IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAY GREGORY, SHERIFF OF PATRICK COUNTY, a constitutional Officer of the Commonwealth of Virginia and elected under the Laws of the Commonwealth, Defendant.	CIVIL ACTION NO. 83-0094

SUPPLEMENTAL MEMORANDUM OF PLAINTIFF UNITED STATES IN OPPOSITION TO MOTION OF DEFENDANT SHERIFF OF PATRICK COUNTY FOR SUMMARY JUDGMENT

INTRODUCTION

By motion dated December 15, 1983, defendant Sheriff of Patrick County moved this Court for summary judgment, pursuant to Rule 56, F.R.Civ.P. That motion was unaccompanied by any supporting papers and did not "state with particularity the grounds therefore," as required by Rule 7(b), F.R.Civ.P. To the extent that defendant's motion lent itself to any response, the United States did so in an initial memorandum in opposition which was served on January 3, 1984. Thereafter, on January 6, 1984, the

motion for summary judgment dated December 30, 1983. This supplemental memorandum is being submitted by the United States with leave of the Court granted January 11, 1984.[1/]

ARGUMENT

I
THE UNITED STATES HAS STANDING TO BRING THIS ACTION

Title VII specifically defines who is covered by the Act. Section 701 of Title VII, 42 U.S.C. §2000e, provides, in relevant part, that:

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions...
>
> (b) The term 'employer' means a person engaged in an industry effecting commerce who has fifteen or more employees ... and any agent of such a person...

Defendant Sheriff contends (Memorandum, pp. 2-3) that the United States has no standing to prosecute this action under Title VII because, argues the Sheriff, he is not a "government, governmental agency or political subdivision."

As we responded in our initial memorandum (pp. 2-3), we find it incredible for the defendant to suggest that he is not a "government, governmental agency or political subdivision," in light of the uncontested facts, among others, that: the Sheriff of Patrick County is a constitutional officer of the Commonwealth of Virginia elected under the laws of the Commonwealth; the Sheriff is responsible for the protection of life and property, the

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1/ The Standard which must be met by a movant for summary judgment already has been set forth at pp. 6-8 of our January 5, 1984 memorandum in opposition to the Sheriff's Rule 12(b)(6), F.R.Civ.P., motion to dismiss, and need not be repeated here.

maintenance of order and the enforcement of State laws and local ordinances within Patrick County; and in order to carry out his responsibilities, the Sheriff maintains and operates the Patrick County Sheriff's Department (the "PCSD").

In addition to being a "government, governmental agency or political subdivision" under Title VII, the Sheriff properly may be considered an "agent" (under Section 701(b) of Title VII) of the Commonwealth of Virginia (since he is a constitutional officer of the Commonwealth, charged with the responsibility to enforce State laws), as well as of Patrick County (since he enforces local ordinances, the County in part funds the maintenance and operation of the Sheriff, and the Sheriff must submit his proposed budgets to the County for approval). This constitutes an additional ground for the Sheriff's coverage under the provisions of Title VII.

II
THE VIRGINIA COMPENSATION BOARD IS NOT AN INDISPENSABLE PARTY TO THIS ACTION

Under Rule 19, F.R.Civ.P., only after a court has found that a person is one who should be joined but cannot be and that the litigation cannot go forward without that missing person is the label "indispensable" appropriate. Challenge Homes v. Greater Naples Care Center, 669 F.2d 667, 669 n. 3, (11th Cir. 1982), citing, inter alia, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968). There has been no showing in the instant case that the Compensation Board is a person (or entity) that should be joined but cannot be.

As set out in Provident Tradesmens Bank, 390 U.S. 102, Rule 19 has a two-part test for determining the indispensability of a party. First, the court must determine whether under Rule 19(a) a person in question is one who should be joined if feasible. If the person should be joined but cannot be (for example, because joinder would divest the court of jurisdiction), then the court must determine whether, after applying the factors enumerated in Rule 19(b), the litigation should continue. Challenge Homes, 669 F.2d at 669.

The defendant suggests that the Compensation Board has the sole and exclusive authority to provide the remedial relief being sought by the United States, such as retroactive seniority, monetary compensation and ancillary benefits (Memorandum, pp. 3-4). On the contrary, the Sheriff has the authority to award the remedial relief requested by the United States. An order of relief by this Court would be directed to the Sheriff. It is the Sheriff who has the sole and exclusive authority to hire his deputies and to award them seniority based upon their dates of hire. With respect to wages and ancillary benefits, the facts demonstrate that the Sheriff alone hires individuals to fill deputy and other positions in the PCSD at a particular salary and with the benefits associated with that position, such as pension benefits, a uniform allowance and workmen's compensation. See, Gov't. Exs. 27-30 (PCSD Budgets for FY 1981-1984) attached to Williams Dep. 10/12/83. Therefore, it is the Sheriff who is

responsible for providing Doris Scales and Stephanie Ressel with back pay and ancillary benefits, and for providing Ms. Scales with a job offer and seniority retroactive to the date she should have been hired.

The Compensation Board functions primarily as a conduit between the State and cities and counties for disbursement of State funds for particular purposes. Funding is provided not to the Sheriff but to Patrick County as reimbursement for specified expenses entailed in the operation of the PCSD. The Compensation Board does not determine the number of deputies that a sheriff may employ. The minimum number of deputies that a sheriff may appoint and what positions will be fully funded by the State is set by State law and is based upon the population of the particular city or county. Va. Code Ann. §14.1-70 (Supp. 1983). This Statute does not prohibit the hiring of additional deputies; but any additional deputy positions created must be funded entirely by the locality. Id. Equally, the Compensation Board has no prohibitions against the payment of additional fringe benefits to deputies, but again these expenses must be borne by the locality. Deputies are paid according to a pay scale established by State law and not by the Compensation Board: road deputies, correctional officers and courtroom security officers are all grade six employees on the State scale, with the actual salary paid based upon years of experience as well as upon the specific request of a sheriff (Trible Dep. 10/26/83, p. 24). Although a sheriff must

get approval from the Compensation Board for an increase in compensation for a deputy, any increase awarded is at the instigation and upon the recommendation of a sheriff.

Thus, it is clear that the Sheriff of Patrick County is responsible for providing the remedial relief requested by the United States. It is also clear that the Compensation Board is not an "indispensable party" under Rule 19, F.R.Civ.P. Nevertheless, since the Compensation Board (and the Patrick County Board of Supervisors) may be requested by the Sheriff to approve funding for the monetary relief awarded, the Court may choose to direct that the Compensation Board and the Board of Supervisors be brought as parties for relief purposes following a determination of liability against the Sheriff to assure that the victims of discrimination obtain complete relief. We are filing a motion to this effect, and respectfully refer the Court's attention to that motion.[2/]

2/ Both the Compensation Board and the Board of Supervisors have had notice of this suit, since an official of the Compensation Board had his deposition taken in the case in October 1983 and was represented at that deposition by an attorney from the State Attorney General's Office; and the Board of Supervisors has at all relevant times since this action was filed been represented by the same counsel who also represents the defendant Sheriff. In light of this, and in light of the reasons for which the Court may choose to bring in the Compensation Board and Board of Supervisors as set forth in our motion and memorandum in support, no unfairness would result from the Court doing so.

III

THE EXTENSION OF TITLE VII TO STATE AND LOCAL GOVERNMENTS IS NOT VIOLATIVE OF THE TENTH OR ELEVENTH AMENDMENTS TO THE CONSTITUTION

The Sheriff next contends (Motion, pp. 1-2) that the extension of Title VII coverage in 1972 to State and local governments, governmental agencies and political subdivisions is violative of the Tenth and Eleventh Amendments to the Constitution. This contention has no merit. See, Fitzpatrick v. Bitzer, 427 U.S. 445 (1975); and EEOC v. Wyoming, ___ U.S. ___, 51 L.W. 4219 (No. 81-554; March 2, 1983). See also, Milliken v. Bradley, 433 U.S. 267 (1977).

IV

THERE IS NO TIME LIMITATION WITHIN WHICH THE UNITED STATES MUST FILE AN ACTION UNDER SECTION 706 OF TITLE VII

Section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1), on its face states no time limitation within which the United States must file suit in order to maintain an action under the Act. The language of this section, rather than imposing a time limit for filing upon the United States or the Equal Employment Opportunity Commission ("EEOC"), provides an alternative enforcement mechanism for an aggrieved person who is unwilling to await the conclusion of any EEOC or other federal proceedings. The 180-day limitation in Section 706 provides only that a private right of action does not arise until 180 days after a charge has been filed.

The Supreme Court in Occidental Life Insurance Company of California v. EEOC, 432 U.S. 351 (1977), specifically held that the literal language of Section 706(f)(1) did not support the imposition of a 180-day limitation to the filing of EEOC suits. 432 U.S. at 361. Furthermore, the Court in Occidental instructed that the legislative history of this section clearly demonstrated that Section 706(f)(1) was intended to mean exactly what it says on its face. Occidental, 432 U.S. at 366. Although Occidental involved a suit brought by the EEOC, the holding of the Court is clearly applicable to suits such as this, brought by the United States. In suits filed against public employers, the United States stands in exactly the same position as does the EEOC in a suit against a non-governmental employer: both the EEOC and the United States are charged with the authority to bring legal action following the failure of conciliation. Section 706(f)(1). At this stage of the procedure, Section 706(f)(1) does not differentiate as to whether the action is brought by the United States or by the EEOC.

Defendant has attempted to distinguish EEOC v. Cleveland Mills Company, 502 F.2d 153 (4th Cir. 1974), which held that there is no statute of limitations under Section 706 for the filing of a suit by the EEOC. Initially, it should be noted that Cleveland Mills was decided prior to Occidental. Further, defendant's attempt to distinguish Cleveland Mills is futile. Although defendant suggests that the Fourth Circuit based its decision in Cleveland Mills solely upon Congressional concern that the EEOC

would be burdened by an overload of cases, even the most cursory review of Cleveland Mills reveals that the Court based its holding on the "literal reading of the statute" (502 F.2d at 156); and the Court then observed that such a reading was consistent with its legislative history. 502 F.2d at 156. Indeed, the Court specifically rejected consideration of EEOC's backlog of cases as affecting Congressional intent behind Section 706. Id. at 158. While the Sheriff also seeks to distinguish Cleveland Mills on the basis that the EEOC, and not the United States, had filed suit in that case, this is a specious argument. The United States files suit under Section 706(f)(1) in exactly the same manner as does the EEOC - only after conciliation has failed. Thus, the EEOC and the United States are in procedurally-identical positions.

Defendant also has suggested that because the United States is seeking monetary relief for the victims of unlawful discrimination, it is somehow pursuing a private action, which should be controlled by the two-year Virginia statute of limitations for civil actions (Memorandum, pp. 7-8). This argument is devoid of merit. The suit is brought by the United States solely under Title VII, a federal statute prohibiting discrimination on the basis of race, sex or national origin. Title VII provides for suits by the United States and also provides for back pay (Sec. 706(g), 42 U.S.C. 2000e-5(g)). The Supreme Court in Occidental

held a state statute of limitations inapplicable to Title VII as inconsistent with the Congressional intent of Title VII. 432 U.S. at 369. The only case cited by defendant in support of his statute of limitations contention is EEOC v. Griffin Wheel Company, 511 F.2d 456 (5th Cir. 1975). That case is, however, not applicable; it dealt with the filing of a charge under Title VII in 1970, before Title VII was amended in 1972. The 1972 amendments to Title VII included a back pay limitation period in the statute itself (Section 706(g)), thereby eliminating the need to refer to a state statute of limitations in any Title VII suit filed after March 24, 1972, the effective date of the amendments to the Act.

V

PATRICK COUNTY SHERIFF'S DEPARTMENT PERSONNEL ARE "EMPLOYEES" WITHIN THE MEANING OF TITLE VII

In response to the Sheriff's contention that the personnel of the Patrick County Sheriff's Department are not "employees" within the meaning of Title VII, we respectfully refer the Court to our memorandum in opposition to the Sheriff's motion to dismiss, served January 5, 1984, as well as to our pre-trial brief (pp. 3-12), served January 10, 1984.

VI

THE CLAIM OF THE UNITED STATES FOR INJUNCTIVE RELIEF IN THIS ACTION IS NOT MOOT; AND TO THE EXTENT THAT THIS COURT FINDS THAT THE SHERIFF OF PATRICK COUNTY HAS DISCRIMINATED AGAINST WOMEN ON THE BASIS OF THEIR SEX IN VIOLATION OF TITLE VII, THE COURT HAS NOT ONLY THE POWER BUT THE DUTY TO RENDER A DECREE THAT WILL ELIMINATE THE EFFECTS OF PAST DISCRIMINATION AS WELL AS BAR FUTURE DISCRIMINATION

In our Complaint, we alleged (para. 7) that defendant Sheriff of Patrick County "has engaged and continues to engage" in discriminatory employment practices against women on the basis of their sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. In our prayer for relief (Complaint, pp. 4-5), we asked this Court to enter an order enjoining the Sheriff of Patrick County: from engaging in employment practices that unlawfully discriminate against women on the basis of their sex; and from failing or refusing to take appropriate measures to overcome the present effects of these past discriminatory practices by - among other means - establishing a recruitment program on behalf of women, and providing remedial relief (in the form of an offer of employment, monetary compensation, retroactive seniority and fringe benefits) to any woman who has been unlawfully denied employment by the Sheriff.

In his Memorandum, defendant Sheriff asserts (pp. 10-12) that the claim of the United States for injunctive relief should be dismissed as moot, since Jesse Williams was defeated in his bid for re-election as Sheriff, and Jay Gregory has been the

Sheriff of Patrick County since January 1, 1984. Defendant argues, on the one hand, that Mr. Williams is no longer in a position either unlawfully to discriminate against women with respect to job opportunities in the PCSD, or to provide the relief sought by the United States (Memorandum, p. 10). Defendant argues, on the other hand, that the United States "can show nothing more than the fact that Doris Scales, Wanda Hylton and Stephanie Ressel have suffered past exposure to illegal conduct unaccompanied by any continuing adverse effect," and that the United States is unable "to say beyond mere speculation that the Sheriff-elect, Jay Gregory, will continue the allegedly discriminatory actions of his predecessor" (Id., pp. 11-12). Defendant concludes that, based upon the Supreme Court's holding in O'Shea v. Littleton, 414 U.S. 488 (1974), there exists here no "case or controversy" as required by Article III of the Constitution (Id.).

Also, during the course of an in-chambers discussion with counsel for the parties on January 11, 1984 and just before the trial in this action commenced, the Court questioned whether there exists a "case or controvery" concerning injunctive relief, based upon the Supreme Court's holding in Spomer v. Littleton, 414 U.S. 514 (1974), the companion case to O'Shea, supra.

As is hereafter demonstrated, the United States' action fully satisfies the "case or controversy" requirement of Article III of the Constitution and the claim of the United States for injunctive relief is not moot. Both O'Shea and Spomer were

actions brought under 42 U.S.C. §§1981, 1982, 1983 and 1985, as well as various amendments to the Constitution and have no application to actions, such as the instant one, brought under the specific coverage of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. However, even assuming arguendo that O'Shea and Spomer may have applicability to Title VII actions, the facts and circumstances presented to the Court in those cases are dramatically different from those presented in this action and, thus, those holdings have no applicability here. Lastly, to the extent that this Court finds that the Sheriff of Patrick County has discriminated against women on the basis of their sex in violation of Title VII, the Court has not only the power but the duty to render a decree that will eliminate the effects of past discrimination as well as bar future discrimination.

1. Unlike this action, which has been brought by the United States under Title VII, both O'Shea and Spomer were actions brought under 42 U.S.C. §§1981, 1982, 1983 and 1985, as well as various amendments to the Constitution. The distinction between Title VII actions and actions brought under 42 U.S.C. §1981, et seq. is not merely conceptual, since important legal consequences hinge on what statute underpins the lawsuit. See Washington v. Davis, 426 U.S. 229, 238-239 (1976). Title VII, unlike 42 U.S.C. §1981, et seq., specifically defines who is

covered by the Act. Section 701 of the Act, 42 U.S.C. §2000e, provides, in relevant part, that:

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions....
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees...and any agent of such a person....

The United States' action was not brought against Jesse Williams in his individual capacity, but rather against Mr. Williams in his official capacity as Sheriff of Patrick County. The Sheriff of Patrick County was at the time of the filing of our Complaint and presently remains an employer under Section 701(b) of Title VII; and thus was at the time of the filing of our Complaint and presently remains subject to the prohibitions against discrimination contained in Section 703(a) of Title VII, 42 U.S.C. §2000e-2(a).[3/] For the purpose of coverage under Title VII, it is irrelevant that Mr. Williams lost his bid for re-election and that Mr. Gregory now occupies the office of Sheriff of Patrick County. As such, Mr. Gregory properly has been substituted for Mr. Williams, pursuant to Rule 25(d), F.R.Civ.P.

Title VII, again unlike 42 U.S.C. §1981, et seq., also contains its own remedial relief provision, Section 706(g), 42

3/ See Part I of this Supplemental Memorandum, supra.

U.S.C. §2000e-5(g).[4/] In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court observed that the legislative history of Section 706(g) strongly reaffirmed Title VII's dual purpose of eliminating employment discrimination and making whole those persons who have been the victims of such discrimination.

In particular, the Court in Albemarle referred (422 U.S. at 420-421) to the Section-by-Section Analysis which accompanied the Conference Committee Report on the Equal Employment Opportunity Act of 1972 which, among other things, extended Title VII's coverage to State and local governments, governmental agencies and political subdivisions. As the Court observed (422 U.S. at 421), that Report stated:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972).

4/ Section 706(g) of Title VII provides, in relevant part, that upon a finding of unlawful discrimination:

> ...the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

The Court in Albemarle thus instructed (422 U.S. at 421) that, as the legislative history of the 1972 Act makes clear:

> ...Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashion[ing] [of] the most complete relief possible'. 5/

These teachings of the Supreme Court in Albemarle have been expressly applied by the Court of Appeals for this Circuit in United States v. County of Fairfax, Va., 629 F.2d 932 (1980), also a Title VII action. In Fairfax, the lower court entered judgment largely for the County. See 629 F.2d at 936. Thus, the lower court found that the County had discriminated against blacks in only two job categories (protective services and service and maintenance) and against women in only one job category (service and maintenance). Fairfax, 629 F.2d at 936. Further, the lower court concluded that equitable relief was unnecessary to correct for the racial discrimination it had found, since the County had maintained an affirmative action plan since 1978, two years prior to the filing of suit by the United States. 629 F.2d at 936-938. Lastly, the lower court declined to order the County to comply with the record keeping and reporting relief sought by the United States, since the court was of the view that the County would voluntarily comply with Title VII. 629 F.2d at 936. On appeal, the Court of Appeals held that lower court erred by rejecting the United States' evidence of applicant flow data,

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5/ See also, Franks v. Bowman Transportation Co., 424 U.S. 747, 762-764 (1976).

stating that when resort is had to that evidence, "it is obvious that the government proved a more extensive prima facie case than the district court realized" 629 F.2d at 941. The Court of Appeals vacated the judgment of the district court and remanded the action to the lower court with the following instructions (629 F.2d at 941-942):

> While we express no view on the extent of the violation of Title VII which the district court may find on remand, we are constrained to comment on the limited relief the district court granted the victims it identified and its further refusal to grant a mandatory injunction to insure compliance with the record keeping requirements of law. In both respects, we think that the district court was in error.
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> To the extent that the district court finds racial discrimination, it is under a duty to render a decree which will both eliminate past discrimination and bar discrimination in the future. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). It is commendable that the County is continuing its affirmative action programs, although there was some evidence that the goals may soon be reduced. But, in any event, as we said in Barnett v. W.T. Grant Co., 518 F.2d at 550, 'a court cannot abdicate to defendants' good faith its duty of insuring removal of all vestiges of discrimination.' 6/
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> Thus, we think that the district court should have granted injunctive relief against future discrimination. In granting injunctive relief, it should both have required compliance with the record keeping and disclosure requirements of existing law, see EEOC v. Rogers Brothers, Inc., 470 F.2d 965 (5 Cir. 1972), and imposed requirements for periodic reports to enable it to monitor compliance with its decree. Finally, if proof is offered of identifiable economic injury to

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6/ See also, United States v. International Brotherhood of Electrical Workers, Local 38, 428 F.2d 144, 151 (6th Cir. 1970) (that a new union administration which favored compliance with Title VII was elected after the commencement of the action but before trial, did not warrant the district court's refusal to retain jurisdiction or its refusal to grant affirmative relief).

> blacks or women, or both, who have suffered from the County's discriminatory practices, it should grant back pay or retroactive seniority or both. Teamsters v. United States, 431 U.S. at 361-62, 97 S.Ct. at 1867-68; Albemarle Paper Co. v. Moody, 422 U.S. at 421, 95 S.Ct. at 2373; Hill v. Western Electric Co., 596 F.2d 99, 104 (4 Cir. 1979), cert. denied, 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4 Cir. 1978); Robinson v. Lorillard Corp., 444 F.2d 791, 803-04 (4 Cir. 1971).

2. Even assuming arguendo that the Supreme Court's holdings in O'Shea and Spomer may have applicability to Title VII actions, the facts and circumstances presented to the Court in those cases are dramatically different from those presented in this action and, thus, the holdings have no applicability here.

O'Shea and Spomer grew out of an action filed by a group of residents of Cairo, Illinois, individually and on behalf of a class of City residents, against the State's Attorney for Alexandria County, Illinois, his investigator, the Police Commissioner of Cairo and the Magistrate and Associate Judge of the Alexandria County Circuit Court, alleging that the defendants had engaged in a pattern of conduct since the early 1960's of depriving plaintiffs of their rights under 42 U.S.C. §§ 1981, 1982, 1983 and 1985 and the First, Sixth, Eight, Thirteenth and Fourteenth Amendments to the Constitution. O'Shea, 414 U.S. at 490-491.

Initially, the Court in O'Shea held that the plaintiffs' complaint against the Magistrate (O'Shea) and the Associate Circuit Judge failed to satisfy the threshold "case or controversy" requirement imposed by Article III of the Constitution, since

"[n]one of the named plaintiffs is identified as himself having suffered any injury in the manner specified." O'Shea, 414 U.S. 488. Noting that counsel for the plaintiffs stated at oral argument that he could if necessary identify some of the plaintiffs as having been defendants in criminal proceedings before the Magistrate and Circuit Judge and as having suffered injury therefrom, the Court stated (414 U.S. 495-496):

> Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects. Neither the complaint nor [plaintiffs'] counsel suggested at any time that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before [the defendants].

Having noted that none of the named plaintiffs had alleged that he had suffered injury from the alleged unlawful practices, the Court in O'Shea analyzed what was left of their complaint as follows (414 U.S. at 497):

> Apparently, the proposition is that if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before [the Magistrate and the Judge], they will be subjected to the discriminatory practices that [the Magistrate and the Judge] are alleged to have followed. But it seems to us that attempting to anticipate whether and when these [plaintiffs] will be charged with a crime and will be made to appear before either [the Magistrate or the Judge] takes us into the area of speculation and conjecture. (emphasis in original)
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> . . .
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> [W]e are ... unable to conclude that the case or controversy requirement is satisfied by general assertions or inferences that in the course of their [civil rights] activities [plaintiffs] will be prosecuted for violating valid criminal laws.

The Court in O'Shea also determined that even if plaintiffs' complaint presented an existing case or controversy, plaintiffs had not demonstrated an adequate basis for the equitable relief they sought, such as the filing of periodic reports on bail and sentencing actions, since they have "an adequate remedy at law and will not suffer irreparable injury if denied equitable relief, Younger v. Harris, 401 U.S. 37, 43-44 (1971)." O'Shea, 414 U.S. at 499. Indeed, the Court observed that the plaintiffs did not challenge the constitutionality of any state law, nor did they seek to enjoin any criminal prosecutions that might result pursuant to a law under challenge. Rather, the Court observed, the plaintiffs "apparently contemplate that prosecutions will be brought under seemingly valid state laws." O'Shea, 414 U.S. at 500.

In Spomer, the companion case to O'Shea, the Supreme Court addressed the plaintiffs' allegations that the State's Attorney had purposely discriminated against blacks on the basis of their race and under color of state law, through, inter alia: the initiation of criminal proceedings; the presentation of matters to the grand jury; recommendations concerning the setting of bonds; and the imposition of sentences. Spomer, 414 U.S. 517-518. In their complaint, the plaintiffs sought damages against the State's Attorney, an injunction from continuing the alleged unlawful practices and the periodic submission to the court of a report detailing the nature, status and disposition of any complaint brought to the State's Attorney by the plaintiffs. Id.

At the time of the filing of plaintiffs' complaint, the State's Attorney was Berbling, and he was named a defendant in his individual as well as in his official capacity. 414 U.S. 520, n. 8. Following the Court of Appeals' decision in the case, Spomer was elected to succeed Berbling and took office as State's Attorney. Spomer was substituted for Berbling, pursuant to Rule 48(3), Sup. Ct. Rules, in the proceedings before the Supreme Court. 414 U.S. 520.

In Spomer, the Court stated that there was nothing in the record before Court upon which it could conclude that there existed a case or controvesy between the plaintiffs and Spomer. In this regard, the Court first stated that Spomer was not named in the plaintiffs' complaint, he had never appeared either before the district court or the court of appeals, and the wrongful conduct charged in the complaint was "personal to Berbling, despite the fact that he was sued in his then capacity as State's Attorney" 414 U.S. at 514.[7/] The Court further stated that the plaintiffs had made no attempt to substitute Spomer for Berbling after Spomer assumed office, and that the plaintiffs had made no record

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7/ At the time of the filing of plaintiffs' complaint as well as at the time of the Supreme Court's decision in Spomer, local governments were wholly immune from the types of suits brought in Spomer and O'Shea. See, Monroe v. Pape, 365 U.S. 167 (1961). Local governments remained wholly immune from those types of suits until the Supreme Court in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), overruled Monroe. The Court in Monell nevertheless upheld Monroe to the extent that it holds that the doctrine of respondeat superior is not a basis for rendering municipalities liable under 42 U.S.C. §1983 for the constitutional torts of their employees. 436 U.S. at p. 663-664, n. 8.

allegations that Spomer intended to continue the alleged unlawful practices of Berbling. 414 U.S. at 514. The Court concluded that, on the record before it, the plaintiffs "have never charged Spomer with anything and do not presently seek to enjoin him from doing anything" (414 U.S. at 522); and it was upon that basis that the Court vacated the judgment of the Court of Appeals and remanded to that court for a determination as to whether the issue of the availability of injunctive relief against the State's Attorney was moot and whether plaintiffs desired to or should be permitted to amend their complaint to include claims for relief against Spomer. 414 U.S. at 513-514.

Unlike the named plaintiffs in O'Shea who the Supreme Court determined lacked standing to seek equitable relief for alleged unlawful conduct they themselves did not suffer (414 U.S. at 494-495 and n. 3), it is clear that the United States has standing to bring this action pursuant to Section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1). Further, it is clear that this Court has jurisdiction of the action pursuant to Section 706(f)(3) of Title VII, 42 U.S.C. §2000e-5(f)(3), as well as pursuant to 28 U.S.C. §1345.

While the United States in its Complaint named Jesse W. Williams as defendant in his official capacity as Sheriff of Patrick County,[8/] all of the allegations of unlawful discrimination against women, as well as the prayer for injunctive

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8/ As noted by the Supreme Court in Monell, supra, 436 U.S. at 690, n.5, "Official-capacity suits generally represent only another way of pleading an action against an entity of which the officer is an agent..."

relief, are directed to the "Sheriff of Patrick County," and not to Mr. Williams personally. In contrast, even the most cursory review of the specific examples of unlawful conduct which the plaintiffs in Spomer alleged in their complaint (414 U.S. at 516-518, nn. 1-4) reflects that the wrongful conduct alleged was personal to Berbling, and the Court thus so found. 414 U.S. at 521. Further, while the Court in Spomer emphasized that Spomer, of course, had never appeared before either the district court or the court of appeals and that the plaintiffs never attempted to substitute Spomer for Berbling after Spomer assumed office (414 U.S. at 521), here Jay Gregory properly was substituted for Jesse Williams as Sheriff of Patrick County, pursuant to Rule 25(d), F.R.Civ.P., by bench order of the Court on January 11, 1984,[9/] and Mr. Gregory is thus before this Court. Unlike Spomer, where the allegations of unlawful conduct were unique to Berbling (414 U.S. at 516-518, nn. 1-4), and where the plaintiffs "never charged Spomer with anything and ... [did not] ... seek to enjoin him from do anything" (414 U.S. at 552), we have alleged in our complaint that:

> Defendant Sheriff of Patrick County has engaged and continues to engage in employment practices that discriminate against women... (Complaint, para. 7);

9/ Although Rule 25(a), F.R.Civ.P., provides that this substitution is to be automatic, the record reflects that the United States moved the Court for this substitution by motion served January 3, 1984, three days after Mr. Gregory assumed office.

> [These] employment practices of defendant Sheriff of Patrick County ... have deprived and continue to deprive women of the full enjoyment of their right to equal employment opportunity without discrimination based upon sex... (Complaint, para. 10)

Having been properly substituted for Mr. Williams, Mr. Gregory - as the Sheriff of Patrick County and an "employer" within the meaning of Section 701(b) of Title VII - is in his official capacity as answerable to the allegations of the United States as was Mr. Williams in his official capacity.

So also, while the plaintiffs in Spomer never sought "to enjoin [the new State's Attorney] from doing anything" (414 U.S. at 552), we have asked the Court to enter an order enjoining the Sheriff of Patrick County: from engaging in employment practices that unlawfully discriminate against women on the basis of their sex; and from failing or refusing to take appropriate measures to overcome the present effects of past discriminatory practices by - among other means - establishing a recruitment program on behalf of women, and providing remedial relief (in the form of an offer of employment, monetary compensation, retroactive seniority and fringe benefits) to women who have been unlawfully denied employment (Complaint, pp. 4-5).

In his Memorandum (pp. 10, 11) defendant Sheriff refers to the Supreme Court's statement in O'Shea (414 U.S. at 495-496) that:

> Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.

and the Sheriff asserts (pp. 11, 12):

> ...in this case, [the United States] can show nothing more than the fact that Doris Scales, Wanda Hylton and Stephanie Ressel have suffered past exposure to illegal conduct unaccompanied by any continuing adverse effect.
>
> . . .
>
> ...[and] these three individuals ... will not go unrecompensed; they have an adequate remedy at law for money damages for wrongs allegedly suffered.

The Sheriff thus concludes (Memorandum, p. 12) that the United States' claim for injunctive relief - the only type of relief sought by the United States since back pay is an equitable remedy under Title VII - must be dismissed as moot.[10/]

10/ In his Memorandum (p. 12), the Sheriff also makes passing reference to the Supreme Court's decision in Los Angeles v. Lyons, ___ U.S. ___, Slip Op. No. 81-1064 (April 20, 1983). Lyons, a Non-Title VII action, has no applicability whatsoever to the suit before this Court.

Lyons was an action commenced in 1977 by plaintiff Lyons, alleging that during the course of a routine traffic stop in 1976 he had been subjected, without provocation, to a chokehold by a City police officer. Slip. Op., pp. 1-2. Lyons had sought a declaratory judgment, damages against the officer and the City, and a preliminary and permanent injunction against the use of chokeholds by the City's police officers. Id., p. 2. After the Court had granted the City's petition for a writ of certiorari, the City imposed a moratorium on the use of chokeholds except under circumstances where deadly force was authorized. Id., p. 4. In his brief and at oral argument Lyons advised the Court that, due to City's moritorium, he thought injunctive relief was unnecessary because he was "no longer subject to a threat of injury," and Lyons urged the Court to vacate the injunction imposed by the Court of Appeals. Id., p. 5.

Although the Supreme Court in Lyons held that the case before it was not moot (Id., p. 5), the Court held that there was no case or controversy and that Lyons lacked standing, because of "the speculative nature of his claim that he will again experience injury" (Id., p. 13), a fact conceded by Lyons himself.

Initially, we view as disingenuous defendant's statement that Ms. Scales and Ms. Ressel[11/] will not go unrecompensed if the Court dismisses the United States' claim for injunctive relief, because they have an adequate remedy at law for money damages. Earlier in his Memorandum (p. 8), the Sheriff argues that the applicable statute of limitations for civil rights in Virginia is two years, and Ms. Scales' and Ms. Ressel's claims arose in 1980.[12/] We also find it incredible for defendant to suggest that Sheriff Williams' refusal to hire Ms. Scales and Ms. Ressel has been "unaccompanied by any continuing adverse effect," since to date neither of them has been compensated for the monetary loss she incurred as a result thereof, and Ms. Scales has not been offered employment with the PCSD.

While the Sheriff asserts (Memorandum, pp. 11-12) that the United States is "unable to say beyond mere speculation that the Sheriff-elect, Jay Gregory, will continue the allegedly discriminatory actions of his predecessor," such assertion overlooks the fact that the United States has alleged in its Complaint that the Sheriff of Patrick County "has engaged and continues to engage in employment practices that discriminate against women," as well as the fact that Mr. Gregory has been properly substituted as defendant Sheriff of Patrick County. Since the United States has

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11/ The United States is not seeking relief on behalf of Ms. Hylton. Our back pay computations for Ms. Ressel and Ms. Scales are attached hereto.

12/ As we have demonstrated, supra, Part IV, there is no statutory time limit following the conclusion of administrative procedures in a Title VII action brought by the United States.

clearly alleged continuing violations of Title VII by the Sheriff of Patrick County, the United States is entitled to have the opportunity to prove its allegations, rather than to be precluded from doing so upon the "mere speculation" that the United States cannot demonstrate continuing violations of Title VII.

Nor do the allegations of the United States in this regard lack substance. On the contrary, Sheriff Gregory to date has not provided either Ms. Scales or Ms. Ressel with monetary compensation for the loss each of them incurred as a result of having been denied employment in the PCSD, and Sheriff Gregory has not provided Ms. Scales with an offer of employment in the PCSD. Further, the defendant has plead as an affirmative defense in his Answer (para. 11) that "sex is a bona fide occupational qualification [bfoq] for some positions as sworn officers within the Patrick County Sheriff's Department." That Answer, which was served on December 12, 1983, has not been amended and, thus, defendant's bfoq defense is still being asserted. Moreover, the record before the Court reflects that: upon assuming office on January 1, 1984, Sheriff Gregory terminated Kathy Sheppard, the only woman who has ever been employed in the PCSD in a sworn, uniformed position; and since he has assumed office, Sheriff Gregory has hired two persons as sworn officers, both of whom are men (Gregory Dep. 1/10/84). Given defendant's continuing bfoq defense, the fact that to date neither Ms. Scales nor Ms. Ressel have been made whole for the discrimination they have suffered,

and the record evidence referred to above, it is not "mere speculation" that the Sheriff of Patrick County "continues to engage in employment practices that discriminate against women".

Lastly, even assuming arguendo that the Court were to determine, after the trial of this action, that although the Sheriff of Patrick County has in the past engaged in employment practices which unlawfully discriminated against women, Sheriff Gregory himself did not engage in such practices - that determination would not preclude the United States' entitlement to the injunctive relief it seeks, since:

> To the extent that the district court finds [sex] discrimination, it is under a duty to render a decree which will both eliminate past discrimination and bar discrimination in the future. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). United States v. County of Fairfax, Va., supra, 629 F.2d at 941.

Voluntary measures by Sheriff Gregory to afford equal employment opportunity to women, while certainly to be hoped for, would nevertheless not warrant the denial of the injunctive relief the United States seeks. United States v. County of Fairfax, Va., supra, 629 F.2d at 942; United States v. International Brotherhood of Electrical Workers, Local 38, supra, 428 F.2d at 151.

CONCLUSION

For the foregoing reasons, as well as those set forth in our January 3, 1984 initial memorandum in opposition to defendant's motion for summary judgment and our January 5, 1984 memorandum in opposition to defendant's motion to dismiss, the motions of defendant Sheriff of Patrick County to dismiss and for summary judgment, properly should be denied.

Respectfully submitted,

WILLIAM B. FENTON
JOHN M. GADZICHOWSKI
MELISSA P. MARSHALL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2188

Counsel for Plaintiff United States of America

COMPUTATION OF EARNINGS LOSS
FOR BACK PAY PURPOSES

STEPHANIE GREGORY RESSEL

Dates	Ms. Ressel's Interim Earnings[1]	Interim Earnings of PCSD Personnel[2]	Ms. Ressel's Earnings Loss
July 1, 1980-Dec. 31, 1980	$1,169.80	$5,134.99	$3,965.19
Jan. 1, 1981-March 31, 1981[3]	$ 0.00[4]	$2,567.49	$2,567.49
		Earnings Loss =	$6,532.68
		Plus Interest[5] =	_____
		Total Earnings Loss =	_____

1/ See Gov't. Trial Ex. __, 1980 Federal Income Tax Return of Stephanie Gregory.

2/ The statutory base rate salary for a deputy with zero to one year of experience for 1980 through 1981 was $10,271. See compensation Board Depty Salary Scale, included in Gov't Ex. 30 attached to the 10/12/83 Williams Depostion.

3/ March 31, 1981 is the date upon which Ms. Ressel effectively lost interest in employment in the PCSD.

4/ From January 1, 1981 to March 31, 1981, Ms. Ressel was employed by Ronbuilt on an uncompensated basis.

5/ Interest on earnings loss accrues commencing with the last day of each calendar quarter of the last back pay period on the total amount then due and owing at the adjusted prime rate then in effect and continuing at such rate, as modified from time to time by the Secretary of the Treasury, until compliance with this Court's order for relief. EEOC v. Pacific Press Publishing Association, 482 F.Supp. 1291, 1320 (M.D. Cal. 1979), aff'd 676 F.2d 1272 (9th Cir. 1982).

COMPUTATION OF EARNINGS LOSS
FOR BACK PAY PURPOSES

DORIS SCALES

Dates	Ms. Scales' Interim Earnings	Interim Earnings of PCSD Personnel[1]	Ms. Scales' Earnings Loss
July 1, 1980-June 30, 1981	$3,313.00[2]	$10,270.00	$ 6,957.00
July 1, 1981-June 30, 1982	$ 0.00	$10,740.00	$10,740.00
July 1, 1982- June 31, 1983	$ 0.00	$12,731.00	$12,731.00
Julyl, 1983-Jan. 20, 1984	$ 200.00[3]	$ 7,383.76[4]	$ 7,183.76
		Earnings Loss[5] =	$37,611.76
		Plus Interest =	_____
		Total Earnings Loss =	_____

1/ These figures reflect the statutory base salary rate for deputies as set forth by the Compensation Board. For FY 1980 to 1981, the base rate for a deputy with zero to one year of experience was $10,270.00; for FY 1981 to 1982, the base rate for a deputy with one to two years of experience was $10,740.00; for FY 1982 to 1983, the base rate for two to three years of experience was $12,731; and for FY 1983 to 1984, the base rate for three to four years of experience was $13,309.00. See Gov't Exs. 27-30, the 1980 through 1984 Budgets, attached to the 10/12/83 Williams Deposition.

2/ Ms. Scales earned $610 from Spencer's during July 1980 and $1,483 from Oakdale Knitting Company for the period February 4, 1981 to April 14, 1981. See Ms. Scales' W-2 forms and 1980 and 1981 Federal Income Tax Returns, Gov't Trial Exs. ___ and ___.

3/ Ms. Scales' estimated income from employment as a salesperson for Lloyd's House of Gifts; she has not yet received a W-2 form for that employment.

4/ This is based on an annual salary of $13,309.00 for a deputy with four years of experience. Six months and twenty days at that salary is $7,383.76. See the statutory pay scale included in Gov't. Ex. 30 attached to 10/12/83 Williams Deposition.

5/ Interest on earnings loss accrues commencing with the last day of each calendar quarter of the last back pay period on the total amount then due and owing at the adjusted prime rate then in effect and continuing at such rate, as modified from time to time by the Secretary of the Treasury, until compliance with this Court's order for relief. EEOC v. Pacific Press Publishing Association, 482 F.Supp. 1291, 1320 (M.D. Cal. 1979), aff'd 676 F.2d 1272 (9th Cir. 1982).

CERTIFICATE OF SERVICE

I, JOHN M. GADZICHOWSKI, hereby certify that on the 20TH day of January 1984, I served a copy of the foregoing Supplemental Memorandum of Plaintiff United States in Opposition to Motion of Defendant Sheriff of Patrick County for Summary Judgment, by hand upon Anthony P. Giorno, Esq., counsel for defendant Sheriff.

JOHN M. GADZICHOWSKI
Senior Trial Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2188

Counsel for Plaintiff United States of America