UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RENAE MARABLE, et al., **Plaintiffs,** **v.** **DISTRICT HOSPITAL PARTNERS, L.P.,** **Defendant.**	**Civil Action 01-cv-02361 (HHK)**

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action against George Washington University Hospital ("GWUH"),[1] alleging that tests it employs to screen applicants for Multi-skilled Technician ("MST") positions are racially discriminatory in violation of 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. In 1998, GWUH eliminated the position of Nursing Assistant and replaced it with a new MST position. "Internal" applicants, those who had been Nursing Assistants, and external applicants for these positions were required to pass certain examinations in order to be considered for the position. Plaintiffs, five Black former Nursing Assistants, allegedly were denied employment as MSTs as a result of their performance on the tests. Plaintiffs challenge the use of the tests on their own behalf and seek to do so as well on behalf of a putative class of Black external applicants for the MST positions who were not hired because they did not pass the tests.

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

Before the court is plaintiffs' motion to permit two unsuccessful Black external applicants, Monica Brooks and Tracee Taylor, who failed the tests in 1999 and 2002, respectively, to intervene [#57] in this action.[2] Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that plaintiffs' motion should be granted.

I. BACKGROUND

A. Factual Background

When GWUH eliminated its Nursing Assistant position and replaced it with the MST position, it established two hiring procedures for the new position: one for displaced Nursing Assistants and a second for external applicants. Former Nursing Assistants who wished to become MSTs were required to first pass three screening examinations on math, reading comprehension, and writing in order to be admitted to the MST training program. According to GWUH, the tests were administered to the former Nursing Assistants to determine whether they would be successful in the MST training program. Former Nursing Assistants were permitted to take each of these three screening exams twice and were offered free tutoring if they failed the first time. Former Nursing Assistants who passed the tests were admitted to a training program, completion of which required passing ten more examinations to obtain employment as a MST.

External candidates were screened for education and experience, and those selected also were administered the tests. According to GWUH, the tests were administered to the external applicants to determine whether they would be successful in the MST position. External

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[2] Plaintiffs' motion was captioned as a "Motion for Leave to File an Amended Complaint." Plaintiffs accept that their characterization of the motion was inappropriate and that the motion is properly considered as a motion to intervene. *See* Pls.' Reply at 1 n.1. Plaintiffs also indicate that the former Nursing Assistants intend to "pursue their claims through individual suit, even if joined together in a single action." *Id.* at 2.

applicants were only provided one opportunity to pass each exam and GWUH did not offer any assistance in preparing for the exams. The external applicants who passed the exams were evaluated against the other external applicants before consideration was given to offering them MST positions. Plaintiffs contend generally that the tests had an unlawful discriminatory impact on Black applicants.

B. Procedural Background

In their second amended complaint, plaintiffs sought class certification on behalf of former Black Nursing Assistants and external applicants, but they did not include any external applicants among the named class representatives. On August 31, 2006, this court denied plaintiffs' motion for class certification on the grounds that the distinct purposes of the tests with regard to Nursing Assistants and external applicants indicate that the claims of the two groups lacked commonality of questions of law or fact as required by Rule 23(a) of the Federal Rules of Civil Procedure. Furthermore, the court concluded that it could not separate the groups into sub-classes because: (1) the named representatives did not include any external applicants and their claims were not typical of external applicants; (2) there were not a sufficient number of Black former Nursing Assistants to qualify as a sub-class without the external applicants; and (3) the Black external applicants could not qualify as a sub-class without a named representative. Plaintiffs now seek to add two Black external applicants in order to cure these deficiencies.

II. ANALYSIS

GWUH opposes plaintiffs' motion on the grounds that (1) the motion is futile because it will not cure the deficiencies in plaintiffs' class claims; (2) the claims of the external applicants are time-barred; and (3) the external applicants have not exhausted their administrative remedies.

A. Futility

GWUH contends that plaintiffs' motion is futile because the addition of the two external applicants for MST positions would not address the court's determination that plaintiffs had not demonstrated that their class claims fulfilled the commonality and typicality requirements of Rule 23(a). GWUH is correct that the addition of external applicants would not change the fact, or bear upon this court's determination, that the tests were used for two different purposes insofar as the applications of former Nursing Assistants and external applicants are concerned. Perhaps because they recognize the problem this presents for their attempt to gain class certification for a class that would include former Nursing Assistants *and* external applicants, plaintiffs explain in their reply that they no longer seek class certification for former Nursing Assistant applicants.[3] Given this understanding, the addition of external applicants Monica Brooks and Tracee Taylor would appear to adequately lay the groundwork for seeking certification of the external applicants as a separate class. The tests were used for the same purpose regarding all external applicants — to determine their likelihood of success in the MST position — and the two named representatives appear to have claims typical of a class comprised solely of such applicants. The

[3] GWUH must be excused from failing to recognize this, of course, because plaintiffs did not make this explicit until filing their reply. *See* Pls.' Reply at 1–2.

claims of such a class would also appear to involve common questions of law or fact. Thus, the court rejects GWUH contention that plaintiffs' motion is futile.

B. Exhaustion of Administrative Remedies

GWUH next contends that the external applicants who plaintiffs seek to add to this suit have failed to exhaust their administrative remedies, which is a prerequisite to maintaining a Title VII suit in federal court. Plaintiffs contend, however, that they may rely on plaintiff Marable's EEOC charge under the "single-filing rule" applicable to class action suits under Title VII.

It is well established that, "each individual plaintiff in a Title VII class action suit need not individually file an EEOC complaint, but that it is sufficient if at least one member of the plaintiff class has met the filing prerequisite." *Foster v. Gueory*, 655 F.2d 1319, 1321 (D.C. Cir. 1981) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)). Further, a federal complaint need not be a mirror image of the EEOC charge, but the Title VII claims 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 v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (internal quotation marks and citations omitted). Plaintiffs in a class-action suit may rely on an EEOC charge if "(1) there is a reasonable relationship between the allegations in the EEO charge and the civil complaint; and (2) the civil claim can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge." *Contreras v. Ridge*, 305 F. Supp. 2d 126, 132 (D.D.C. 2004) (internal quotation marks and citations omitted).

Here, these requirements have been satisfied. In her EEOC charge, Marable asserted that the tests were discriminatory against Blacks on behalf of herself and all Nursing Assistants; she

did not include external applicants because she was apparently of the mistaken belief that external applicants were not required to take the test. Def.'s Opp'n, Ex. 4 at 2 (Marable EEOC Charge) ("Persons hired from the outside to fill the vacancies were not required to take either of the written tests."). However, the EEOC investigation ultimately encompassed all of those who took the test — including external applicants — and GWUH was well aware that the investigation examined any discrimination against external applicants. Indeed, GWUH conducted a validation study concerning the impact of the exam on both internal and external applicants, which it submitted to the EEOC. Pls.' Mot. to Cert. Ex. 2 at 2 (Right to Sue Letter, Aug. 10, 2001) (discussing validation study). In these circumstances, Marable's allegations in her initial EEOC charge bore a "reasonable relationship" to the complaint made here by the external applicants and their claim here could "reasonably be expected" to have grown out of the investigation of Marable's EEOC charge. Thus, the exhaustion requirement is not an impediment to the attempt to seek redress for the external applicants in this action.

C. Timeliness of External Applicants' Claims

GWUH finally contends that the external applicants' claims are time-barred because the normal provision tolling the 90-day statute of limitations during the pendency of a class action is not applicable. Plaintiffs counter that they are asserting the same claim as plaintiffs in the initial complaint, which was timely, and thus they are entitled to tolling.

Ordinarily, "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (permitting intervention where class certification was denied for lack of

numerosity). Once the statute of limitations has been tolled, "it remains tolled for all members of the putative class until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

There is no merit to GWUH's contention that this doctrine protects only individual claims, not class claims. The cases that GWUH cites for support refer to the prohibition against filing "new but repetitive complaints." *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *see also Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (concluding that plaintiffs may not "piggyback one class action onto another and thus toll the statute of limitations indefinitely"). These cases stand for the proposition that plaintiffs bringing a *new* class action complaint are not entitled to tolling, but they have no application to *intervention* in an existing class action by plaintiffs covered by the original putative class claims. Intervention to substitute a new named representative does not start a new class action, and such intervenors are entitled to tolling of the statute of limitations from the filing of the first complaint. *See Shields v. Washington Bancorp.*, 1992 WL 88004, *2 (D.D.C. Apr. 7, 1992) (permitting intervention where named representative was initially rejected); *but see Fleck v. Cablevision VII, Inc.*, 807 F. Supp. 824, 825–27 (D.D.C. 1992) (concluding that new proposed class representative is not entitled to tolling). As the Third Circuit concluded in similar circumstances, "class claims of intervening class members are tolled if a district court declines to certify a class for reasons unrelated to the appropriateness of the substantive claims for certification." *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389 (3d Cir. 2002).

Because the intervenors here were part of the initial putative class and their claims were

not rejected on substantive grounds, they are entitled to tolling of the statute of limitations from the date the complaint was filed to the date the class certification was rejected. The external applicants sought to intervene on the day that class certification was denied.[4] As they were entitled to tolling during the pendency of the class certification issue, their motion to intervene was timely and is not barred by the statute of limitations.

III. CONCLUSION

For the foregoing reasons, it is this 29th day of May, 2007 hereby

ORDERED that the plaintiffs' motion to amend the complaint and to intervene [#57] is **GRANTED.**

Henry H. Kennedy, Jr.
United States District Judge

[4] As Marable's complaint was filed on the last day of the 90-day statute of limitations period, the motion to intervene was due on the date that certification was denied.