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United States District Court, N.D. Illinois, Eastern Division.

Glenn KOSKI, Owen Reeves, Fred Winterroth, Jesse Bean, Jerry Myers, Anthony Bishop, and Michael Mobley, individually, and Aaron Booker, individually and as a member of a class of persons similarly situated, Plaintiffs,
v.
Terrance GAINER, Harry Orr, John Rednour, David P. Schippers, Richard T. Mitchell, Nancy Beasley, Fred E. Inbau, James E. Seiber, James Redlich, in their individual and official capacities, and the State of Illinois, Defendants.

No. 92 C 3293. | Oct. 05, 1995.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** This ruling focuses on the influence of race and gender in the hiring practices of the Illinois State Police ("ISP") over a period encompassing more than 15 years. Plaintiffs are a class consisting of white males who charge the ISP with committing a brand of reverse discrimination that is impermissible under Title VII and unconstitutional under the Equal Protection Clause. Defendants comprise the State of Illinois, the director of the ISP, past and present members of the ISP's Merit Board ("Merit Board"), and the ISP's general counsel.

Plaintiffs originally sought relief under 42 U.S.C. §§ 1981, 1983, and 1985(3) (1988), and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–1 to 2000e–17. Presently before the court are the parties' cross motions for summary judgment on "the issue of liability for [plaintiffs'] hiring claims." For the reasons stated below, the court grants both motions in part and denies them in part.

FACTS

In the mid 1970s, the ISP instituted an affirmative action program that had the avowed goal of hiring substantial numbers of minorities and females. To implement this program, the ISP maintained separate matrices, or lists, for white males, African–American and other racial minority males, and females. Each matrix had its own "cutoff"—a number tied to an applicant's written examination scores—and persons falling below the applicable cutoff were not eligible to continue in the hiring process.[1] The cutoff scores for male and female minority candidates fell well below the score applied to white male candidates, producing an incongruity among candidates who performed equally on the written exam. (*See* Pltf.Ex. I).

Plaintiff Aaron Booker ("Booker"), a white male, sat for the ISP's written examination in 1985 and, apparently, did so again in 1987 and 1989. Although Booker's scores placed him on the ISP's "eligibility lists," he was never invited to complete the application process. In 1992, Booker, along with state troopers who challenged the ISP's use of race in promotion decisions, filed a complaint in federal court. On May 6, 1993, the court granted Booker's motion to certify a class consisting of:

> all white male applicants for hire with the Illinois State Police, from 1975 to the present, who were eliminated from contention, or whose hire date was delayed, by the imposition of a higher cut-off score for white male applicants on the written entrance test than for applicants of all other race/sex groups.

Koski v. Gainer, 1993 WL 153828, at *1 (N.D.Ill. May 6, 1993). The court also rejected defendants' assertion that Booker lacked standing to seek injunctive relief. *Id.* at *3.

Both sides now move for summary judgment on the hiring allegations, even though they disagree about certain facts underlying the lawsuit.[2] The discrepancies and congruencies are discussed immediately below, as the court frames the information presented by the parties in some detail.

HISTORY

***2** In 1972, a woman named Patricia Cross accused the ISP and Merit Board of sex discrimination. As a result, the Merit Board executed a settlement contract with the Equal Employment Opportunity Commission ("EEOC") in 1974 (Deft.Ex. B, p. 4). The settlement required the ISP to maintain nondiscriminatory hiring practices and to compose its trainee classes " 'of at least 25% minorit[ies] and 7% females.' " (*Id.*); *Washington v. Walker,* 529 F.2d 1062, 1064 (7th Cir.1976). It also required the ISP to insure that its then-current use of unvalidated tests would not adversely affect a disproportionate number of minority or female job applicants. (Deft.Ex. B, p. 5). The parties incorporated the 1974 settlement agreement (the "1974 agreement") into a Terms of Resolution, signed in 1976 (the "1976 agreement"). This document required the ISP to report annually to the EEOC on the race and gender composition of its applicants. (*Id.* p. 6).

In addition to the Cross complaint and settlement, defendants have provided a list of 30 sex or race discrimination complaints filed with the EEOC or similar state agencies against the ISP. (Deft.Ex. F–3). These complaints focus on hiring and discharge, span from 1975 to 1992, and appear equally divided between hiring and discharge claims.

The 1976 agreement also stipulated that the ISP would "insure that no less than fifty (50%) percent of those admitted to the training academy will be black, other minorities[,] and females." (*Id.; see* Pltf.Ex. JJ, p. 3). The 50 percent requirement applied when "any of the selection criteria ... have a significant adverse impact ... on females or minorities, and such guidelines have not been validated by the EEOC...." (Deft.Ex. B, p. 6). Thus, the original plan utilized the 50 percent requirement when the ISP's hiring tests adversely affected minorities and were not validated.

The ISP's employment practices in hiring, promotion, and termination have since been the subject of federal litigation. In *Washington,* a case initiated in 1975, black class action plaintiffs sought (and were denied) an injunction restraining the ISP from enrolling future trainees until the plaintiffs' lawsuit, which charged the ISP with racially discriminatory hiring practices, was decided on the merits. The Seventh Circuit ultimately affirmed the district court's dismissal of the case for want of prosecution. *Washington v. Walker,* 734 F.2d 1237 (7th Cir.1984). *Dixon v. Margolis,* 765 F.Supp. 454 (N.D.Ill.1991), involved a class action in which black plaintiffs contended that the ISP engaged in discrimination in the promotion process. The court approved the parties' settlement of *Dixon* in 1992. *Dixon v. Margolis,* 1992 WL 1707 (N.D.Ill. Jan. 2, 1992).

Percentages, Labor Pools, and Job Requirements

The ISP believed that its number of minority and female personnel fell substantially short of the corresponding percentages in the state's population. In 1974, "fewer than 1.7% of the approximately 1690 State Troopers were black, although the pool of eligible applicants was 14.7% black." *Washington,* 529 F.2d at 1063. The parties, however, dispute the numbers and percentages informing the precise degree of the discrepancy. Part of their disagreement lies in the changing job parameters during the years in question, which, in turn, define the applicable labor pool.

***3** In 1974, the ISP required candidates to be between 21 and 33 years of age (or 20 years old with two years of college); to have a high school degree or equivalency certificate; to have minimum uncorrected vision of 20/30, with no color blindness and 100% depth perception; to be a United States citizen; to be without any felony convictions; to be free of tattoos on the hands, wrists, or forearms; to be physically fit with moderate agility; and to be willing to accept employment anywhere in the state, alone, and often in dangerous situations. (Pltf.Exs. C, D). According to defendants, from 1981 to 1988, the maximum permissible age was increased to 37 years of age. (Deft. 12(M) stmt. ¶ 3). In 1988, the ISP began to require two years of college of its applicants. (Deft. 12(M) stmt. ¶ 4).

Relying on the 1980 census, defendants offer percentage figures of females and minorities in the "appropriate work force," which defendants equate to all persons "aged 20–37 with 12 or more years of education." (Deft. 12(M) stmt. ¶ 25). According to defendants, the "appropriate work force" in 1980 consisted of 40% women, 11.72% "black," and 3.49% "Hispanic." (*Id.* ¶ 25–27). Defendants then highlight the disparity between these numbers and those of the "sworn ISP work force," which included (by year):

1981	8.20%	Black	1982	N/A	Black
	2.17%	Hispanic		N/A	Hispanic
	2.12%	Female		N/A	Female
1983	N/A	Black	1984	9.56%	Black
	N/A	Hispanic		2.34%	Hispanic
	N/A	Female		3.35%	Female
1985	9.99%	Black	1986	9.81%	Black
	2.79%	Hispanic		3.32%	Hispanic
	3.44%	Female		4.63%	Female
1987	11.05%	Black	1988	10.95%	Black
	4.39%	Hispanic		4.42%	Hispanic
	6.26%	Female		5.93%	Female
1989	11.65%	Black			
	4.39%	Hispanic			
	6.42%	Female			

(*Id.* ¶ 28).

In response, plaintiffs assert that defendants' "appropriate work force" percentages "double count" black and Hispanic women, "by counting them in both the women count and in the black and Hispanic counts." (Plft. 12(N) stmt. ¶¶ 25–27). When females are deducted, plaintiffs contend, black males compose only 5.58%, and Hispanic males only 2%, of persons aged 20–37 with 12 or more years of school. Moreover, plaintiffs state, defendants' figures fail to account for the further "winnowing" effect of the prerequisites for becoming a trooper—*i.e.,* defendants have not excluded felons, nondrivers, and the like from the census figures. In this vein, plaintiffs allude to, but do not attempt to demonstrate, an assertion that blacks and other minorities possess a higher incidence of disqualifying attributes than do white males. Plaintiffs also state that minorities attrited from ISP cadet classes at a "much higher" rate than white males. (Plft. 12(N) stmt. ¶ 28). Plaintiffs' supporting documents show that minorities and females departed the ISP training programs from 1982 to 1990 in enhanced proportions when compared to white males. (Plft.Ex. RR).

The ISP Plan

A. Goals

***4** The ISP responded to its employment difficulties by instituting an affirmative action program aimed at augmenting its

female and minority ranks. The 1974 agreement with the EEOC set forth specific percentage goals for the ISP of 14.6% black, 5.6% Hispanic, and 7.0% female. (Def Ex. B, p. 77).

In defendants' Rule 12(N) statement, they deny plaintiffs' contention that they sought to achieve percentage parity between the ISP work force and the population of Illinois: "The ISP Affirmative Action Plan is based on numerical goals based on the work force availability and representation of minorities in the regions and state wide." To buttress this statement, defendants rely on the affidavit of an affirmative action program manager who has held the position since May of 1993. (Deft. 12(N) stmt. ¶ 18 & Ex. O). Defendants also submit that they derived their ultimate goals from a more flexible procedure that computed the percentage to which minorities and women are "underutilized." According to defendants, the ISP was "allowed" to use a "Final Availability Percentage" ("FAP")—a number based on work force data as well as internally developed data—which measured the ISP's internal work force against the availability of females and minorities in "the appropriate surrounding labor area." (Deft.Ex. O, p. 2). The resulting "underutilization figures" then supposedly became "a goal toward which to work to achieve parity." (*Id.*)

Evidence submitted by both sides, however, demonstrates that the ISP, from the inception of the plan to at least 1990, sought to achieve racial parity with Illinois' black and Hispanic population. For example, defendant Terrance Gainer, describing the effectiveness of the plan, once stated: "The department continues to show progress in achieving parity for each affirmative action group in its sworn work force. However, the department has not reached its goal of reflecting the ethnic/gender composition of the population to which it provides police services...." :(Pltf. 12(M) stmt ¶ 20).

In addition, the stated percentage goals show an undeniable continuity and are expressly tied to the state's population percentages. The 1974 goals for the ISP, as described above, were 14.6% black and 5.6% Hispanic. The ISP's internal report in 1983 reiterates the same percentage goals, and openly concedes that it derived the "black" and "Hispanic" figures "from the representation of these two groups within the population." (Deft.Ex. B, pp. 6, 28). The source, importance, and continued adherence to these figures are described in an ISP report compiled in approximately 1987. It states:

> The goal of the department's Affirmative Action Plan with regard to sworn officers is to ensure that minorities, who represent at least two percent or more of the state's population, as identified by the U.S. Census Bureau, are represented at the same percentage within the department's internal sworn work force as they are represented in the external population.

***5** (Deft.Ex. O, p. 25). The report then attributes the numbers used (14.6% for blacks and 5.6% for Hispanics) to equivalent overall population statistics in the state. (*Id.* p. 26; *see also id.* p. 30).

The minutes from a 1990 ISP Board Meeting reveal the "goals and current status" of the program at that time, in the following nomenclature: Black: goal—14.5%; current status—11%; Hispanic: goal—5.6%; current status—5%; Female: goal—33%; current status—6%. (Pltf.Ex. W). Board minutes from a 1991 meeting also show that the ISP tied its affirmative action goals to the state's demographics. They note that the availability of the 1990 census figures would allow the ISP to readjust its affirmative action goals "to reflect the shift in population within the [state]." (Pltf.Ex. W–1). The subsequent effect of the completed 1990 census is reflected in the minutes from a 1992 Board meeting. Describing an update of the ISP's affirmative action program, the minutes state: "The 1990 census shows an increase in the black population in Illinois so [that] the underutilization of blacks will increase in the 1993 Affirmative Action Plan." (Pltf.Ex. X–1).

Finally, defendants' assertion that the ISP used flexible "FAPs" in place of a goal of long-term racial parity is belied by defendants' own submissions. The 1987 report, discussed above, shows that the ISP, in fact, used "FAPs" to fulfill its long-range plan of mirroring the state's racial and gender composition. It states that "parity," which the ISP intended to "ensure," (*see* Deft.Ex. O, p. 25), is reached

> when the utilization of each racial group is the same as its proportional availability. For example, if the utilization of blacks in the department is nine percent, and the availability of blacks (F.A.P.) is 14.6%, the department has attained 62% of its parity index. In measuring the degree to which parity is met the utilization of blacks was divided by their percentage of availability (F.A.P.) in the population and multiplied by 100. When the utilization and availability percentages are equal, the figure will be 100, which is the statistical measure of perfect parity.

(Deft.Ex. O, p. 26).

B. Means

No dispute exists that the ISP used lower cutoff scores on the written exam for minorities and females. Moreover, the parties do not dispute that applicants to the ISP had to pass a written examination in order to move forward in the hiring scheme. (Deft. 12(N) stmt. ¶ 11). They cannot agree, however, on whether the ISP sought 50/50 class composition as a flexible "goal" or "target," or, instead, as an inflexible quota.

As noted above, the early '70s agreement with the Office of Civil Rights Compliance required that at least 50% of new trainees consist of minorities and females (but only in circumstances involving adverse test impacts and unvalidated testing criteria). (Pltf.Ex. JJ, p. 3). Additionally, a 1982 memorandum from the director of the state's Department of Law Enforcement refers to the ratio more in terms of a quota. It states that "classes will consist of " '50/50' (50% minorities/females and 50% white males.)." (Pltf.Ex. Q, p. 2).

***6** On the other hand, defendants contend that the ISP rarely met its 50/50 "hiring goal" to highlight that the plan contained meaningful flexibility. (Deft. 12(M) stmt. ¶ 62). The class enrolled when *Washington* was decided (February, 1976) included 21 white males out of its 43 members. *Washington,* 529 F.2d at 1065 n. 4. During the times relevant to this action, some classes approximated the 50/50 mark; many did not. (Deft.Ex. F).

Defendants also assert that the ISP's entrance examination between 1975 and June 1986 adversely impacted minorities and women and was not validated. (Deft. 12(M) stmt. ¶ 52; affdvt. of James E. Seiber, Executive Director of the ISP, ¶ 22). The adverse impact assertion is not proved by the mere fact that any one race consistently underperformed whites. *Billish v. City of Chicago,* 989 F.2d 890, 896 (7th Cir.), *cert. denied,* 510 U.S. 908, 114 S.Ct. 290 (1993). It is, however, supported by studies commissioned by the ISP. (*see* Deft.Ex. B, p. 57). Before 1975, the ISP used the Army Classification Test ("AGCT") and a memory test, which had the combined effect of eliminating a substantial percentage of blacks, even when score cut-offs were lowered. *See Washington,* 529 F.2d at 1064.

In support of their claim of lack of validation, defendants rely on the affidavit of the Executive Director of the Merit Board, (Deft.Ex. A, ¶ 22), and the 1974 settlement agreement with the EEOC, which states that the AGCT, as well as the memory and agility tests, were unvalidated. (Deft.Exs. B, C). The Seventh Circuit's opinion in *Washington* supports defendant's position; the court noted that the defendants did not dispute the tests had not been validated. *Washington,* 529 F.2d at 1064.

In response, plaintiffs contend that the AGCT was validated, and that in any event, the ISP ceased using the AGCT on minority applicants. (Pltf. 12(N) stmt. ¶¶ 16–17). In support for the first proposition, plaintiffs cite a 1975 "Validation Study" on the AGCT as a selection device for the ISP. Contrary to plaintiffs' description, the study states that the "AGCT adds little to the prediction of job performance ... and could perhaps be eliminated from the selection process." (Pltf.Ex. KK–1, p. 8). While plaintiffs contend that the ISP began using a validated test in 1977, the information they offer indicates only that the ISP reached an accord concerning the preparation and implementation of a new entrance exam. (Pltf.Ex. KK–9). Plaintiffs similarly exaggerate the importance of a 1980 document that shows only that a consulting group administered an experimental test. (Pltf.Ex. KK–10).

DISCUSSION

Standards Governing Summary Judgment

A court may grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). The applicable substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). If a fact is material, the court cannot award summary judgment when there is a genuine dispute about the reality of that fact—when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 88 S.Ct. 1575 (1968)). In addition, summary judgment motions focus on burdens of proof; judgment must be entered against a party who fails to establish

sufficiently "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Doe v. R.R. Donnelley & Sons Co.,* 42 F.3d 439, 443 (7th Cir.1994) (citing *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552)).

Scope Of This Ruling

***7** As noted *supra,* plaintiffs originally sought relief under 42 U.S.C. §§ 1981, 1983, and 1985(3), as well as under Title VII. In the sole brief accompanying their motion, however, plaintiffs press their attack only on equal protection grounds, which fall under section 1983, and on the Title VII theory. Furthermore, the briefs accompanying defendants' cross motion for summary judgment do not exhume plaintiffs' initial claims under section 1981 or section 1985(3).

Plaintiffs' election not to pursue their section 1981 and section 1985(3) claims obviates the court's obligation to pass on them. *See Hartmann v. Prudential Ins. Co.,* 9 F.3d 1207, 1212 (7th Cir.1993) ("Failure to press a point (even if it is mentioned) and to support it with proper argument and authority forfeits it...."). Accordingly, the discussion below considers only plaintiffs' equal protection claim under section 1983 and their Title VII claim.

ANALYSIS

I. Statute of Limitations

Defendants contend that plaintiffs cannot recover for the ISP's hiring practices in existence before 1990 and 1991 because the respective limitations periods for section 1983 and Title VII bar these claims.[3] A limitations defense is an affirmative defense that the defendant must plead, Fed.R.Civ.P. 8(c), but once invoked, the burden is on the plaintiff to prove that the claims are timely. *Weger v. Shell Oil Co.,* 966 F.2d 216, 218 (7th Cir.1992). In this case, plaintiffs have submitted evidence entitling them to summary judgment on limitations grounds for class members similarly situated to Booker.

Borrowing from Illinois law, the applicable statute of limitations period for bringing section 1983 claims is two years. *Palmer v. Board of Ed.,* 46 F.3d 682, 684 (7th Cir.1995); *Smith v. City of Chicago Heights,* 951 F.2d 834, 836–37 n. 1 (7th Cir.1992); *Kalimara v. IDOC,* 879 F.2d 276, 277 (7th Cir.1989). Title VII generally requires a plaintiff to file a discrimination charge with the EEOC within 180 days of the alleged discriminatory act, but extends this time to 300 days for claimants who initially commence proceedings with a state or local agency. *Russell v. Delco Remy Div'n of GMC,* 51 F.3d 746, 750 (7th Cir.1995); *Sofferin v. American Airlines, Inc.,* 923 F.2d 552, 553 (7th Cir.1991) (claims that arose more than 300 days before the plaintiff filed its complaint with the EEOC are time-barred); *see Koelsch v. Beltone Elecs. Corp.,* 46 F.3d 705, 707 (7th Cir.1995). Defendants argue that because plaintiffs filed their complaint on May 19, 1992, the two-year statute of limitations for the constitutional claims bars those claims arising before May 19, 1990. Because the named plaintiff Booker lodged his complaint with the EEOC between June 2 and June 9, 1992, defendants contend, all Title VII claims arising before July 27, 1991, are barred. Defendants also assert that Booker (the class representative), and the other plaintiffs, had a "duty to inquire as to why they were not hired," (Deft.Resp.Mem. p. 8), but failed to do so. Further, defendants state that information on "the different cutoffs was available on inquiry from the Merit Board" and "available on request." (*Id.* p. 7). According to a staff member on the Merit Board from 1978 to 1994, the staff received 25–30 (unidentified) telephone inquiries concerning score cutoffs each time the ISP developed its certified list for appointment. (Deft.Ex. L). This person is purportedly "aware of no applicant who inquired and was denied score cutoff information." (Deft.Resp.Mem. p. 7).[4]

***8** In response, plaintiffs assert that the ISP misled applicants about the race and gender-based cutoffs by sending out innocuous follow-up letters—letters that intentionally obscured the true division among cutoff scores. Beginning in 1985, the named plaintiff Booker received three letters. The first, dated July 23, 1985, stated:

> THE ESTABLISHED RANGE FOR THE QUALIFIED CATEGORY IS 100 [to] 69 WITH 1314 QUALIFIED APPLICANTS AS FOLLOWS: [(69–79)—845 applicants; (80–89)—359 applicants; (90–99)—10 applicants.]
>
> THE DEPARTMENT OF STATE POLICE MERIT BOARD HEREBY INFORMS YOU THAT [YOU] ARE A

> QUALIFIED APPLICANT AS THE RESULT OF YOUR WRITTEN EXAMINATION SCORE [OF 73].... QUALIFIED APPLICANTS WILL BE ELIGIBLE FOR CERTIFICATION TO TRAINING CLASS[ES UNTIL] THIS CATEGORY IS EXHAUSTED OR ONE YEAR HAS PASSED OR THE BOARD HAS [TERMIN]ATED ELIGIBILITY.

(Pltf.Ex. CC). Booker later received a letter (dated September 21, 1987) informing him of his new test score, which stated:

> THE DEPARTMENT OF STATE POLICE MERIT BOARD IS PLEASED TO INFORM YOU THAT YOU HAVE SUCCESSFULLY COMPLETED THE JULY 12, 1987 TROOPER ELECTION TEST WITH A SCORE OF 75.
>
> ALL APPLICANTS WITH SCORE 75 OR ABOVE ARE QUALIFIED FOR CONSIDERATION IN THE SELECTION PROCESS AND PLACED ON OUR ELIGIBILITY LIST WHERE THEY WILL REMAIN UNTIL JULY 12, 1988. APPLICANTS ARE PLACED ON THE ELIGIBILITY LIST IN TEST SCORE ORDER. THE ESTABLISHED RANGE FOR THE ELIGIBILITY LIST IS 100 [to] 75 WITH 1535 ELIGIBLE APPLICANTS DISTRIBUTED AS FOLLOWS: [(75–79)—1283 applicants; (80–84)—245 applicants; (85–ABOVE)—7 applicants.]

(Pltf.Ex. DD).

Subsequently, Booker received a letter dated May 17, 1989, stating:

> THE ILLINOIS STATE POLICE MERIT BOARD IS PLEASED TO INFORM YOU THAT YOU HAVE SUCCESSFULLY COMPLETED PHASE I OF THE RECRUITMENT SELECTION PROCESS. APPLICANTS ARE PLACED ON THE ELIGIBILITY LIST IN TEST SCORE ORDER WHERE THEY WILL REMAIN UNTIL APRIL 29, 1990. YOU WILL BE NOTIFIED IN WRITING IF YOUR TEST SCORE IS REACHED AND YOU ARE SELECTED TO CONTINUE IN THE SELECTION PROCESS. THE ESTABLISHED RANGE FOR THE MERGED ELIGIBILITY LIST IS 100–75 WITH 687 ELIGIBLE APPLICANTS DISTRIBUTED AS FOLLOWS: [(75–79)—532 applicants; (80–84)—149 applicants; (85–ABOVE)—6 applicants.]

(Pltf.Ex. EE).

Booker asserts that these letters concealed the ISP's application of different standards to white males, and that he otherwise had no reason to believe that the ISP was lying when it informed him that applicants were placed on the eligibility list "in test score order." He states that he did not learn of the ISP's separate matrices and cutoff scores until April of 1992.

Statutes of limitations operate on the basis of when a plaintiff learns (or fails to learn) of certain events; accordingly, the analysis here must begin by designating a plaintiff to scrutinize. This is a certified class action, and Booker is the class representative. As discussed further below, the dates and events affecting Booker control the outcome of this motion, including the limitations issue, because this motion for summary judgment tests the evidence and merits of the class representative's claims. *See Jarrett v. Kassel,* 972 F.2d 1415, 1428 (6th Cir.1992) ("once a class action has been filed, the named plaintiff becomes the legal representative of the class with respect to the subject matter of that class action"), *cert. denied,* 507 U.S. 916, 113 S.Ct. 1272 (1993).

***9** The court originally certified this class under Federal Rule of Civil Procedure 23(b)(2), which provides for class certification when the defendant has acted or refused to act on grounds generally applicable to the class. *Koski,* 1993 WL 153828, at *4. The court also ruled that the commonality and typicality requirements of Rule 23(a)(2) and (a)(3) had been met. Inherent in these conclusions is the premise that defendants' secrecy concerning "the fact that they had separate lists based on race and sex" applied to all class members. *Koski,* 1993 WL 153828, at *1. Evidence of the alleged "secrecy" is supplied by the letters received by Booker, and the letters themselves corroborate the theory that all class members received correspondence of the same type—they are of a mass-produced, machine-generated variety, bearing the earmarks of form letters with blanks for the applicant's name, address, and test score to be filled in.[5] If the letters sent to Booker somehow stopped the running of one of the limitations periods, the conclusion that Booker's claim is not barred applies equally to all other similarly situated class members. *See Jarrett,* 972 F.2d at 1428 (court invoked doctrine of fraudulent concealment and attributed due diligence conclusion applicable to initial class plaintiffs to toll time for intervening class plaintiffs).

Nonetheless, defendants press the affidavit of the ISP staff member stating that she had fielded calls and letters from curious applicants from 1978 to 1994. Specifically, this person states that she was "aware of approximately 25–30" instances per hiring cycle of applicants inquiring "as to the score cutoffs for [that] person [and the] the cutoff for that group" and about "the cutoff score for other groups." (Deft.Ex. L). These inquires were supposedly received by the affiant and the staff, and "at

no time was [she] aware of information regarding cutoffs for any group being withheld or concealed from the person inquiring....” (*Id.*)

This effort fails. The affidavit does not state that Booker was among those who called, but asserts instead that “25–30” persons, who by no means are confined to white males (in a class estimated to consist of thousands of them), obtained the true story about cutoff scores in each hiring cycle. This argument does not, however, even attempt to win the point with respect to Booker or to the entire certified class. Accordingly, it cannot be used as a justification to dismiss the entire class’s claims on a limitations theory. *See Palmer,* 46 F.3d at 685 (rejecting defendants’ contention in class action that “if the limitations period has expired for *anyone,* then they are immune from litigation”; court also noted: “That some other pupils ... may have lost the ability to litigate could not justify dismissal of the entire suit.”). In essence, defendants are really contending that the class is overbroad or contains atypical class members. Defendants should have raised these arguments—and these facts—when the parties fought the class certification battle in 1993, or, alternatively, in a motion to decertify or modify the class.

***10** A number of flaws exist in defendants’ present argument, which views the limitations period only from the perspective of when plaintiffs filed their complaint; defendants begin with this date and then work backward to determine the date before which all claims are supposedly time-barred. This analysis of the limitations period, however, is incorrect. The beginning of a limitations period—the accrual date—usually must be ascertained before the end of the period can be fixed. “Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured.” *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir.1990), *cert. denied,* 501 U.S. 1261, 111 S.Ct. 2916 (1991). Accrual does not wait until the plaintiff determines that the injury was unlawful. *Thelen v. Marc’s Big Boy Corp.,* 1995 WL 497555, at *1 (7th Cir. Aug. 21, 1995).

In the instant case, Booker’s “injury” occurred when the time came for the next round in the hiring process to begin and he was not allowed to continue. *See Teumer v. GMC,* 34 F.3d 542, 550 (7th Cir.1994) (plaintiff’s claim accrued when he found out about his lay-off, not when he became aware of wrongdoing). Booker applied for employment several times and received at least two separate scores, but he was passed over each time. Nothing in the record indicates that the ISP’s hiring decisions were connected; instead, the record, which contains the separate letters, scores, and differing eligibility lists, indicates that the ISP made each decision independently. Accordingly, Booker may challenge the last decision to reject him. *See Lever v. Northwestern Univ.,* 979 F.2d 552, 556 (7th Cir.1992) (discussing *Webb v. Ind. Nat’l Bank,* 931 F.2d 434 (7th Cir.1991)), *cert. denied,* 508 U.S. 951, 113 S.Ct. 2443 (1993). The time at which that event was “communicated” to him, *see Cada,* 920 F.2d at 450, is not clear from the record, but the letters sent by the ISP make this date unimportant.

Limitations periods are subject to tolling and estoppel for both section 1983 and Title VII actions. *Smith,* 951 F.2d at 839 (section 1983 claims); *Lever,* 979 F.2d at 556 (Title VII). Defendants assert that the doctrine of equitable tolling cannot apply because plaintiffs failed to exercise “due diligence.” Equitable tolling is appropriate when the plaintiff, despite all due diligence, “is unable to obtain vital information bearing on the existence of his claim.” *Chakonas v. City of Chicago,* 42 F.3d 1132, 1135 (7th Cir.1994). Plaintiffs in discrimination cases, however, have “no affirmative duty to investigate until they have ‘reason to know’ that they should.” *Artis v. Hitachi Zosen Clearing, Inc.,* 967 F.2d 1132, 1144 (7th Cir.1992). In the instant case, defendants have failed to specify any event that would have provided Booker with “reason to know” that the ISP had divided its hiring criteria along racial and anatomical lines.[6] Moreover, defendants’ theory that Booker had a duty to investigate the true reasons for the ISP’s adverse hiring decision, despite the fact that the decision followed delivery of a document cleansing it of any racial or gender-based undercurrent, defies common sense.

***11** In any event, the foregoing conclusion is not significant because the doctrine of equitable estoppel stopped time from running against Booker and similarly situated class members. Federal courts apply a federal doctrine of equitable estoppel. *Smith,* 951 F.2d at 841. Equitable estoppel “comes into play if the defendant takes active steps to prevent the plaintiff from suing in time,” *Cada,* 920 F.2d at 450, “as by promising not to plead the statute of limitations ... or by concealing evidence from the plaintiff that he need[s] in order to determine that he [has] a claim.” *Singletary v. Continental Ill. Nat’l Bank & Trust Co.,* 9 F.3d 1236, 1241 (7th Cir.1993). Under the rubric of “fraudulent concealment,” equitable estoppel applies to situations where the defendant engages in a wrongful effort to conceal its misconduct. *Martin v. Consultants & Adm’rs, Inc.,* 966 F.2d 1078, 1093–95 (7th Cir.1992); *Bermudez v. First of Am. Bank Champion,* 860 F.Supp. 580, 598 (N.D.Ill.1994), *order withdrawn pursuant to settlement,* 886 F.Supp. 643 (N.D.Ill.1995). When a defendant actively conceals its misconduct, the statute of limitations does not run until the plaintiff actually discovers the misconduct, whether or not the plaintiff was diligent in attempting to discover its injury. *McCool v. Strata Oil Co.,* 972 F.2d 1452, 1461 (7th Cir.1992); *Bermudez,* 860 F.Supp. at 598; *see Martin,* 966 F.2d at 1098 n. 19 (in cases of “active concealment separate from the underlying wrong[,] ... the cases in this circuit have generally held that diligence is not required”). Other factors used in invoking equitable estoppel

include " 'a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations' " and " 'evidence of improper purpose on the part of the defendant and the defendant's actual or constructive knowledge of the deceptive nature of its conduct.' " *Smith,* 951 F.2d at 841 (citation omitted).

In *Cada,* which was an age discrimination case, Judge Posner noted that equitable estoppel can apply in situations less egregious than when a defendant promises not to plead a limitations defense. He noted that the doctrine would have applied if the defendant had "presented [the plaintiff] with forged documents purporting to negate any basis for supposing that [the plaintiff's] termination was related to his age." *Cada,* 920 F.2d at 451. Like the scenario discussed in *Cada,* the letters sent to Booker in the instant case removed any reason he might have had to think that the ISP's hiring decisions were linked to his race or sex, specifically because they created a false but undeniable impression that all applicants were placed on one list, in test-score order, regardless of race or sex. Moreover, the court finds that Booker's actual reliance on these letters was " 'reasonable,' " that the letters supply " 'evidence of improper purpose on the part of' " the ISP, and that the ISP had " 'actual ... knowledge of the deceptive nature of its conduct.' " *Smith,* 951 F.2d at 841. For the foregoing reasons, equitable estoppel is an appropriate remedy.

***12** Analytically, the event marking the estoppel period either predated the accrual date or occurred contemporaneously with it, because in the latter case, the letters preemptively supplied a false description of the decision process. Thus, the statute of limitations did not begin to run until April of 1992, the month in which Booker "actually discover[ed] the misconduct." *See Bermudez,* 860 F.Supp. at 598. This case began in May of 1992, within the two-year limitations period for section 1983 actions, and Booker filed with the EEOC in early June of 1992, well within filing requirement of Title VII.[7]

In summary, the court does not agree that "[d]efendants did nothing to conceal the different cutoffs." (Deft. brief, p. 8). At the very least, the letters sent to Booker were calculated to make him believe that applicants would all be drawn from one list, in an order dictated by their distance from one score. The law of limitations would be sorry indeed if it permitted a state to escape the ramifications of a program that admittedly tied its hiring criteria to race and gender by concealing the true nature of the program from those most affected by it. Accordingly, the court grants summary judgment on this issue in favor of Booker and all similarly situated class members. Any disputes the parties may have concerning the number of similarly situated class members or the size or typicality of the class may be resolved at a later date.

II. Equal Protection

As noted above, the ultimate goal of the ISP's affirmative action plan, from its creation until 1990, was to have the percentage of black and Hispanic ISP troopers match those found in the state's population. While factual disputes exist concerning other aspects of the plan, the ISP's avowed goal of creating racial parity violates the Equal Protection Clause. The fact that the ISP began using its percentage goals in connection with an agreement with the EEOC does not insulate it from constitutional liability. *See Billish,* 989 F.2d at 893–94.

The Equal Protection Clause guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. From the times approximating the introduction of the Equal Protection Clause to the present, it has increasingly been thought to mandate that government refrain from drawing lines among its citizenry on the basis of race. *Compare Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens."), *overruled by Brown v. Board of Ed.,* 347 U.S. 483, 74 S.Ct. 686 (1954), *with Shaw v. Reno,* 509 U.S. 630, ——, 113 S.Ct. 2816, 2824 (1993) (observing that the primary purpose of the Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race.").

But color-blindness is not the watchword of Equal Protection Clause litigation. In June of 1995, in *Adarand Constructors, Inc. v. Pena,* 515U.S. 200, 115 S.Ct. 2097 (1995), the United States Supreme Court ruled that federal race-favoring programs must withstand the same judicial scrutiny applied to similar state programs, but nevertheless continued to permit both levels of government to make race-based distinctions among citizens. When, as in the instant case, a state institutes a program that admittedly benefits members of one race and concomitantly deprives members of another race of "equal treatment," that program must survive detailed and searching review, or strict scrutiny. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706 (1989).[8]

***13** *Croson* invalidated a municipal plan that required prime contractors who received city construction contracts to

subcontract at least 30 percent of the contract's value to one or more minority-owned business enterprises. In striking down the plan, the Court applied strict scrutiny, under which a program affording race-conscious relief must serve a "compelling interest" and must be "narrowly tailored" to achieve that interest. *Id.* at 493, 109 S.Ct at 721; *see Adarand,* 515 U.S. at ——, 115 S.Ct. at 2109. *Croson* followed cases similarly hostile to state programs using "reverse" racial preferences. In *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978), for example, five members of the Court determined that interests such as reducing a perceived racial deficit and "countering" the effects of societal discrimination could not justify a state medical school's plan that eliminated nonminorities from consideration for a set number of seats in the class. In *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842 (1986), a plurality of the Justices concluded that a school board could not employ race-based priorities in picking teachers to lay off.

A. Compelling Interest

The ISP asserts that it desired to remedy the effects of past exclusion of minorities and women from its ranks. A governmental unit must have a "strong basis in evidence for its conclusion that remedial action [is] necessary." *Croson,* 488 U.S. at 497, 109 S.Ct. at 724. Undefined claims of "societal discrimination" cannot suffice; instead, there must be "some showing of prior discrimination by the governmental unit involved." *Wygant,* 476 U.S. at 274, 106 S.Ct. at 1847. To demonstrate the requisite prior discrimination, the governmental unit may offer gross statistical disparities between the percentage of minorities in its work force and the "relevant qualified labor pool." *Janowiak v. Corporate City of South Bend,* 836 F.2d 1034, 1041–42 (7th Cir.1987), *cert. denied,* 489 U.S. 1051, 109 S.Ct. 1310 (1989). Because naked statistical imbalances provide a "treacherous rationale" for the implementation of race preferences, *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072, 1074, 1077 (4th Cir.1993), anecdotal evidence serves as useful corroboration. *Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1565 (11th Cir.1994).

The relevant statistical pool is composed of "all persons qualified for the position at issue." *Aiken v. City of Memphis,* 37 F.3d 1155, 1163 (6th Cir.1994) (internal quotations and citation omitted). Special qualifications for a particular job mean that the qualified labor pool is limited to the number of minorities qualified to undertake the task. *Croson,* 488 U.S. at 501–02, 107 S.Ct. at 726.

In the instant case, defendants argue that the relevant historical statistics demonstrate a "gross disparity" in need of remediation. For example, they point to the statement in *Washington* (decided in 1976), that blacks composed only 1.7% of the state trooper contingency, even though "the pool of eligible applicants was 14.7% black." *Washington,* 529 F.2d at 1063. In addition, relying on the 1980 census data set out *supra,* which confines the data to persons in the relevant age group, defendants note that a "significant statistical disparity" existed for blacks and Hispanics during the early and mid–80's. In addition, defendants admit that the written tests they employed negatively impacted blacks and other minorities and have offered anecdotal evidence in the form of the numerous complaints filed with both federal and state equal opportunity agencies. In response, plaintiffs contend that defendants rely on overbroad benchmarks because these figures double count certain minorities and fail to account for various forms of winnowing.

***14** When a race-based affirmative action plan is attacked, the party defending the plan has the burden of producing evidence of the plan's constitutionality. *Aiken,* 37 F.3d at 1162. The challenger, however, always has the burden of proving the unconstitutionality of the plan. *Wygant,* 476 U.S. at 277–78, 106 S.Ct. at 1849; *Aiken,* 37 F.3d at 1162. Applying these burdens to this case, neither side has demonstrated the absence of a fact issue that would allow the court to decide this point conclusively for one side or the other.

First, the parties cannot agree about the proper numeric value to assign to the relevant labor pool. Although courts do not regard certain civic positions, like firefighting, as requiring "special skills," *see Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1554 (11th Cir.1994); *Davis v. City of San Francisco,* 890 F.2d 1438, 1447 (9th Cir.1989), *cert. denied,* 498 U.S. 897, 111 S.Ct. 248 (1990), it stands to reason that imposing an increasing number of job prerequisites, in the form of disqualifying factors, tends to decrease the size of the eligible, relevant labor pool. *Cf. Croson,* 488 U.S. at 501–02, 109 S.Ct. at 726 (defining pool not in terms of skills, but instead in terms of "special qualifications"). In the instant case, even a cursory appraisal of the numerous affirmative and disqualifying employment requirements of the ISP (*e.g.,* no visible tattoos, no felony convictions, good eyesight) shows that not all persons in an exclusive age-range will measure up. Plaintiffs also contend that defendants have failed to account for discounting factors that would significantly shrink the size of the appropriate minority labor pools. While their argument may lack moral appeal, it highlights the existence of a fact issue concerning the size of the appropriate labor pool. Such an issue is for the jury, and not the court, to resolve. *See Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 921 (7th Cir.1994) ("the non-movant need not ... persuade the court that her case is convincing, she need only come forward with appropriate evidence demonstrating that there is a pending dispute of material

fact").

The uncertainty surrounding the size of the appropriate labor pool hinders an accurate determination of whether defendants have shown a "gross statistical disparity." For reasons known only to them, defendants have provided scant statistical evidence covering the years most relevant to this action—those preceding the mid–'70's institution of the affirmative action plan—other than the recitation in *Washington* that blacks constituted only 1.7% of the trooper force in 1975. This speaks only to African Americans; defendants have not indicated the percentage of Hispanics serving as ISP troopers before 1980.

Courts can draw, however, "inferences that arise from ... statistics," *Aiken,* 37 F.3d at 1163, and the race statistics from 1980 onward suggest that blacks and Hispanics filled small portions of the ISP before 1980. Defendants note that in the early '80's two standard deviations separated the actual from the expected percentages of blacks and Hispanics (using defendants' labor pool figures) (*see* Deft. brief p. 11); assuming the validity of these numbers it would be fair to infer that the gulfs were wider (*i.e.,* larger than 2 standard deviations) in the early 1970's and the preceding years. Since a finding of two or three standard deviations is "generally considered highly probative of discriminatory treatment," *Waisome v. Port Auth.,* 948 F.2d 1370, 1376 (2d Cir.1991), defendants' figures for the 1980s (with the proviso that disputes color the veracity of them) would show a "gross statistical disparity." In addition, the anecdotal evidence supplied by the litigation in *Washington* and the other complaints of discrimination supports defendants' position, but by no means cures the omissions that would allow the court to grant summary judgment in defendants' favor. On the other side of the dispute, plaintiffs have failed to submit any information from which the court could find that no gross statistical disparity existed between the ISP's Hispanic figures, for example, and those of the population. This failure, combined with the fact dispute concerning the size of the appropriate labor pool, prevents a finding that plaintiffs have carried their burden. Accordingly, neither side is entitled to summary judgment on the "compelling interest" issue.

B. Narrow Tailoring

***15** When a state uses a person's race in deciding whether to award that person some benefit, it must use specifically and narrowly tailored means to accomplish the purpose of the plan. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant,* 476 U.S. at 507–08, 106 S.Ct. at 1850. Several factors exist to measure the appropriateness of the chosen means, including:

> the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

U.S. v. Paradise, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066 (1987) (plurality opinion).

In the instant case, defendants offer evidence that they engaged in certain minority recruiting efforts unrelated to the application process, but that these efforts yielded little success. While this information favors a conclusion that "alternative remedies" were not effective, *Peightal,* 26 F.3d at 1557–58 (high school and college recruiting programs), other aspects of the ISP's affirmative action plan violated the constitution.

To measure the exactness of race-conscious relief, courts scrutinize the flexibility and duration of its means and the relationship of the program's numerical goals to the relevant labor market. *Paradise,* 480 U.S. at 171, 107 S.Ct. at 1066; *see Croson,* 488 U.S. at 507, 109 S.Ct. at 729. Race-based relief cannot serve as a proxy for entitlement, nor can a government operate its subdivisions as laboratories experimenting with prescribed racial compositions. These concepts mean that narrow tailoring excludes the use of quotas, in either means or ends, and forbids the long-term goal of achieving racial parity with the surrounding work force. *Croson,* 488 U.S. at 507, 109 S.Ct. at 729 ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests on the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."); *Ensley Branch,* 31 F.3d at 1570 (city's long-term racial goals are "fundamentally flawed" in "that they are designed to create parity between the racial composition of the labor pool and the race of the employees in each job position."); *Peightal,* 26 F.3d at 1558 ("Flexibility forbids mechanistic application of fixed quotas."); *In re Birmingham Reverse Discrimination Employment Litigation,* 20 F.3d 1525, 1548 (11th Cir.1994) ("The City's use of the 50% annual quota to establish a work force of fire lieutenants reflecting black employment in lockstep proportion to the proportion of blacks in the local labor force cannot withstand strict scrutiny."), *cert. denied,* —— U.S. ——, 115 S.Ct. 1695 (1995); *Peightal v. Metropolitan Dade County,* 940 F.2d 1394, 1408 (11th Cir.1991) ("rigid quotas are by their very nature antithetical to the flexibility mandated by the narrow tailoring requirement"); *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 914 (11th Cir.) (narrow tailoring means "that the plan

must be designed to further some goal other than outright racial balancing"), *cert. denied,* 498 U.S. 983, 111 S.Ct. 516 (1990).

***16** Focusing on the means used in the instant case, the class compositions show that the 50/50 figure was not utilized as an inflexible quota. The percentage of white males in relation to other cadets commonly diverged from a 50/50 composition, often widely, which indicates the presence of a flexible goal rather than a rigid quota. *See Hopwood v. Texas,* 861 F.Supp. 551, 574 (W.D.Tex.1994) (refusing to find quota because law school "did not rigidly and inflexibly apply the numbers" and in some years "failed to meet its goals"), *aff'd,* 21 F.3d 603 (5th Cir.1994).

On the other hand, the ISP undeniably maintained an ultimate goal of racial parity, and the record shows that it maintained the same percentage goals from the plan's beginning until 1990. The ISP conceded that its overarching goal was "to *ensure* that minorities ... are represented at the same percentage within the department's internal sworn work force as they are represented in the external population." (Deft.Ex. O, p. 25) (emphasis added). In addition, the information presented leads to the conclusion that from 1974 to 1990, the ISP never changed the percentage of Hispanics and blacks it sought and expressly tied these figures to the state's statistical representation in each category.[9]

Moreover, the ISP implicitly admits that its goals of 14.6% (for blacks) and 5.6% (for Hispanics) were overbroad. These percentages were derived, by defendants' own admission, from the complete population of blacks and Hispanics in Illinois rather than from groups limited to a certain age category. (*E.g.,* Deft. Ex. B, p. 28) In the briefs it submitted to this court, however, the ISP used 11.72% black, and 3.49% Hispanic, as the "appropriate work force" (which included persons "aged 20–37 with 12 or more years of education") against which to measure its past discrimination. (Deft. 12(M) stmt. ¶ 25–27). Therefore, the ISP's self-defined "appropriate work force" figures it uses in this litigation are markedly smaller than the undifferentiated figures it actually used as final goals, and they further suggest the utter lack of any "tailoring" to the ISP's plan. *See Hammon v. Barry,* 813 F.2d 412, 431 (D.C.Cir.1987) (concluding that district's goal of achieving racial representation in its fire department work force proportional to that in the district "is an impermissible goal under our law"), *cert. denied,* 486 U.S. 1036, 108 S.Ct. 2023 (1988); *see also Paradise,* 480 U.S. at 171, 107 S.Ct. at 1066 (noting that "the relationship of numerical goals to the relevant labor market" plays role in passing upon the precision of a plan).

The parties' battle over the written test used by the ISP highlights an additional problem. According to defendants' version of the facts, the ISP knowingly used unvalidated written tests, which had a documented adverse racial impact, from at least 1974 to 1986. While continuing to use these tests, the ISP attempted to compensate by adjusting cutoff scores to produce acceptable (at least to the ISP) race-norming results, and it embarked on a program of filling its classes with, when possible, 50% minorities and women. In its briefs, the ISP relies heavily on the negative results of the written tests to supply the justification for its other race-conscious efforts.

***17** The more curious reader may ask why the ISP quickly did not discontinue the use of these tests and thereby eliminate an admittedly discriminatory tool from its arsenal. Without asking the question, courts have condemned the practice of hiding behind the discriminatory effects of a selection or promotion procedure while simultaneously manipulating racial percentages to remedy the resulting racial inequity. *See Billish,* 989 F.2d at 894 ("[T]he city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list").

In *Ensley Branch, supra,* the court ruled that a government agency's continued use of racially discriminatory selection procedures could not justify its "attempt to cure the resulting injury to blacks with race-conscious affirmative action." 31 F.3d at 1572. The court noted:

> Use of racial hiring quotas to mask the effects of discriminatory selection procedures places grievous burdens on blacks as well as whites.... The Constitution will not allow such a discriminatory construct. One color of discrimination has been painted over another in an effort to mask the peeling remnants of prejudice past, leaving a new and equally offensive discoloration rather than a clean canvas.

Id. at 1572–73.

In the instant case, by its own admission, the ISP knew that its test adversely affected minorities, yet it continued to apply the test as a sorting device that disqualified members of all races. Although the ISP evidently studied the problem, it failed to fix it, by its reckoning, for at least 12 years. Studies and wishes do not supply valid excuses; the case law is replete with examples of validated, nondiscriminatory, legal examinations. *See id.* at 1573 (collecting 13 cases discussing validation of

fire fighting and police exams). Last, the court notes that the ISP apparently cannot state that it ceased using different cutoff scores before 1990, (*See* Deft.Ex. A), even though it ceased using defective examinations in 1986. This practice, whatever its reason, is even less defensible.

Paradise, supra, also considered the "impact of the relief on the rights of third parties" in deciding whether a program is narrowly tailored. 480 U.S. at 171, 107 S.Ct. at 1066. Defendants rely on this factor to point out that the conduct addressed by the present motions includes only the ISP's failure to hire people, which "is not as intrusive as loss of an existing job." *Wygant,* 476 U.S. at 283, 106 S.Ct. at 1851. Defendants overlook, however, that the Court made this observation in the context of "cases involving valid hiring goals...." *Id.* This limitation suggests that the Court did not intend to permit a state actor to escape the ramifications of using, for instance, blatantly overbroad goals or goals predicated upon stereotypes merely by claiming that the resulting harm was diffused among many people. Would the Constitution permit a public employer to seek a 100% black, Asian, or white work force on the grounds that the failure to obtain a job is "less intrusive" than the loss of an existing job? The answer must be no—such a plan does not have a valid goal. In the instant case, the ISP pursued an invalid goal of "ensuring" racial parity, based on undifferentiated—and by defendants' concession, overbroad—figures obtained from the state census. The fact that the real-life consequences of the plan were "diffused" among the finite group of persons who desired to become ISP troopers cannot save it. In summary, the court finds that no genuine issue of fact exists concerning the ISP's ultimate goal of achieving racial parity with the black and Hispanic populations of the State of Illinois. Because this aspect of the plan fails the narrow tailoring requirement, the court grants summary judgment in plaintiffs' favor on the racial classification issue for the years covering the inception of the plan to 1990. To the extent that their motion relates to additional years, it is denied. The relevant portion of defendants' motion is denied in its entirety.[10]

III. Title VII

A. The Individual Defendants

***18** Defendants move the court to rule that Title VII liability cannot lie against the individual defendants in this case. Title VII liability is confined to "employers." 42 U.S.C § 2000e–2(a). In *U.S. EEOC v. AIC Security Investigations, Ltd.,* 55 F.3d 1276 (7th Cir.1995), the Seventh Circuit ruled that individuals who do not otherwise meet the definition of "employer" under the Americans with Disabilities Act ("ADA"), which tracks Title VII's definition of "employer," cannot be liable under the ADA. *Id.* at 1279–80, 1282. Moreover, the court implied that the same result would be obtained under Title VII. *Id.* at 1280 & nn. 1 & 10. *AIC,* coupled with this court's earlier decisions declining to impose Title VII liability on individuals, *e.g., Finley v. Rodman & Renshaw, Inc.,* 1993 WL 512608, at *1–2 (N.D.Ill. Dec. 7, 1993), move the court to grant defendants' request.

B. Merits

Title VII prohibits "employers" from discriminating against an employee on the basis, among other things, of the employee's race or sex. 42 U.S.C. § 2000e–2(a). On the other hand, employers may develop affirmative action plans designed to "further[ ] Title VII's purpose of eliminating the effects of discrimination in the workplace." *Johnson v. Transportation Agency,* 480 U.S. 616, 630, 107 S.Ct. 1442, 1451 (1987). An employer's choice to allow for race in an affirmative action program is "consistent with Title VII's objective of break[ing] down old patterns of segregation and hierarchy." *Id.* at 628, 107 S.Ct. at 1450. Nonetheless, when an employer uses a race-conscious affirmative action program, it must insure that "the interests of those employees not benefiting from the plan will not be unduly infringed." *Id.* at 632, 107 S.Ct. at 1452.

The test to address the validity of a plan under Title VII contains two parts. First, the employer's consideration of race must be justified by a manifest racial imbalance that reflects under-representation of minorities or women in "traditionally segregated job categories." *Id.* at 632, 107 S.Ct. at 1451–52. Second, the plan itself must provide a proper remedy for the imbalance by not unnecessarily trammeling the rights of non-beneficiaries or creating an absolute bar to their advancement. *Id.* at 637, 107 S.Ct. at 1455; *McNamara v. City of Chicago,* 867 F.Supp. 739, 749 (N.D.Ill.1994) ("The validity of an affirmative action plan under Title VII is concerned with two discrete factors: whether the purpose and design of the plan is to correct a manifest racial disparity in some part of the employer's work force and whether the plan unduly trammels the rights of nonminority employees."). As with a claim that an affirmative action plan violates the Constitution, the plaintiff bears the burden of establishing the plan's invalidity under Title VII. *Johnson,* 480 U.S. at 626, 107 S.Ct. at 1449.[11]

1. Manifest Imbalance

An employer attempting to vindicate an affirmative action plan under Title VII "need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Johnson,* 480 U.S. at 630, 107 S.Ct. at 1451. Rather, the employer need only show a "manifest ... imbalance in traditionally segregated job categories." *United Steelworkers of Am. v. Weber,* 443 U.S. 193, 197, 99 S.Ct. 2721, 2724 (1979) (*cited in Johnson,* 480 U.S. at 628, 107 S.Ct. at 1450). Whether a "manifest imbalance" exists depends on the position at issue. If the job requires no special expertise or is an entre to a training program designed to provide expertise, "a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate...." *Johnson,* 480 U.S. at 631–32, 107 S.Ct. at 1452. When the job requires specialized training, however, "the comparison should be with those in the labor force who possess the relevant qualifications." *Id.* at 632, 107 S.Ct. at 1452.

***19** In this case, even though the record inferentially shows the longstanding paucity of women in the ISP, neither side is entitled to summary judgment on this issue. Despite defendants' mystifying omission of ISP gender statistics for the years predating the ISP's adoption of the plan, the statistics they have provided, which cover the ensuing years, all but confirm that women composed a minuscule portion of the state's trooper force during the years that matter. By year, the female percentage of the ISP was: 1981—2.17%; 1982—N/A; 1983—N/A; 1984—3.35%; 1985—3.44%; 1986—4.63%; 1987—6.26%; 1988—5.93%; and 1989—6.42%. (Deft. 12(M) stmt. ¶ 28; Def.Ex. F). These numbers reflect a trend of a female ISP population increasing with time; conversely, it is fair to draw the inference that the female ranks in the ISP were less than 2.17% in the years before 1981, which are the years relevant to this issue. Moreover, plaintiffs do not contend that defendants' figure of 40% for the "appropriate" female work-force wildly overestimates the actual number.

Nevertheless, the fact disputes and omissions that precluded summary judgment on whether the racial component of the ISP's plan was statistically justified (Part II(A), *supra,* also prevent an award of summary judgment on this point. As noted above, the size of the appropriate racial labor pools cannot currently be ascertained, which makes a decision concerning "manifest imbalance" infeasible.

2. Effect on Non–Beneficiaries

As discussed above, a Title VII plan cannot "unnecessarily trammel" the interests of non-beneficiaries nor create an absolute bar to their advancement. In *Weber,* the Court upheld, against a Title VII challenge, a private employer's reservation of 50 percent of its new skilled-craft trainee positions for black employees until the percentage of blacks in these positions approximated the percentage of blacks in the appropriate labor force. The Court noted that the plan did not unnecessarily trammel the interests of white employees because it did not require "the discharge of white workers and their replacement with new black hirees." 443 U.S. at 208, 99 S.Ct. at 2730. Additionally, the plan did not create an absolute bar to the advancement of white employees, since half of those who would receive training in the new program would be white. *Id.* Finally, the court noted that the plan "was a temporary measure, "not designed to maintain racial balance, but to 'eliminate manifest racial imbalance.' " *Johnson,* 480 U.S. at 630, 107 S.Ct. at 1451 (*quoting Weber,* 443 U.S. at 208, 99 S.Ct. at 2730).

Johnson upheld a public employer's affirmative action plan that authorized, *inter alia,* the employer to consider the applicant's sex as one factor in making promotion decisions. The employer implemented the plan after it discovered that women constituted 36.4% of the area labor market, but only 22.4% of its employees. 480 U.S. at 621, 107 S.Ct. at 1446. The plan was intended to achieve a " 'statistically measurable yearly improvement in hiring, training and promotion of minorities and women ... in all major job classifications where they are underrepresented.' " *Id.* "As a benchmark by which to evaluate progress," the employer "stated that its long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force." *Id.* at 621–22, 107 S.Ct. at 1446. Accordingly, the employer's "aspiration was that eventually about 36% of the jobs would be occupied by women." *Id.*

***20** The Court ruled that this plan did not unnecessarily trammel the interests of nonbeneficiaries or improperly bar their advancement. With respect to the plan's "goal" of creating a balanced work force, the Court emphasized that the plan "was intended to *attain* a balanced work force, not to maintain one." *Id.* at 639, 107 S.Ct. at 1455 (original emphasis):

> The Plan contains 10 references to the [employer's] desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The director testified that, while the "broader goal" of affirmative action, defined as the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is a "permanent part" of "the [employer's] operating philosophy, that broader goal is divorced, if you will, from specific numbers or

> percentages." ... As both the Plan's language and its manner of operation attest, the [employer] has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

Id. at 639, 641, 107 S.Ct. at 1455, 1457.

Weber and *Johnson* establish that employers lawfully—under Title VII—may seek to attain a balanced work force, but cannot endeavor to create and then maintain one through affirmative action programs. *See also Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 475, 106 S.Ct. 3019, 3050 (1986) (noting "Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force").

In the instant case, insufficient evidence exists to determine whether the ISP intended to go beyond "attainment" of a racially balanced work force and into the realm of permanent maintenance of the same thing. On one hand, as discussed above in section II(B) of this opinion, the ISP indisputably sought to attain certain racial parities with the State of Illinois, from the plan's origination to at least 1990. (*E.g.,* Deft.Ex. O, p. 25) ("The goal of the department's Affirmative Action Plan with regard to sworn officers is to ensure that minorities, who represent at least two percent or more of the state's population, as identified by the U.S. Census Bureau, are represented at the same percentage within the department's internal sworn work force as they are represented in the external population.") On the other hand, the evidence does not demonstrate that the ISP intended (or intends) to maintain the racial parity it sought to attain with the plan.

Moreover, like the plan in *Weber,* the ISP's plan did not create an absolute bar to the "advancement" of white males, because the ISP's training classes contained substantial numbers of white males. *See Weber,* 443 U.S. at 208, 99 S.Ct. at 2730 (no "absolute bar" when half of those who would receive training in the new program would be white). Thus, summary judgment cannot be awarded to either side on this point.

CONCLUSION

***21** In summary, the court grants both sides' motions in part and denies them in part. The court grants summary judgment to plaintiffs on limitations grounds and on their claim that the ISP's plan violated the Equal Protection Clause because it was not narrowly tailored. This conclusion applies only to the years spanning the plan's inception to 1990. Defendants' motion is denied except with respect to their argument that the individual defendants cannot incur liability under Title VII.

IT IS SO ORDERED.

Footnotes

[1] This description of the ISP's affirmative action program is supported by the ISP's Local General Rule 12 statement of facts from a previous case, *Dixon v. Margolis,* 765 F.Supp. 454 (N.D.Ill.1991). In that document, the state's Attorney General admitted:

> The ISP has had an affirmative action program since 1976.... The program is aimed at a 50–50 mix of white males and minority/female recruits.... This is accomplished by the maintenance of three separate lists from which recruits are selected: 1) white males[,] 2) black males and other racial minorities, and 3) females.... Each list has a cutoff based on a written entrance exam and physical test, beneath which candidates are not hired.... The cutoff score for black candidates has been lower than that for whites in order to meet the goal of 50% minority training classes....

[*Dixon*] Defendants' 12(i) Statement Of Facts As To Which There Is No Genuine Issue Of Material Fact, p. 4, ¶¶ 21–25; *see Dixon,* 765 F.Supp. at 457

[2] Plaintiffs also contend that, in addition to the different cutoff scores employed on the written exam, the ISP used reverse racial and sexual favoritism in other aspects of the hiring process, namely, the interview and physical aptitude tests. The evidence offered by plaintiffs is largely anecdotal and self-serving. For instance, one affidavit alleges that an ISP instructor asked the affiant, who is white, to perform a more strenuous stomach exercise than a black applicant.

[3] The court addressed and rejected similar arguments in a 1993 motion to dismiss the claims of the plaintiffs challenging the ISP's promotion practices, relying on the doctrine of equitable tolling. *Koski v. Gainer,* 1993 WL 488409, at *3 (N.D.Ill. Nov. 22, 1993).

[4] Defendants also note, rather lamely, that the information disclosing the racially divided cutoff scores "would also be available under the Freedom of Information Act, ... effective July[,] 1984." (Deft.Resp.Mtn. p. 7).

[5] For example, a letter directed to another applicant (dated August 15, 1980) states:

> The Department of Law Enforcement Merit Board hereby informs you that as the result of your participation in the selection process to date, you are a QUALIFIED applicant.
>
> Depending upon test score results (highest to lowest) qualified applicants will be notified accordingly to participate in an oral interview, background investigation and medical examination....
>
> Qualified applicants will be eligible for certification to training classes until this category is exhausted or one year has passed or the Board has terminated eligibility.

(Pltf.Ex. AA).

[6] At the end of their reply brief, defendants have appended factual information in which the ISP requested the applicant to specify his or her race and gender and informed applicants that the ISP maintained "equal employment" opportunities. This method of presenting information is contrary to Local General Rule 12(M) and violates the principle that parties should not raise new arguments in reply memoranda. *See Reynolds v. East Dyer Dev. Co.,* 882 F.2d 1249, 1253 n. 2 (7th Cir.1989). Accordingly, the court ignores this information in addressing the limitations issue. The court cannot help pointing out, however, the ludicrousness of defendants' position that this information, found on most employment applications in the United States, would cause a reasonable person (even though the person had received the ISP's follow-up letter) to inquire whether the ISP subsidized test scores by race and sex.

[7] Defendants do not contend that the unconventional filing dates of Booker's charges with the EEOC and Title VII claim with the court (here, the latter preceded the former) give rise to a jurisdictional or other problem. In any event, the charge-filing requirement is not jurisdictional, *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 128 (7th Cir.1989), and it can be "cured" after a complaint is filed in court. *See Perkins v. Silverstein,* 939 F.2d 463, 471 (7th Cir.1991).

[8] The court rejects defendants' argument that their alleged lack of intent to discriminate "against" white males absolves them of constitutional liability. It is true that a defendant must *intentionally* discriminate to violate the Equal Protection Clause. *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040 (1976). The question, however, is not whether defendants intended to discriminate against white males, but whether defendants intended to create racial classifications. *See Adarand,* 515 U.S. at ——, 115 S.Ct. at 2109 ("racial classifications of any sort must be subjected to 'strict scrutiny' "; "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination") (internal quotations and citation omitted); *Croson,* 488 U.S. at 494, 109 S.Ct. at 722 ("the standard of review under the Equal Protection Clause is not dependant on the race of those burdened or benefitted by a particular classification"). The court notes that defendants' argument, if believed, would eliminate most, if not all, constitutionally based reverse discrimination claims.

[9] The court finds that the percentage goal for blacks remained the "same" from the beginning of the plan until, on this record, 1990, even though the figure is interchangeably recited as 14.5% and 14.6%. The 1983 report describes the ISP's original early '70s goal as "14.5[%] black and 5.6[%] Hispanic," figures which were derived from the state census. (Deft.Ex. B, pp. 20, 28). The same report, however, later states that these original percentage goals were 14.6% (black) and 5.6% (Hispanic). The 1987 report later uses, respectively, 14.6% and 5.6%, again connecting the derivation of these figures to the state census. (Deft.Ex. O, pp. 25, 26). Last, the minutes from a 1990 ISP Board meeting define the goals, respectively, as 14.5% and 5.6%. (Deft.Ex. W, W–1). The minor discrepancy in the "black" goal does not cloud the fact that the ISP derived this figure from the plenary census figures and used it as an ultimate goal; in any event, the "Hispanic" figure (5.6%) *never* fluctuated.

[10] Defendants also argue that the ISP's plan, insofar as it benefitted women, did not violate the Equal Protection Clause. It is true that the Supreme Court discriminates among types of discrimination; gender preferences, as opposed to racial ones, are held up to only "intermediate" scrutiny. *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 457 (1976); *see Milwaukee County Pavers Ass'n v. Fiedler,* 922 F.2d 419, 422 (7th Cir.), *cert. denied,* 500 U.S. 954, 111 S.Ct. 2261 (1991). There is, however, only one Equal Protection Clause, which was violated in this case by the absence of narrow tailoring respecting the ISP's race classifications. That conclusion renders unnecessary any discussion of whether the ISP's plan survives intermediate scrutiny.

[11] In passing, plaintiffs contend that *Johnson* is inapplicable and, instead, the analysis in *Croson* should apply because the employer in this case is a state actor. *Johnson* implicitly rejected this argument, however, because it recognized that a public employer's obligations under Title VII and the Constitution are distinct. *See* 480 U.S. at 628 n. 6, 107 S.Ct. at 1449 n. 6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which the employer must contend was not intended to extend as far as that of the Constitution."); *id.* at 632, 107 S.Ct. at 1452 ("[W]e do not regard as identical the constraints of Title VII and the Federal Constitution").