provide: "Renae Marable also files these charges on behalf of all other Assistant Nurses who were similarly situated and subjected to the same discriminatory discharge." *Id.* ¶ 5. The charge continued: "The class of employees involved consists of all Assistant Nurses who were unlawfully terminated on or about November 15, 1998 . . . . *Id.* ¶ 6.

In determining whether the charge is sufficient, the relevant inquiry is whether the charge provides adequate notice of the fact that it was filed on behalf of Marable *and* others. *Cf. President v. Vance,* 627 F.2d 353, 361 (D.C. Cir.1980); *Shehadeh v. Chesapeake & Potomac Tel. Co*., 595 F.2d 711, 727-28 (D.C. Cir. 1978); *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 203 (D.D.C. 2002) ("'adequacy of notice is [at] the core of Title VII's administrative exhaustion

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[6] The court notes that the possibility exists that, assuming the EEOC treated the charge as an individual charge, it did so out of error. If so, "courts have affirmed the principle that errors committed by the EEOC to the detriment of complainants bringing EEOC charges cannot, as a matter of equity, be allowed to deny the complainants relief under Title VII." *Alfred*, at * 5; *accord Beverly v. Lone Star Lead Const. Corp.*, 437 F.2d 1136, 1138 (5th Cir. 1971).

requirements'") (quoting *Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985) (in turn citing *Loe v. Heckler*, 768 F.2d 409, 417-18 (D.C. Cir. 1985)); *Colantuoni v. Macomber*, 807 F. Supp. 835, 838 (D.D.C. 1992). In this case, after giving plaintiffs the benefit of all favorable inferences, as the court must under Rule 12(b)(6), the court finds that defendant was on notice that the charge was filed by Marable for and on behalf of herself and others.[7]

3. The EEOC Charge Properly Challenged the Entirety of Defendant's Conduct.

Defendant next claims that plaintiffs failed to exhaust because the EEOC charge only complains of one narrow requirement: the initial math, reading, and writing screening tests. Plaintiffs' limited EEOC charge, according to defendants, cannot serve as the basis for this broader judicial action.

As stated previously, Title VII actions are "limited in scope to claims that are 'like or reasonably related to the allegations of the charge and growing out of such allegations.'" *Park,* 71 F.3d at 907 (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994)); *accord Mayfield v. Meese*, 669 F. Supp. 1123, 1127 (D.D.C. 1987). That is, a plaintiff's complaint may, in some respects, span more broadly than her administrative charge, but her claims must at least

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[7] Plaintiffs claim, alternatively, that even if the charge is interpreted to have been filed only on behalf of Marable, the other plaintiffs' claims are similar enough that the other plaintiffs should receive the benefit of the single file rule. *See generally Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C. Cir. 1981) (discussing the single file rule) (citing *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968)); *Mayfield*, 669 F. Supp. at 1132. Under the single-filing rule, "in a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1011 (11th Cir. 1982) (internal citations and quotations omitted). Because the court finds that the charge was, in fact, filed on behalf of all six plaintiffs, the court need not, at this time, consider whether plaintiffs have satisfied the requirements to receive the benefit of the single file rule.

arise from "the administrative investigation that can reasonably be expected to follow the charge of discrimination." *Park*, 71 F.3d at 907 (quoting *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981)). *Accord Marshall v. Fed. Express Corp.*, 130 F.3d 1095 (D.C. Cir. 1997).[8] The question before this court, then, is whether plaintiffs' charge is sufficiently broad to form the basis for the present legal action. After careful analysis, the court finds that it is, in most respects.

In this case, the administrative charge stated that plaintiffs opposed the elimination of the Assistant Nurse position and its replacement with the MST position and provided that, as a result of defendant's actions, "the large majority of Assistant Nurses, a protected class of employees, suffered termination of employment in violation of Title VII." Def.'s Ex. A., ¶ 3. Moreover, the administrative charge complained of the requirements imposed on those who wished to become MST's, stating: "To be eligible for continued employment under the new classification the Assistant Nurses were required to pass two separate[ly] administered written test[s]." *Id.*, ¶ 7.[9]

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[8] Generally, courts agree that in construing whether a claim was properly raised, the charge filed before the EEOC is to be "liberally construed," *Colantuoni v. Macomber*, 807 F. Supp. 835, 838 (D.D.C. 1992) (quoting *Brown ,*777 F.2d at 13). This liberal construction is usually considered appropriate because EEOC charges are often filed by "persons who are unfamiliar with the technicalities of formal pleadings." *Tillman v. City of Boaz*, 548 F.2d 592, 594 (5th Cir. 1977). In such cases, courts find that "the administrative charge requirement should not be construed to place a heavy technical burden on 'individuals untrained in negotiating procedural labyrinths.'" *Park*, 71 F.3d at 907 (quoting *Loe v. Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985)). Some courts have held, however, that when plaintiffs are assisted by counsel in the filing stage, as these plaintiffs were, the EEOC charge need not be given such a liberal construction. *See Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991); *Blalock v. Dale County Bd. of Educ.,* 84 F. Supp. 2d 1291; 1302 (M.D. Ala. 1999); *Hawley v. Dresser Indus., Inc.*, 737 F. Supp. 445, 452 n. 3 (S.D. Ohio 1990). The D.C. Circuit has not yet expressed its view.

[9] It is somewhat unclear whether plaintiffs are challenging the written math, reading, and writing tests (as one entity) and also the ten written examinations administered at the conclusion

The charge provided that the tests, which a "large majority of the Assistant Nurses" did not pass, were "discriminatory," not job related, and unsupported by "business necessity." *Id*., ¶¶ 3, 6, 7.

While defendant is correct that plaintiffs' charge fails to discuss separately each of the four requirements challenged in this action, the court finds that, with one exception, plaintiffs' allegations before this court are similar enough to those in their EEOC charge that they could reasonably grow out of an investigation therefrom. In both the charge and the instant complaint, plaintiffs state a disparate impact, racial discrimination claim, challenging defendant's conduct during a narrow window of time: from November 1998 through April 1999. Moreover, in both the charge and complaint, plaintiffs challenge defendant's decision to terminate all Nursing Assistants as well as the testing requirements defendant imposed on those who wished to transition from the eliminated Nursing Assistant position to the new MST position. Thus, it appears that plaintiffs' charge adequately challenged the math, reading, and writing tests as well as the requirement that plaintiffs attend ten training courses and pass examinations administered in connection therewith.

In this case, moreover, the court need not merely opine as to whether plaintiffs' instant claims would be encompassed by an EEOC investigation reasonably following the charge. In this case, the EEOC actually conducted an investigation. The course of this investigation, therefore, provides useful evidence of how plaintiffs' administrative charge was reasonably understood. *See EEOC v. Reichhold Chemicals Inc*., 700 F. Supp. 524, 526 (N.D. Fla. 1988) (providing that, while interpreting a charge, a court may look to the actual investigation that

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of each training class (as one entity), constituting these "two tests." Alternatively, plaintiffs may be inaccurately referring to the math, writing, and reading tests.

ensued).[10] The EEOC's investigation into plaintiffs' charge focused on, not just the three math, reading, and writing tests, but also the ten-week training program and the tests offered thereunder, thus recognizing that the charge encompassed these aspects of defendant's conduct.[11] The EEOC's investigation thus confirms the court's initial determination that defendant's screening tests, training course, and examinations thereunder, were all adequately challenged by plaintiffs' EEOC charge.

The court does not find, however, even under the lenient motion to dismiss standard, that plaintiffs adequately exhausted their claim with respect to the requirement that Nursing Assistants submit a "Request to Transfer" form within two weeks. This requirement, which is somewhat analytically distinct from the other three, was neither referred to in the administrative charge, nor hinted at in the course of the ensuing investigation. Defendant has therefore shown that plaintiffs have failed to exhaust their administrative remedy with respect to this claim.

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[10] Defendant argues that the court should not look to the scope of the EEOC's investigation because "'it is not the scope of the actual investigation pursued that determines what complaint may be filed, but what EEOC investigation could reasonably be expected to grow from the original complaint.'" Def.'s Reply at 5 (quoting *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 128 (7th Cir. 1989)). This court's approach is not in serious tension with *Schnellbaecher,* however, because *Schnellbaecher* recognizes that "the investigation may help define the scope of the charge." *Schnellbaecher*, 997 F.2d at 127. The court here is merely recognizing that what was done by the EEOC is persuasive evidence of what was reasonably done by that body.

[11] As an aside, the court reiterates that "'adequacy of notice is [at] the core of Title VII's administrative exhaustion requirements.'" *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191 (D.D.C. 2002) (quoting *Brown*, 777 F.2d at 14) (in turn citing *Loe*, 768 F.2d at 417-18). Here, the charge's adequacy is, in part, exemplified by the fact that, in the course of the EEOC investigation, defendant made statements that demonstrated its recognition that plaintiffs were challenging its entire process of replacing Nursing Assistants with MSTs–not just the isolated math, reading, and writing examinations. *See* Pls.' Ex. 1 at 96 *et seq*. This helps to show that defendant was on adequate notice regarding the scope of plaintiffs' charge.

III. CONCLUSION AND ORDER

For the foregoing reasons, the court concludes that defendant's motion to dismiss must be **GRANTED** in part and **DENIED** in part. All elements of plaintiffs' complaint survive except plaintiffs' challenge to the requirement that Nursing Assistants file a "Request to Transfer" form within two weeks.

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Henry H. Kennedy, Jr.
United States District Judge

Dated: February 20, 2003