UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 00-0953 (RWR)**
	)	
TOM RIDGE, Secretary U.S. Department of Homeland Security,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, ten black current and former special agents of the United States Secret Service -- individually and on behalf of a putative class of black special agents who have been employed by the United States Secret Service as GS-1811's from January 1, 1974 to the present -- filed this action against the Treasury Secretary[1] under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2000), and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Plaintiffs allege that the Secret Service has engaged in a pattern and practice of racial discrimination in its promotion of black special agents from the

[1] As the Secret Service is now housed in the Department of Homeland Security, Secretary Tom Ridge will be substituted for the Treasury Secretary as the defendant. Fed. R. Civ. P. 25(d)(1).

GS-13 to the GS-14 level. Defendant filed a Motion to Dismiss ("Mot. to Dismiss") arguing, among other things, under Federal Rule of Civil Procedure 12(b)(1), that this court lacks jurisdiction over plaintiffs' claims because of plaintiffs' failure to exhaust their administrative remedies. Because the class claim has been filed prematurely without exhaustion of administrative remedies, defendant's motion to dismiss that claim will be granted without prejudice. Because plaintiff Reginald Moore has exhausted his individual non-selection claim, and because the individual non-selection claims of Special Agents John Turner, C. Yvette Summerour, Cheryl Tyler and Luther Ivery can be deemed vicariously exhausted by Moore's claim, defendant's motion to dismiss those claims will be denied. Defendant's motion to dismiss the remaining individual claims regarding discrimination in transfers and assignments (including discriminatory assignments to undercover work), as well as claims regarding discrimination in making career-enhancing opportunities, discrimination in hiring, testing, discipline, awards, bonuses, and performance evaluations available to black agents, will be granted because these claims were never filed with the EEOC and administratively exhausted. For the same

reason, defendant's motion to dismiss the hostile environment claims and retaliation claims will be granted.

BACKGROUND

Plaintiffs allege that the Secret Service has systematically discriminated against them in the areas of recruitment, assignments, promotions, and discipline, among other claims. (See Class Action Complaint ("Compl.") ¶¶ 7-20.) Plaintiffs recount a history of non-selections, desultory recruitment efforts, exclusion from choice assignments, and general harassment, all of which was brought to the attention of Secret Service management at various points throughout a period of twenty-six years beginning in 1974. (See id. ¶¶ 12, 21-25, 34, 40.) According to plaintiffs, management at the Secret Service repeatedly assured them that the Service would improve its efforts to recruit, hire and retain black agents. (See id. ¶ 40.) Plaintiffs filed this action asserting that after twenty-five years of unsatisfactory progress, they could no longer rely on the Service to redress their grievances.

I. GENERAL HISTORY OF ALLEGED DISCRIMINATION: 1974-1999

Black agents of the Secret Service sent then-Director H.S. Knight a memorandum in 1974 outlining numerous concerns that they had about the treatment of black agents within the Service. (Id.

¶ 6.) The agents noted that less than three percent of the agents in the Secret Service were black, that most of the black agents in the field offices were limited to working on less desirable "check cases," and that only one black agent that year was considered sufficiently qualified to merit a promotion. (Id. ¶¶ 7-9.)

The agents sent a similar communication to Director Knight in 1977, outlining essentially the same concerns. (Id. ¶ 10.) In this second communication, the agents recounted two specific incidents where racial slurs had been uttered in a black agent's presence. (Id. ¶¶ 12-13.) The agents explained that they had not brought their claims to the attention of the equal employment opportunity ("EEO") personnel in the Secret Service because they believed that the EEO personnel were neither qualified to address their concerns nor interested in doing so. (Id. ¶ 11.) Director Knight issued a letter to all Secret Service employees, urging them to refrain from uttering racist remarks and ordering all supervisors to handle reports of such incidents promptly and firmly. (Id. ¶ 14.)

Ten years later, representatives of the black special agents met with Kevin Houlihan, the Assistant Director of the Office of Investigations, and George Opfer, the Acting Assistant Director

of Protective Operations. (Id. ¶ 15.) In that meeting, the black agents reiterated the same concerns that they had ten years before: continuing discrimination in recruiting and hiring, promotions, assignments and discipline. (Id.) In particular, the agents challenged the apparent lack of effort to recruit black agents, the Service's failure to assign any black agents to the policy-making divisions at headquarters, the disproportionate relegation of black agents to undercover assignments, the differences experienced in matters of discipline, and the fact that black agents spent a longer time within promotion grades than their non-black counterparts. (Id. ¶¶ 16-20.) In response, Assistant Director Houlihan agreed to intensify recruitment efforts, to keep channels of communication open with the black agents, and to discuss their concerns with other Secret Service management personnel. (Id. ¶¶ 22-25.)

Two years later in 1989, representatives of the black special agents sent another memorandum to then-Director John R. Simpson, which detailed the same concerns that were outlined in 1987 and 1974.[2] (Id. ¶ 33.) In that same year, the black agents of the Secret Service filed an EEO complaint requesting

[2] In the 1989 memorandum, the black special agents added that the Secret Service discriminated when giving out awards as well. (See Compl. ¶ 28.)

certification of a class of black special agents who were alleging widespread discrimination throughout the entire Secret Service. (See Mot. To Dismiss at 14-15.) The administrative judge handling the case recommended denying class certification in November 1990, and in 1991, the Department of the Treasury issued a Final Agency Decision accepting the recommendation. (Id. at 15-16.) The plaintiffs there did not appeal the decision. (Id. at 16.)

Seeing no improvement in the employment practices of the Service, the black special agents sent another memorandum outlining their concerns to then-Director John W. Magaw. (See Compl. ¶ 34.) Recounting no effort by Director Magaw to specifically address the issues raised by the black agents, plaintiffs allege that the Secret Service continued to adhere to an "old boy" system which systematically excludes black employees from desirable employment positions and subjects black agents within the organization to disparate treatment. Plaintiffs here filed this action on May 3, 2000.

II. AGENTS' INDIVIDUAL CLAIMS

A. Reginald Moore

Lead plaintiff Reginald Moore alleges that he was the victim of a discriminatory selection process when he applied for and was

denied promotions on two occasions in 1999. Plaintiff states that he applied for a position at the GS-14 level and was denied the promotion while a less-qualified white male received it. (Id. ¶ 50.) In addition, Moore claims that he has been subject to discriminatory performance evaluations. (Id. ¶ 61.) On October 12, 1999, Moore filed an individual complaint with the Department of the Treasury alleging that his non-selection was the product of discrimination. (See Pls.' Mem. Of P. & A. in Opp'n to Def.'s Mot. To Dismiss ("Pls.' Opp'n") at 5, Ex. 1 & Ex. 2.)

B. John Turner

John Turner alleges that he was discriminated against in the promotions process twice in 1999. Plaintiff asserts that he applied for and was denied a promotion to the GS-14 level in favor of two less-qualified white males. (See Compl. ¶ 52.) In addition, he claims that the Secret Service discriminated against him by giving him unfavorable treatment in performance evaluations. (Id. ¶ 62.) Turner also claims that the Secret Service discriminated against him when he was hired at the GS-5 level, despite his former status as a GS-8 while working for the Bureau of Prisons and despite three years of service in the Army. Turner also alleges that he was retaliated against for expressing

concerns about the lack of diversity in Service leadership positions in 1995. (Id. ¶¶ 92, 120.) Turner filed a class action complaint with the Department of the Treasury on or about February 2, 2000.[3] (See Pls.' Opp'n at 5 & Ex. 1.)

C. Yvette Summerour

Yvette Summerour applied for twelve promotions from January to December 1999 and was denied a promotion on each occasion while allegedly similarly situated or lesser-qualified white agents were promoted. (Id. ¶ 54.) Summerour also claims that she was discriminated against through deflated performance evaluations, by being given transfers and assignments that diminished her chances of promotion, and when a Service recruiter told her in the year she was hired that she could not apply directly from college though other white agents were hired straight from college. (Id. ¶¶ 63, 69, 93.) Summerour never filed an EEO complaint.

D. Leroy Hendrix

Leroy Hendrix claims that he was denied an assignment to a "whip" position while four white agents who were less qualified

[3] The parties have advanced two different dates for the filing of Turner's class action complaint. Defendant states that Turner filed on February 3, 2000, and plaintiffs contend that Turner filed on or about February 2, 2000. The parties do not allege that this discrepancy is of any consequence.

than Hendrix were assigned to whip positions in 2000. (Id. ¶ 70.) In addition, he claims that the Secret Service discriminated against him by hiring him at a GS-7 level although he was previously a GS-9 in the Air National Guard. (Id. ¶ 94.) Furthermore, Hendrix asserts that he was discriminatorily forced to take the Treasury Enforcement Exam ("TEA") three times before passing it, which delayed his employment as a special agent. Hendrix also alleges a hostile work environment claim because in 1989, a white agent used a racial epithet in his presence. (Id. ¶ 110.) Hendrix never filed an EEO complaint.

E. Cheryl Tyler

Cheryl Tyler resigned from the Secret Service in 1999 after fifteen years of service. (Id. ¶ 55.) She alleges that during her time in the Secret Service, she was discriminated against in promotions and assignments, that she was subjected to a discriminatory test -- the TEA -- which she initially did not pass, and that she was subjected to a racially hostile work environment in the Atlanta, Georgia field office. (Id. ¶¶ 55, 87, 100, 111.)

F. Luther Ivery

Luther Ivery alleges that despite his ten years of employment with the Service, he has not been promoted from the

GS-13 level after having applied for fifty-three positions in nearly every division of the Secret Service between 1997 and 2000. (Id. ¶ 56.) In each instance, he was passed over, many times in favor of an allegedly similarly-situated white employee. (Id.) Ivery also claims that he was assigned to do undercover work without having been provided undercover training or a gun. (Id. ¶ 88.) In addition, he claims that the Service discriminated against him by hiring him at the GS-5 level when similarly-situated white agents were hired at the GS-7 level. (Id. ¶ 95.) Ivery also claims that he has suffered retaliation for taking part in this lawsuit (id. ¶ 121), and that he has endured a hostile work environment in the Los Angeles field office where racial epithets were uttered in his presence numerous times. (Id. ¶ 112.) Ivery never filed an EEO complaint.

G. Arthur Evans

Arthur Evans, who retired in 1999, makes only one claim here. During his tenure in the Secret Service, he claims that he was subjected to a hostile work environment. (Id. ¶ 113.) While assigned to the Tampa, Florida office, he was under the allegedly harassing scrutiny of a white Special Agent in Charge ("SAIC") who treated him worse than his white counterparts, and during a

special agents' training session in Washington, D.C., he heard a white agent refer to him with a racial slur. (Id.) Evans never filed an EEO complaint.

H. Robert Moore

Robert Moore retired from the Secret Service in 1993. He alleges that he was subjected to discrimination in promotions, hiring, transfers and assignments; was subjected to a racially hostile work environment; and suffered retaliation for making racial discrimination complaints. (Id. ¶¶ 57, 71-73, 89, 96, 114, 122.) Moore never filed an EEO complaint.

I. Donald Tucker

Donald Tucker retired from the Secret Service in 1990. (Id. ¶ 41(i).) He claims that the Secret Service discriminated against him when it did not promote him to the GS-15 level after a tenure at headquarters as the Assistant Special Agent in Charge ("ASAIC") of the counterfeit division. Tucker alleges that other white males who had held the ASAIC position transferred out of it at the GS-15 level. (Id. ¶ 58.) In addition, he claims that he received a discriminatory performance evaluation when he was the SAIC of the Phoenix, Arizona field office, that he was discriminated against when the Service made selections for bonuses and performance awards, and that he was subjected to a

hostile work environment claim when agents posted swastikas and racial slurs on the walls of Service offices in 1987. (Id. ¶¶ 64, 107, 115.) Tucker never filed an EEO complaint.

J. Jenell G. Walker-Clark

Jennell Walker-Clark resigned from the Secret Service in 1996. (Id. ¶ 41(j).) She claims that she received discriminatory performance evaluations, that she was discriminated against in transfers and assignments, and that she was denied career-enhancing opportunities. (Id. ¶¶ 65-66, 74-84.) In addition, she claims that despite having a master's degree, she was hired as a GS-7, while other white agents with master's degrees were hired at the GS-9 level. (Id. ¶ 97.) Furthermore, she claims that she was subjected to retaliation during her tenure in the Atlanta field office after complaining about racial discrimination. (Id. ¶ 124.) Finally, she alleges that she was discriminated against in disciplinary matters, bonuses and awards, and that between 1990 and 1992, she was subjected to a racially hostile work environment. (Id. ¶¶ 104-105, 108, 116-118.)

DISCUSSION

I. APPLICABLE LEGAL PRINCIPLES

Before a court may address the merits of a complaint, it must be assured that it has the authority to exercise jurisdiction over the claims. See Scott v. England, 264 F. Supp. 2d 5, 8 (D.D.C. 2002) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)). Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss a claim based on the court's lack of jurisdiction over the subject matter, and the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. Forrester v. United States Parole Comm'n, 310 F. Supp. 2d 162, 167 (D.D.C. 2004); see also McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (noting that the plaintiff "must carry throughout the litigation the burden of showing that he is properly in the court").

Because subject matter jurisdiction focuses on the court's authority to hear the claim, a court must "conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not," 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d ("Wright & Miller") § 1350 (1990), by examining the complaint and, "where necessary, . . . [by] consider[ing] the complaint supplemented by

undisputed facts evidenced in the record. . ..” Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003). If the defendant facially challenges the basis for subject matter jurisdiction, the plaintiff’s factual allegations are assumed to be true. See Wright & Miller, § 1350; see also Artis v. Greenspan, 223 F. Supp. 2d 149, 154 (D.D.C. 2002). If the jurisdictional ground pled in the complaint is “insufficient or entirely lacking, but there are facts pleaded in the complaint from which jurisdiction may be inferred, then the [Rule 12(b)(1)] motion must be denied.” Minebea Co., Ltd. v. Papst, 13 F. Supp. 2d 35, 38 n.2 (D.D.C. 1998) (citing Wright & Miller).

A defendant may move to dismiss a claim under Rule 12(b)(1) for plaintiff’s failure to exhaust her administrative remedies that are a condition precedent to filing suit. See Scott, 264 F. Supp. 2d at 9. Under Rule 12(b)(6), a court may dismiss for failure to state a claim only if the plaintiff would be unable to prove any set of facts that would entitle her to relief. See Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); see also Alexis v. Dist. of Columbia, 44 F. Supp. 2d 331, 336 (D.D.C. 1999). A court must accept as true all well-pleaded facts alleged by the plaintiff, and must give the plaintiff the benefit of all reasonable inferences that can be derived in her

favor. See Coleman v. Pension Benefit Guar. Corp., 94 F. Supp. 2d 18, 21 (D.D.C. 2000); see also Alexis, 44 F. Supp. 2d at 336. In order to determine whether the facts alleged by the plaintiff state a claim, the court may consider the facts in the complaint and any attached documents incorporated in it. See E.E.O.C. v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). The court need not, however, accept as true the legal conclusions that are drawn by the plaintiff. See Papasan v. Allain, 478 U.S. 265, 286 (1986).

In its motion to dismiss, defendant argues that plaintiffs failed to administratively exhaust both their individual and class claims, and that many of the individual claims are untimely. (See Mot. to Dismiss at 2.) Plaintiffs assert that the class claim has been administratively exhausted; that since the lead plaintiff exhausted his claims, the claims of the other plaintiffs may be deemed to have been vicariously exhausted; and that the defendant is equitably estopped from raising its exhaustion argument and that the doctrine of continuing violations renders their untimely claims timely. (See Pls.' Opp'n at 3.)

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Prior to filing a Title VII suit, ordinarily a federal employee must exhaust her administrative remedies as described in 29 C.F.R. Part 1614. Failure to exhaust will deprive a court of jurisdiction over the Title VII claim. See 42 U.S.C. § 2000e-5(b); Love v. Pullman Co., 404 U.S. 522 (1972). If an aggrieved employee believes that she has been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap, then she must consult an EEO counselor in an effort to informally resolve the situation. See 29 C.F.R. § 1614.105(a). This contact with the EEO counselor must occur within forty-five days of the alleged discriminatory action. See id. § 1614.105(a)(1).

If the EEO counselor is unable to informally resolve the matter within thirty days of the date of the aggrieved person's first contact, the counselor must inform the party of her right to file a formal complaint of discrimination. See id. § 1614.105(d). The agency must then complete an investigation within 180 days of the filing. See id. § 1614.106(e)(2).

If a class complaint is filed with an agency, the agency must, within 30 days of receiving the complaint, forward the complaint and other relevant information to the EEOC. See id.

§ 1614.204(d)(1). The EEOC will assign the case to an administrative law judge or complaints examiner, who then makes a decision to accept or dismiss the complaint. See id. at § 1614.204(d)(1)-(7). The agency must take final action by issuing a final order within forty days of receiving the hearing record and administrative judge's decision. See id. at § 1614.204(d)(7).

Section 1614.606 states that "[c]omplaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the agency or the Commission . . . ." 29 C.F.R. § 1614.606. Complaints which are consolidated with earlier filed complaints shall be investigated by the agency "within the earlier of 180 days after the filing of the *last complaint* or 360 days after the filing of the original complaint . . . ." Id. (emphasis added). A complainant has the right to file a civil action in federal district court after administrative remedies have been exhausted. See id. at § 1614.407.

While the remedial purposes underlying Title VII caution against engaging in overly technical interpretations which have the effect of "improperly imped[ing] the goal of making federal

employment free from proscribed discrimination," Loe v. Heckler, 768 F.2d 409, 417 (D.C. Cir. 1985), a court also "cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process." Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir. 1995). The extensive regulatory requirements permit a defendant to understand the nature of the claims and narrow the issues to be adjudicated. See id. More importantly, however, "it is part and parcel of the Congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel 'primary responsibility' for maintaining nondiscrimination in employment.'" Kizas v. Webster, 707 F.2d 524, 544 (D.C. Cir. 1983); see also Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) ("Exhaustion is required in order to give federal agencies an opportunity to handle matters internally whenever possible and to ensure that the federal courts are burdened only when reasonably necessary.").

A. Class Claim

On October 12, 1999, Reginald Moore filed an EEO complaint with the Department of the Treasury alleging that he had been discriminated against when he was passed over for two promotions in the summer of 1999. Turner filed an EEO complaint on or about

February 2, 2000 on behalf of himself and a class of black agents who allegedly had been discriminated against while employed by the Secret Service. (See Pls.' Opp'n at 4-5.) On or about March 9, 2000, the Treasury Department forwarded the case file to the Washington Field Office of the Equal Opportunity Employment Commission ("EEOC"). (See Pls.' Opp'n Ex. 1.) The complaints were consolidated, and on March 20, 2000, the EEOC informed the parties that the class complaint could be deemed to have been filed on October 12, 1999. (Id. at 5.) Defendant urges, however, that the EEOC should have determined that the dispositive filing date was February 3, 2000, fewer than 180 days before plaintiffs filed this action.

Plaintiffs note that the regulation which was in place when Moore filed his complaint stated that "complaints of discrimination . . . may be consolidated . . . for joint processing . . . [and] [t]he date of the *first filed complaint* controls the applicable timeframes . . . ." See 29 C.F.R. § 1614.606 (1999) (emphasis added). Plaintiffs describe that the regulation was changed in 1999, to give the EEOC 180 days from the filing of the *last complaint* to complete its investigation of a matter. (See Pls.' Supplemental Opp'n at 5.) Plaintiffs argue that the regulation did not take effect until November 1999 and

that the EEOC elected not to apply the new regulation and instead, applied the regulation that was in force when Moore filed his complaint in October 1999. Id. They suggest that under Chevron v. National Resources Defense Council, 467 U.S. 837 (1984), the EEOC's determination was a reasonable interpretation of an EEOC-administered regulation to which the court should now defer.

A court must defer to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." See First Am. Disc. Corp. v. Commodity Futures Trading Comm'n, 222 F.3d 1008, 1016-17 (D.C. Cir. 2000) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); see also Auer v. Robbins, 519 U.S. 452, 461 (1997). In this case, applying the old regulation to the consolidated complaint was plainly erroneous. The new rule was published in the Federal Register on July 12, 1999, and in the section entitled "Applicability Dates," the rule stated that "[a]ll actions taken by agencies and by the Commission after November 9, 1999 shall be in accordance with this final rule." Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,644 (July 12, 1999). The consolidation was an action taken by the EEOC on March 20, 2000, well after the November 9, 1999 date. Accordingly, plaintiffs'

class claim is deemed to have been filed when Turner filed his complaint in February 2000. Since this action was filed before the 180-day period for investigating the class claim had expired, the class claim will be dismissed for failure to exhaust administrative remedies.[4]

B. Individual Claims

Defendant argues that many of the individual claims are untimely and/or unexhausted. A plaintiff may assert equitable defenses to failure to comply with a limitations period for initiating a charge. These timing requirements are not meant to be jurisdictional barriers to a plaintiff. Instead, these requirements are subject to the equitable considerations of estoppel and equitable tolling. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Since a claim of untimeliness is an affirmative defense that must be pled by a defendant, a plaintiff has the burden of proving facts which support a ruling that he may avoid the consequences of his own untimeliness. See Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997). Plaintiffs have raised equitable arguments in support of maintaining claims dating back to 1974. Before making those arguments, however, the plaintiffs first state that lead

[4] Thus, defendant's argument that the class claim fails to state a claim need not be reached.

plaintiff Reginald Moore *did* exhaust his claims, and the other claims can survive by means of vicarious exhaustion.

1. Vicarious Exhaustion

Defendant argues that plaintiffs have failed to exhaust their administrative remedies with respect to their individual claims. Plaintiffs oppose, arguing that Reginald Moore's exhausted claim operates to vicariously exhaust the claims of the other individual plaintiffs. Under the doctrine of vicarious exhaustion, a Title VII plaintiff who has failed to file an EEO charge may, under some circumstances, join his claim with that of another plaintiff who *has* filed properly an EEO charge. See Foster v. Gueory, 655 F.2d 1319, 1322 (D.C. Cir. 1981). A plaintiff may invoke the doctrine of vicarious exhaustion only if one plaintiff actually has exhausted his claims and if the exhausted claims are so similar to the unexhausted claims that "it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges . . . ." Id.

In Foster, several non-union plaintiffs attempted to intervene in a Title VII suit brought by black union pile drivers who were alleging racial discrimination in employment. See id. at 1231. Despite alleging that the only difference between themselves and the other plaintiffs was their non-union status,

the district court denied the motion to intervene, in part because the plaintiffs there had not exhausted their administrative remedies. Id. The court of appeals reversed, holding that the plaintiffs' complaints were so similar to the timely-filed complaints that no conciliatory purpose would be served by requiring separate EEOC filings. Id. at 1323. The court noted however, that when "the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts," the additional complaint should not be deemed vicariously exhausted. Id. Critical to the court's reasoning was the opportunity for a defendant to be on notice of the charges against it. There, all of the plaintiffs' claims were so similar that one individual filing was enough to make the alleged wrongdoers aware of the scope and nature of the charges. Id.

Similarly, in Cook v. Boorstin, 763 F.2d 1462, 1464 (D.C. Cir. 1985), thirty-one black employees of the Library of Congress were denied permission to intervene in a Title VII class action suit against the Library. The plaintiffs there -- most of whom had failed to exhaust their administrative remedies -- alleged that the Library systematically discriminated against black

employees in promotions and advancement decisions. Id. The court of appeals reversed the district court, holding that the plaintiffs' claims were functionally identical. Though the individual circumstances giving rise to the claims differed, each plaintiff planned to prove the same thing: that a pervasive pattern and practice of racial discrimination existed in the area of promotion and advancement. Id. at 1466. Furthermore, since the final decision in the administrative class action had rejected the allegations of systemic discrimination, there was no possibility that the individual claims could be administratively settled. Id.; cf. Mayfield v. Meese, 669 F. Supp. 1123, 1133 (D.D.C. 1987) (holding that the plaintiffs who had failed to exhaust their administrative remedies could not make use of the vicarious exhaustion principle because there was a real possibility that their claims could be settled).

In this case, it is uncontested that Reginald Moore has exhausted his claim. He filed his individual EEO complaint on October 12, 1999, and on April 10, 2000, that claim was exhausted. Moore's complaint described discriminatory failure to promote on two occasions. The only claims which could be sufficiently similar to Moore's claim therefore, are the non-selection claims raised by Agents Turner, Summerour, Tyler,

Ivery, Robert Moore and Tucker.[5] The other claims raised by plaintiffs -- discrimination in hiring, performance evaluations, and testing claims, hostile work environment, retaliation, and discriminatory assignment claims, among others -- have the generic thread of racial discrimination tying them together, but are not the kinds of claims that the Secret Service could have reasonably anticipated while investigating Reginald Moore's single complaint of promotion discrimination. While many of the claims raised by plaintiffs certainly may have had an impact on a decision to promote, it is entirely unclear that investigation of Reginald Moore's 1999 non-selections would have brought to light every other claim that has been made here, or even the non-

[5] In advancing a broad reach of the vicarious exhaustion doctrine, plaintiffs cite cases from two other circuits which suggest that a co-plaintiff who has not exhausted his or her claims need only assert claims on the periphery of issues that were asserted in the exhausted claims. See Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985); see also Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). Although in Oatis, the court did hold that Title VII plaintiffs could join their unexhausted claims to exhausted claims, that ruling sought to ensure that individual claimants could protect their ability to participate in class actions. The defendants there tried to argue that class actions would lie only if *all* members of the class had previously filed a claim with the EEOC. See Oatis, 398 F.2d at 498. Griffin is also distinguishable because the complaint which spurred the internal investigation specifically described individual as well as group claims of discrimination, thereby ensuring that the defendant was on notice of the claims that the non-filers subsequently tried to assert. See Griffin, 755 F.2d at 1532.

selections occurring more than six (Robert Moore) and eight (Tucker) years prior. Therefore, only the non-selection claims of Turner, Summerour, Tyler and Ivery will be deemed to have been vicariously exhausted.[6] All other individual claims will be dismissed for failure to exhaust administrative remedies.

2. Equitable Tolling and Estoppel

Plaintiffs claim that defendant also is equitably estopped from arguing that the statute of limitations bars some of their non-promotion claims. Estoppel saves a claim from being time barred "if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." Id. at 580. "[T]olling on estoppel grounds is proper where 'a claimant has received inadequate notice, . . . where the court has led the plaintiff to believe that she had done everything required of her, . . . [or] where

[6] At oral argument, counsel for the government stated that the Secret Service changed its promotions system in 1997, and conceded that non-selection claims dating back to 1998 would thus be sufficiently similar to survive dismissal. If claims dating back to 1998 would be sufficiently similar, so too would any non-selection claim that postdates the implementation of the new promotions system in 1997. Certainly, then, all non-selection claims referred to in the complaint by Reginald Moore, Turner, Summerour, Tyler and Ivery that postdate the creation of this new system could be deemed vicariously exhausted. Whether "there is a real possibility that one of the claims might be administratively settled while the other[s] can be resolved only be the courts," Foster, 655 F.2d at 1322, ought to await further development of the record.

affirmative misconduct on the part of the defendant lulled the plaintiff into inaction.'" Id.; see also Jarrell v. United States Postal Serv., 753 F.2d 1088, 1091-92 (D.C. Cir. 1985) (holding that the plaintiff would be equitably excused from noncompliance with filing requirements because he relied on the assurances of an EEO officer who stated that he was in the process of rectifying the situation that led the plaintiff to eventually make a complaint); Currier v. Radio Free Europe, 159 F.3d 1363, 1367-68 (D.C. Cir. 1998) (holding that affirmatively misleading statements to an ex-employee gave rise to an equitable claim by the plaintiff).

Plaintiffs offer numerous instances that they claim show that the Secret Service was made aware of the discrimination that existed within the ranks of the organization and that show that it assured the plaintiffs -- albeit allegedly falsely -- that the problems would be meaningfully addressed. The plaintiffs argue that they did not press their rights before now because of their belief in and reliance upon assurances offered by the Service. Although the effectively undisputed[7] facts concerning these

[7] A footnote in the reply memorandum declares that the "Secret Service does not agree with plaintiffs' narration of events." (Def.'s Reply Mem. at 11 n.8.) However, the memorandum supplies no factual rebuttal to the relevant facts alleged by plaintiff concerning defendant's representations, and argues its point on the assumption that plaintiffs' facts are true. (Id. at

contacts as pled by the plaintiffs provide fairly thin support their equitable argument, they suffice to defeat the motion to dismiss under Rule 12(b)(6).[8]

CONCLUSION

Despite plaintiffs' compelling allegations of discrimination within the Secret Service, the class claims must be dismissed because of failure to exhaust, as must the claims of individual plaintiffs that cannot be deemed to have been vicariously exhausted. The non-selection claims raised by five plaintiffs may survive the motion to dismiss because Reginald Moore's claim has been exhausted and there are facts that may equitably estop the defendant from asserting the statute of limitations as a defense. Accordingly, it is hereby

ORDERED that Secretary Tom Ridge, U.S. Department of Homeland Security, be and hereby is, SUBSTITUTED for the Secretary of the Treasury as the defendant. It is further

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11.)

[8] Plaintiffs also assert a theory of continuing violations to save their untimely claims. Because a plaintiff must show that there is a series of related discriminatory acts, one of which falls within the limitations period, or prove the maintenance of a discriminatory system both before and during the limitations period to invoke the continuing violations defense, and because an EEO complaint with at least one timely filed claim is a predicate to the theory, plaintiffs who did not file an EEO complaint cannot save their untimely claims on that ground. See Anderson v. Zubieta, 180 F.3d 329, 336-37 (D.C. Cir. 1999).

ORDERED that defendant's motion to dismiss [#19] be, and hereby is, GRANTED IN PART and DENIED IN PART. Plaintiffs' class claim, and plaintiffs' individual claims except for the discriminatory non-selection claims by Reginald Moore, Turner, Summerour, Tyler, and Ivery, are dismissed. It is further

ORDERED that plaintiffs' amended motion [#83] for class certification and defendant's motions [#62, 84] to postpone briefing be, and hereby are, DENIED as moot. It is further

ORDERED that plaintiffs' motion for a hearing [#107] be, and hereby is, GRANTED. A separate order will issue scheduling an initial scheduling conference. In light of the fact that discovery may begin after the scheduling order is issued at the initial scheduling conference, it is further

ORDERED that plaintiff's motion [#110] for an order regarding preservation of documents be, and hereby is, DENIED. It is further

ORDERED that plaintiffs' motions [##120, 121] to expedite or to refer the case to a Magistrate Judge for all purposes and to reconsider recusal be, and hereby are, GRANTED in part and DENIED in part. As is ordered above, the case will be calendared for an initial scheduling conference in a separate order. Referral to a Magistrate Judge for all purposes is denied absent defendant's

required consent. LCvR 73.1. Reconsideration of recusal is denied without prejudice at this time. It is further

ORDERED that the parties' unopposed motions [##122, 124] for extensions be, and hereby are, GRANTED nunc pro tunc. It is further

ORDERED that the defendant's motion [#126] for leave to file a sur-reply be, and hereby is, DENIED, and that plaintiffs' response [#127] to defendant's sur-reply be STRICKEN.

SIGNED this 24th day of October, 2004.

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RICHARD W. ROBERTS
United States District Judge