IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL,	)	CASE NO.: 3:04-cv-01109-JBA
	)	
Intervenors/Plaintiffs,	)	
	)	JUDGE JANET BOND ARTERTON
v.	)	
	)	
DeSTEFANO, ET AL,	)	
	)	
Defendants.	)	

MOTION TO INTERVENE AS PLAINTIFFS

Now come Gary Tinney, Linda Cohens, Bernard McNeil, Rodney Patterson, Sr., Anthony Reese, Curtis Tolson, and Anthony Wells, firefighters employed by the City of New Haven ("City"), through undersigned counsel, who respectfully move this Court for an Order permitting their intervention as of right, and/or in the alternative, to permissively intervene, in this action as Plaintiffs.

Intervention is necessary, as the existing parties cannot and do not represent the interests of the above-named individuals, whose rights will be irrevocably impaired without allowing their intervention and participation in this case. This motion also is timely, in that, prior to very recently, no examinations were certified or existed to contest.

The bases for the would-be Intervenor/Plaintiffs ("Intervenors") are set forth in the memorandum below.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE PERTINENT CASE AND FACTS

The following is a truncated version of the undisputed case and facts. This case was filed after officials of the City of New Haven threw out the results of two promotional examinations for the ranks of firefighter Lieutenant and Captain, which were conducted in 2003. The examinations at issue carried serious and significant statistical adverse impact against black candidates, setting forth a prima facie case of disparate-impact racial discrimination against black examinees. See *Ricci v. DeStefano,* 129 S.Ct. 2658, 2677 (2009).

Under Title VII disparate impact actions, once a prima facie case of discrimination is made or recognized, the burden of proving that the tests are valid (or in this case invalid) falls to the City. *See, e.g.,* Civil Rights Act of 1991, 42 U.S.C. § 2000-e(k)(B)(i)(ii); *see, also, Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Guardians Assoc. of NY City Police Department, Inc. v. Civil Service Comm.,* 630 F.2d 79 (2nd Cir. 1980); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2406 (2008) (requiring a shift in the burden of proof in age disparate impact cases, analogizing it to Title VII and noting the fate of *Wards Cove* and the superseding legislation on that issue).

However, the City officials never did this. Rather, they discarded the examinations prior to hiring an expert or conducting any validity studies pursuant to the requirements under the EEOC guidelines and controlling case law.[1]

[1] As noted by the Plaintiffs throughout this litigation, the "hearings" at the civil service commission constituted neither a substantial inquiry as to any invalidity, nor did they comprise any sworn testimony. Indeed, it is clear that the few people testifying were not even given actual copies of the examinations. Those who were permitted to see the exams themselves were *not* experts who conducted actual studies as required under the Guidelines and case law, as argued below.

Consequently, the hasty discarding of the examinations without any findings either way of validity (and also without substantial evidence of such) constituted disparate-treatment discrimination against the white firefighters and the Hispanic firefighter who scored highest on these particular exams. In short, mere "fear of a lawsuit" is insufficient to act in the manner the City did. See *Id.* This Court provided a thorough analysis of the facts and determined, in accordance with existing case law, that the actions of the City did not rise to the level of disparate treatment against the Plaintiffs, as there were no longer examinations at issue. The U.S. Supreme Court, however, disagreed, finding that – *based on the record in this case* – the City lacked a substantial basis in evidence to assume it would be *liable* for disparate impact discrimination. Merely running away in fear of one lawsuit into the arms of another lawsuit was not sustainable under the law.

The case has now been remanded and this Court has ordered the existing parties to confer and file suggestions on proceeding with possible promotions and settlement. (Doc. Nos. 148, 152). The City has announced to the media that it intends to certify the examination results. To date, there still has been no finding of validity as mandated under the rigorous requirements of Title VII and the EEOC Guidelines. The parties and the Court have scheduled a settlement conference (Doc. No. 152), the result of which may and likely will directly impact the rights of the Intervenors. It is for this reason that the Intervenors seek to be heard in this case prior to its disposition, as laid out below.

II. LAW AND ARGUMENT

Fed. R. Civ. P. 24(a) reads in pertinent part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or

impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In the alternative, Fed. R. Civ. P. 24(b) reads:

(b) Permissive Intervention.
(1) In General. On timely motion, the court may permit anyone to intervene who:
(A) is given a conditional right to intervene by a federal statute; or
(B) has a claim or defense that shares with the main action a common question of law or fact.
***
(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

The record in this case, as well as the Supreme Court decision make clear that the question of validity still looms highly, and also that any settlement effectuated by the parties and excluding the minorities who were harmed by facially discriminatory examinations will forever impair their rights. To date, they have not had the opportunity to be heard.

In *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128-130 (2nd Cir. 2001), the Second Circuit allowed intervention as of right in a discrimination action prior to settlement discussions and set forth the following criteria for doing so:

> To intervene as of right, a movant must: "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action."
> ***
> [W]e have stated that, for an interest to be cognizable under Rule 24(a)(2), it must be "direct, substantial, and legally protectable." *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2nd Cir. 1990).... An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Washington Elec.*, 922 F.2d at 97.
> ***
> Except for allegations frivolous on their face, an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention, but rather turns on whether the applicant has demonstrated that its application is timely, that it has an interest in the subject of the action, that disposition of the action might as a practical matter impair its interest, and that

representation by existing parties would not adequately protect that interest. *Oneida Indian Nation v. New York,* 732 F.2d 261, 265 (2nd Cir. 1984) (internal citation omitted).

> Thus, while the presumption of validity of a settlement agreement may shift the burden of showing invalidity to non-party objectors, it carries no weight in the determination of whether an interest is sufficient for intervention under Rule 24(a).....The sufficiency of an interest entitles the intervenor to contest the merits of his/her claim based on that interest. **An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court deems the claim to be legally or factually weak. In the present case, it is precisely the existence or non-existence of prior discrimination and its relationship to appellants' present status that they want to contest by intervening as parties. The merits can, therefore, be resolved only after appellants have an opportunity for discovery and the presentation of evidence as a party to the action.**

Id. (emphasis added, some citations and quotations omitted). Intervenors can easily meet all four factors under the *Brennan* test and are entitled to their "day in court."

A. Intervenors' Motion to Intervene is timely under any standard.

1. Intervenors' Motion is timely with respect to disparate treatment claims based on certification of the eligibility lists and race-based promotions absent a showing of formal validity.

In this Motion and accompanying Proposed Complaint, it should be clear that Intervenors' action is timely. Following the examinations and the "hearings" in this action, the City threw out the examinations altogether. This necessarily meant that the exams and/or triggering certification of the eligibility lists have not existed, in a legal and factual sense, until the present. To date, the exams have not even been certified, to Intervenors' knowledge, but are about to be, based on representations to the media by City officials, as well as the Court docket in this case. Certification serves as the triggering event for any disparate treatment case. Until now, there were no "examinations" or eligibility in existence upon which to sue, and hence, no

adverse action as required under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (adverse action required for lawsuit to have validity under disparate-treatment theory).[2]

Moreover, it was only when the City recently publicly announced its intention to certify the examinations and promote the Plaintiffs that the Intervenors even had *standing* in which to intervene in any disparate impact suit. In an intervention context, particularly, a court cannot impute knowledge that a non-party's interests are at stake from mere knowledge that an action is pending, "without appreciation of the potential adverse effect an adjudication of that action might have on one's interests. . . ." *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983); *see also Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-65 (5th Cir. 1977). *See, also, Delaware state College v. Ricks,* 449 U.S. 250 (1980) (limitations period triggered when potential party becomes aware of clear adverse action that is either happening or impending).

Here, it is clear that Intervenors had no basis prior to the present in which to intervene. No direct adverse action had befallen them (although the cumulative effect of the delays and keeping out the Intervenors' claims has caused harm in the form of lost opportunity). There have been no examinations on the table because the City had yanked them off the table five years ago. Then the entire case was on hold because of the appellate process between the existing parties.

However, now, five years later with unvalidated promotions about to ensue and vacancies

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[2] Intervenors are alleging two general and separate discriminatory acts. First, the City is discriminating against them based on a disparate-treatment theory by certifying the eligibility lists and evidently making plans to promote off of them, without a showing of any substantive validity whatsoever. This necessarily means that, in line with the Supreme Court's decision and the Plaintiffs' own lawsuit, the promotions will be made based on a race –conscious remedy and settlement – to the exclusion of minorities who are adversely impacted. On the other hand, to the extent that the City attempts to claim any neutrality in its defense, it has, again, failed to show any sort of validity or validation of the examinations it purports to rely on – as have the Plaintiffs, as discussed in later sections of this Memorandum.

used up to the detriment of those adversely affected by the tests, the interests of the Intervenors in this case, and their standing to assert their rights, have finally ripened.[3]

2. Plaintiffs' Motion is timely with respect to disparate-impact claims based on the refusal to certify the examinations, and also the collateral delay caused by the parties via the lengthy appellate process, from which the Intervenors were foreclosed.

As with the lack of a palpable "adverse action," set forth above, Intervenors likewise, to date, did not have *standing* to intervene in this lawsuit. It is undisputed that: 1) the City yanked off the exams after they were conducted and prior to validity studies being accomplished; 2) the City did this, in part, to foreclose the very fact at issue by the Intervenors now – it successfully attempted to prevent the black firefighters adversely affected by the exams to sue at that time; 3) the Plaintiffs never hired their own expert to show validity and chose instead to pursue a lengthy and arduous legal process – during which time, the Intervenor black firefighters had no opportunity, again, to be involved or be heard.

The standing of, and opportunity for, the Intervenors to become involved was never present until today, after remand and when the Court has invited the parties to put forth at least some of their interests. There is no argument to the contrary that can be made by any existing party to preclude intervention of the above-named persons and their direct interests in this case and its disposition.

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[3] Intervenors currently have EEOC charges pending relating to both Title VII disparate impact and treatment. Under the law, however, they are entitled to intervene to prevent injustice and assert their pending rights under these charges, as well as ripe and existing rights under 42 U.S.C. § 1983; when the charges are fully exhausted, the Complaint will be properly amended to reflect this. See *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385, 393 (1982) (Filing charges with the EEOC is not a jurisdictional prerequisite to suit, but rather is subject to waiver, estoppel, and equitable tolling). When "the reasons for supporting the [exhaustion] doctrine are found inapplicable, the doctrine should not be blindly applied." *Althlone Indus. v. Consumer Prod. Safety Comm'n,* 707 F.2d 1485, 1488 (D.C. Cir. 1983); *see also Cutler v. Hayes,* 818 F.2d 879, 890-91 (D.C. Cir. 1987) (exhaustion doctrine "should be applied flexibly, with an eye toward its underlying purpose"). Moreover, a plaintiff's failure to exhaust an administrative remedy should be excused if the plaintiff cures the defect after filing his lawsuit. *See Williams v. Washington Metropolitan Area Transit Authority,* 721 F.2d 1412, 1418 n.12 (D.C. Cir. 1983); *accord Perry v. Beggs,* 581 F.Supp. 815, 816 (D.D.C. 1983). Here, Intervenor/Plaintiffs will cure any such defects via amendment the moment the rights to sue are issued by the EEOC.

B. Intervenors have a direct, substantial, and legally protectable interest in the outcome of this case.

In accord with the second *Brennan* factor, it is undisputed that, under the City's charter, once the examination eligibility lists are certified, promotions from the lists must commence, unless an intervening circumstance occurs. It is undisputed that there is a prima facie case of unlawful adverse impact on minorities who studied for, and took, the exams. Ironically, the lurking claims of the black firefighters have been made a central and somewhat bombastic piece of this litigation – *without the black firefighters even having had the opportunity to be heard on the issue*. The whole case has been a media whirlwind about whiteness and white firefighters; this smoke has been fanned by the City itself, which took deliberate steps to successfully foreclose any claims the Intervenors might have raised.

There can be no question -- and indeed, it must be undisputed – that the Intervenors have a direct interest in this suit. In a paramilitary organization such as public fire service, promotional cycles are intermittent. Eligibility lists in New Haven last for two years. Candidates compete not only for pay, but also for rank, command in position, as well as seniority – which in turn affects the timing of, and their ability to, take further promotional examinations.[4]

If the Plaintiffs are promoted off the certified eligibility lists at this juncture, then they will have exceeded the Intervenors in seniority, rank, command, pay, and pension – all without the Intervenors being heard.

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[4] A New Haven firefighter must spend a certain number of years in rank, learning the job, before even being permitted to take a promotional exam to the next level, following the paramilitary style of moving up. Moreover, depending on the size of a city, the promotional cycles, and hence opportunity, may not come up for years. In addition, as public employees, not only seniority but state pension amounts are also affected by these issues. Further, because this is a paramilitary organization, one's command ability and rank also factor as very important issues. Such issues should not be discarded so easily based on heretofore untried and unvalidated exams.

Intervenors' interests also are "protectable" under the *Brennan* Court standard. As undisputed, the Intervenors have an untried prima facie case of disparate impact – which shifts the burden of proof to the City to *prove* the tests' validity. See 42 U.S.C. 2000-e(2)(k)(B)(ii) and (ii); *Griggs, supra.* The City has not carried this burden and Intervenor/Plaintiffs have a right to adjudication on these claims, as well as their claims of disparate treatment. As recently as last year, the Supreme Court again reiterated the shift of burden of proof required under the 1991 Civil Rights Act and that a similar shift applies to age disparate impact claims. The Court also noted:

> [T]here is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day… **[w]e have to read it the way Congress wrote it.**

Meacham, 128 S. Ct. at 2406 (2008) (emphasis added). Thus, it is well settled, by the Court itself, that when interpreting federal law, the Court must abide by the statutory language, and cannot change it. Such also is true with Title VII.

The instant case, as presented by the present parties, portrayed a very odd and atypical scenario under the law. It was an aberration. Conflicts between Title VII's disparate impact and treatment provisions are unique to this case. This scenario was the fault of the City in not properly looking at the examinations at issue before throwing them out, thereby causing them to be liable on two fronts. Intervenors dispute that the fronts are competing at this juncture, and, like the Plaintiffs, are seeking relief (should promotions occur) also based on *disparate treatment* and deliberate race-conscious acts by the City. The City should have proved the tests were valid

prior to discarding them, just as the Plaintiffs had argued in the substantive part of this litigation before appeal.[5]

The Supreme Court made clear that there was an incomplete record in the case – certainly to the extent that one might bring a disparate impact claim. The City never had substantial evidence that the tests were valid – it also did not as a consequence have proof (as required) that the tests were valid under the law. This is a necessary conclusion. Indeed the Second Circuit, in *Guardians* , 630 F.2d at 95 made clear there is a constellation of issues and rigorous proof requirements of validity upon challenge that a city is required to meet:

> From our study of the [EEOC] Guidelines, we distill five attributes of an exam with sufficient content validity to be used notwithstanding its disparate racial impact. The first two concern the quality of the test's development: (1) the test-makers must have conducted a suitable job analysis, and (2) they must have used reasonable competence in constructing the test itself. n14 The next three attributes are more in the nature of standards that the test, as produced and used, must be shown to have met. The basic requirement, really the essence of content validation, is (3) that the content of the test must be related to the content of the job. In addition, (4) the content of the test must be representative of the content of the job. Finally, the test must be used with (5) a scoring system that usefully selects from among the applicants those who can better perform the job.

To date, none of these have been subjected to rigorous review, which is Intervenor's right. See *Brennan,* 260 F.3d at128-130.

Nor can the parties cry that Intervenors are foreclosed from intervening. The language in the *Ricci* decision made no such foreclosure. See *Ricci v. DeStefano*, 129 S. Ct. at 2681. First, the Intervenors are seeking remedies pursuant to Title VII and Fourteenth Amendment (42 U.S.C. § 1983) disparate *treatment.* The City, knowing there are tests that are facially discriminatory – and knowing that it has yet to bother to validate the examinations at issue – will be making a race-conscious decision to promote from those examinations.

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[5] Plaintiffs altered their arguments somewhat during the appellate process, but, regardless, always took issue with the fact that the City never sought proper validation of the examinations.

Second, to the extent that Intervenors are seeking disparate *impact* liability (on the off-chance that the City can overcome the hurdles of having the Union dictate the weighting and outcomes and handling of the exams, as well as the tester's admission under oath that he was not sure he could test for such items in the required "oral component"[6]), then there is still a serious inquiry to be made. It is important to observe that the Supreme Court noted repeatedly that the record before them had no showing of "invalidness," and also that the City was remiss in providing any meaningful statistical evidence required for meeting a Title VII disparate-impact defense. Moreover, at page 2681, the Supreme Court did not assume the City would certify the examinations (using the qualifying preposition "if ... the city certifies..."). Moreover, no promotions were directly ordered by the Court; the question remains open.

Notwithstanding these facts, any issues as to such by the Court are *dictum*, and it is a violation of the Fifth Amendment, Article III of the Constitution, and every precedent in this country that a directly affected party's rights cannot be disposed of as a matter of substantive and procedural due process, without that party being able to be heard if s/he seeks the chance. That is precisely what Intervenors seek now.

First, jurisdictionally, it is axiomatic that no appellate court can render any binding decision regarding any subject matter that has not been properly placed in issue before it, as it lacks jurisdiction to do so. See United States Constitution, Art. III. There is no dispute that, to this point, the validity of the promotional examinations has never been in issue in this case. In its opinion, the Supreme Court noted that the validity of the promotional examinations was "undisputed" between the *parties*. Likewise, the issue of test validity has never actually been decided by any court of competent jurisdiction.

[6] This will be covered in later briefings by Intervenors.

There is no question that the black firefighters did not have any claims pending at the time of any prior decision made by any court, nor could they have -- they lacked standing to assert any claim as the test results had not been certified. Since these plaintiffs have never heretofore been party to this case, then, there can be no issue preclusion regarding the validity of the promotional tests as to them, as a matter of law. See, *Graham v. Gonzalez, infra.*

Nor did – or could – the Supreme Court have decided this issue. While that Court discussed the "painstaking" test development process, this was drawn from the self-serving opinions from the testing consultant who developed and administered the tests; none of the evidence that purports to support an assertion of test validity has ever been subjected to any form of scrutiny – indeed no expert reports to date have been given on the actual tests themselves. Again, one need go no further that the original Plaintiffs' arguments to see the refrain that "no experts have examined the tests" as clear in the trial court record.

Second, no existing party can argue or rely on a claim or *res judicata* or issue preclusion. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Graham v. Gonzales*, 2005 U.S. Dist. LEXIS 36014 (D.D.C. Sept. 30, 2005), citing *Migra*, 465 U.S. at 77 n.1 (citation omitted). Collateral estoppel (or issue preclusion), "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *James v. Lajoie*, 535 F. Supp. 2d 300, 306 (D. Conn. 2008), citing *Ashe v. Swenson*, 397 U.S. 436, 443. The doctrine of collateral estoppel is incorporated in the Double Jeopardy Clause of the Fifth Amendment. *Id*, citing *Ashe v. Swenson*, 397 U.S. at 445-46. While estoppel is "embodied in" or "incorporated in" the Double Jeopardy Clause, it is not strictly co-extensive with double jeopardy. *United States v. Shenberg*, 828 F. Supp. 968, 970

(S.D. Fla. 1993). As such, estoppel principles may be implicated even when double jeopardy is not. *Id.*

To determine whether an issue of ultimate fact was determined by a prior judgment, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *James v. Lajoie*, 535 F. Supp. 2d at 306. "[T]he burden [is] on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Id*, citing *Dowling v. United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

There are three elements required to establish a preclusive effect of a prior determination of an issue: 1) the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case; 2) the issue must have been actually and necessarily decided by a court of competent jurisdiction in that prior case; 3) preclusion in the second case must not work a basic unfairness to the party bound by the first determination. *Graham v. Gonzales*, *supra,* citing *Yamaha Corp. of America v. United States*, 295 U.S. App. D.C. 158, 961 F.2d 245, 254 (D.C. Cir. 1992) (citations and footnote omitted).

In short, these Intervening firefighters must have the right to challenge the validity of these tests, to require the City to establish the validity of these promotional examinations before actually making promotions from them. To deny Intervenors that right constitutes Constitutional violations involving both substantive and procedural due process under the Fifth and Fourteenth Amendments. There can be no question that the promotion of any candidates without a proper showing of test validity – when such validity is now in issue and under direct challenge – not only directly affects Intervenors, but likewise would foreclose their legitimate concerns.

No harm inures to either the City or the Plaintiffs. There is no finding (and indeed cannot be) that the tests are immune from challenge. No candidate can be properly promoted until the tests withstand that challenge.

C. Intervenors and the record demonstrate that their interests are impaired by the current situation.

As set forth above, Intervenors have a vital interest. By refusing to certify the tests and also hiding behind "fear of liability," the City essentially deprived Intervenors of their day in court, and presented a weak – indeed uncontested argument in the appellate stages of this case. It now intends to certify the results and make promotions, while knowing the facial adverse impact of the examinations on minorities, and yet still without making sufficient inquiry required by cities mandated to conduct lawful promotions under civil service law and their sworn duty to their citizens. This constitutes disparate treatment. If the City makes such promotions without inquiring into the exams' validity, then it is making a race-conscious decision to promote those whites who used their skin color as a central, divisive basis for their lawsuit.

Achieving rank, as opposed to monetary gain, is of the essence, since one must be at rank for a period of time in order to compete for the next rank. As a consequence, the black firefighters were denied the opportunity to compete for additional promotions because of the delays caused directly by the City's tossing out the examinations merely because of "fears of a lawsuit." If the Plaintiffs are promoted – when the examinations still have not been shown to be valid under the EEOC guidelines and Title VII itself – then this race-conscious remedy for the reverse-discrimination Plaintiffs will irreparably harm the Intervenors – indeed, denying the opportunity to advance to all others who were affected by the poorly executed exams, including the proposed Intervenor Plaintiffs.

Thus, under the present circumstances, any additional promotional cycle will not be for some time should the list be certified and promotions be made. Further, unless the City creates additional vacancies, there are only a limited number of vacancies that will become available through the life of the list – meaning there is little chance of any black firefighters to be promoted under the present circumstances, despite the fact that the examinations are still facially flawed and have never been proved to be valid.

Moreover, this City has a history of discrimination, as shown through past consent decrees dealing with inadequate minority representation among the firefighting force. As the black firefighters hired under now-expired consent decrees decreases due to retirement, there will be fewer black firefighters in rank – or even with a shot to achieve a higher rank. A serious attrition of black representation is occurring in the City, with retirements of those hired and promoted under past decrees now impending. As such, there is a serious need for the interests of the Intervenor black firefighters to be heard before the disposition of this case.

D. None of the existing parties in this lawsuit either represent or can represent the interests of the Intervenors.

It is abundantly clear that neither the City nor the Plaintiffs have the Intervenors' interests in mind, and do not speak for, or represent, the Intervenors. On the contrary, by all appearances, they seem to be seeking to shut out the Intervenors' claims.

It is Intervenors' position that the Plaintiffs cannot complain based on legal or legitimate grounds at this juncture about Intervenors. For all the litigation ongoing in their disparate treatment suit, Plaintiffs did not once hire an expert or attempt an injunction forcing the City to validate or invalidate the examinations, despite the fact that the examinations met the prima facie case of disparate impact, at the very least showing a serious adverse impact against the blacks

and Hispanics who took the examinations. Had they done so, they may have saved both Intervenors and themselves years of lost promotional opportunity via a decisive determination one way or another whether the exams, were, in fact, valid or invalid.

Notably, the Intervenors' claims have nothing substantively to do with the reverse discrimination complaints of Plaintiffs. Indeed, Plaintiffs themselves are *irrelevant* insofar as the tests, the City's actions, and the tests' adverse impact on the Intervenors are a central issue for Intervenors's claims. Rather, the need to intervene as of right at this juncture is that the impending race-based promotions of Plaintiffs, premised on untried and facially discriminatory examinations, will adversely affect them and do so without their even being heard on the matter otherwise. This is an impossible conundrum if this Court denies the Intervenors' motion and Complaint. See *Brennan, supra.* It also will result in additional burden on all, and multiple litigation, compounding the already existing problem confronting the City, as well as causing potentially conflicting results in the law.

III. CONCLUSION

While Plaintiffs have used their race as a platform in this litigation, such is not the Intervenors' intention. Had Intervenors earlier had standing to sue or at least inquire into the examinations originally, the primary concern would *not* have been so divisive about "race," but rather, about invalid tests that adversely impacted a protected class and were *unlawful*. Validity is an objective thing; it is not mindful of social issues, or racial divides, or the arrogance of individuals or groups; it maligns neither whites nor blacks – indeed, both races are protected by disparate impact law.[7]

[7] *See, e.g., Howe v. City of Akron,* 5:06-cv-2779 (N.D. Ohio 2009) (Captain firefighting test found to discriminate against Caucasians).

Regardless, at this juncture, it is clear that the City has used race as a strawman in all sorts of ways to attempt to benefit itself, to the detriment of others. Thus, in light of the record, Intervenors have legitimate claims of disparate treatment, as well, which they bring to the table.

In sum, none of the existing parties can represent or has adequately represented the interests of Intervenors in this case. The City was only dodging the alleged specter of a lawsuit under disparate impact. Their concern was not for "diversity" or the black firefighters per se. They tossed the tests before even black firefighters could review it. And, lest the oft-repeated phrase of how hard the white firefighters "studied" be yet again repeated, the black firefighters studied, took the examinations and also had reasonable expectations and hopes for promotion, as well. If the tests are invalid, they are unlawful. The City bears responsibility for any invalidity, for any failures to the Plaintiffs and for any failures in its duty to the Intervenors – as well as to the citizens of New Haven. The City acted rashly and hastily in throwing out the tests without sufficient evidence in which to do so, to the detriment of all. "Fear of liability" is the pusillanimous way of ducking one's responsibility as a civil servant.[8]

In short, full intervention as of right must be allowed in this case. Otherwise, the Constitution, as well as the underlying rights of the black firefighters affected by this case and seeking to intervene, will be irrevocably violated.

Respectfully submitted,

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[8] Should the tests be shown to be invalid through proper statistical and expert inquiry – and the record indicates that there is a strong basis for this – then all the Plaintiffs' hard work in the world cannot render them valid and/or the best merit-based examinations available.

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LOCAL COUNSEL FOR INTERVENORS

CERTIFICATE OF SERVICE

A copy of the foregoing was manually filed, mailed, and placed in the Court's ecf system, on all parties' counsel of record, this 16 day of November, 2009.

Christy B. Bishop
One of the Attorneys for Intervenor/Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARY TINNEY
660 North Colony Road
Meriden, CT 06450

and

LINDA D. COHENS
159 Clifton St
New Haven CT 06513

and

BERNARD McNEIL
36 Windsor Rd
Hamden CT 06517

and

RODNEY PATTERSON, SR.
161 Thomas St
Hamden CT 06514

and

ANTHONY REESE
62 Treat St, Apt 321
West Haven CT 06516

and

CURTIS TOLSON
122 Springside Ave
New Haven CT 06515

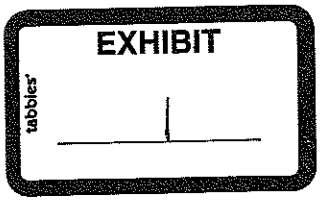
and

ANTHONY WELLS
47 Truman Street
New Haven, CT 06519,

Intervenor/Plaintiffs,

CASE NO.: 3:04 CV 1109 (MRK)

JUDGE ARTERTON



vs.)
)
CITY OF NEW HAVEN)
200 Orange Street)
New Haven, CT 06510)
)
Defendant.)

COMPLAINT
(Equal Protection – Race Discrimination, Fourteenth Amendment 42 U.S.C. § 1983; Substantive and Procedural Due Process - Fourteenth Amendment, 42 U.S.C. § 1983; Race Discrimination/Disparate Treatment, 42 U.S.C. § 2000-e, et seq.; Race Discrimination/Disparate Impact, 42 U.S.C. § 2000-e, et seq.; Declaratory Judgment; Writ of Prohibition; Permanent Injunction)

JURY DEMAND ENDORSED HEREON

PARTIES AND BACKGROUND

1. This is a case involving race discrimination in employment relating to promotional examination administered by the City of New Haven for the ranks of Lieutenant and Captain in the New Haven Fire Department.
2. All Intervenor/Plaintiffs are firefighters in the City of New Haven who participated in and completed the promotional examination process for either the rank of Lieutenant or Captain.
3. The City of New Haven is a municipality located in the State of Connecticut, which operates the New Haven Fire Department (the "City" or "New Haven").
4. The City operates a fire department, known as the New Haven Fire Department (the "Fire Department").
5. The Fire Department consists of approximately 350 uniformed members.
6. There is no requirement that a uniformed member of the Fire Department be a resident of the City.

7. The typical career of a uniformed member of the Fire Department lasts approximately 25 years.
8. The Fire Department is a paramilitary organization that has several ranks; Lieutenant is the first rank in progression and Captain is the next rank up the progression.
9. Promotions to any given rank within the Fire Department are made approximately every 6-7 years.
10. Any given uniformed firefighter may have only 3-4 promotional cycles over the span of their career.
11. The New Haven Civil Service Board ("CSB") is responsible for the preparation, administration and scoring of promotional examinations for the New Haven Fire Department.
12. International Association of Firefighters Local 825 is the collective bargaining agent for the uniformed personnel of the City of New Haven Fire Department (the "Union").
13. The promotional process for the City Fire Department consists of an examination, certification of an eligibility list from the results of the promotional examination, and then promotions made from those eligibility lists.
14. The City uses a "Rule of Three" in making promotions.
15. Under the Rule of Three, the top three candidates from any eligibility list are considered for promotion for any given vacancy.
16. The City is required to select one of the three candidates considered for promotion.

17. The unselected candidates remain on the eligibility list until they are either selected for promotion or the eligibility list expires.
18. Pursuant to some form of agreement between the City and the Union, not contained in the collective bargaining agreement, promotional examinations for the Fire Department consist of a written component and a structured oral interview component.
19. The two components are weighted at 60% for the written component and 40% for the structured oral interview component.
20. There is no scientific basis for either the structure of the promotional examinations or the weighting of the components for the promotional examinations.
21. The agreement for the promotional examinations is not included in the collective bargaining agreement between the City and the Union.
22. This agreement relating to the structure and weighting of the Fire Department promotional examinations has been used as the basis for the design, development and administration of the promotional examinations for the Fire Department for at least the past 20 years.
23. The promotional process for the City's Fire Department is conducted pursuant to the policies, practices and direction of the City.

FACTUAL AVERMENTS

24. In November and December, 2003, the City administered promotional examinations for the ranks of Lieutenant and Captain in the Fire Department.

25. The promotional examinations were developed, administered and scored by a third-party consultant.

26. The promotional examinations were developed, structured, administrated and scored according to the agreement between the Union and the City.

27. After the promotional examinations were administered but before any eligibility lists were certified, the City noticed that there was a severe adverse impact towards black and Hispanic candidates at both ranks.

28. The CSB conducted several public hearings relating to the promotional examinations.

29. After the hearings, the City concluded that there was a prima facie case of disparate impact race discrimination towards black and Hispanic candidates on the promotional examinations.

30. After all the hearings were concluded, the CSB voted not to certify the eligibility lists from the promotional examinations.

31. The CSB voted not to certify the eligibility lists due to the belief that if it certified the eligibility lists it would be sued for race discrimination by black firefighters.

32. The City never requested a validation report from the testing consultant.

33. To the date of this complaint, no validation report relating to the promotional examinations has been prepared.

CAPTAIN'S 2003 PROMOTIONAL EXAMINATION

34. Plaintiff Gary Tinney is a firefighter for the New Haven Fire Department, serving at the rank of Lieutenant;

35. Plaintiff Tinney was qualified for and participated in the promotional examinations for the rank of Captain that were administered in November and December 2003

36. Plaintiff Tinney completed the testing part of the selection process.

37. 41 total candidates completed the testing portion of the process: 25 whites, 8 blacks and 8 Hispanics.

38. Of those, 34 total candidates passed: 25 whites, 6 blacks and 3 Hispanics.

39. The promotional examination was never validated nor has a validation report ever been prepared.

40. The City of New Haven originally failed to certify the eligibility lists which resulted in protracted litigation that was finally resolved by United States Supreme Court decision on June 29, 2009.

41. Based upon that decision, it is impending that the City of New Haven will certify the eligibility lists from the promotional tests, and it must do so before promoting from those lists by its own charter.

42. On October 15, 2009, the City stated publicly that it intends to certify the eligibility lists for these promotional examinations and make promotions therefrom.

43. Intervenor/Plaintiffs could not have filed any action relating to the promotional tests until the City decided to certify the promotional examinations as prior to that time, there was no adverse action upon which to base such a complaint, and no pending litigation in which Intervenor/Plaintiffs at that time could intervene.

44. Promotion from those tests will have an adverse impact on blacks and Hispanic candidates.

45. Upon information and belief, at least 10 promotions will be made from the promotional list for Captain – all of these promotions will be white candidates.

46. The impact ratio will be less than 80%, or less than the 4/5s Rule as provided by the Uniform Guidelines on Employee Selection, 29 C.F.R. 1607, et seq.

47. The promotional tests are not valid and cannot be validated as they do not sample the job domain for the rank of Captain on the New Haven Fire Department.

48. The promotional examinations do not determine which candidates are the most qualified to be promoted based upon merit.

49. There are alternative measures that are available that are more effective at selecting promotional candidates and that have less adverse impact than that observed in these promotional examinations.

50. These types of promotional examinations have been used in New Haven since the 1980s per the agreement with the union and have had a documented history of adverse impact towards blacks and other minorities.

LIEUTENANT'S 2003 PROMOTIONAL EXAMINATION

51. Plaintiffs Linda Cohen, Bernard McNeil, Rodney Patterson, Anthony Reese, Curtis Tolson, David Tyson and Anthony Wells ("Plaintiff Candidates"), are firefighters for the New Haven Fire Department.

52. Plaintiff Candidates were qualified for and participated in the promotional examinations for the rank of Lieutenant that were administered in November and December, 2003.

53. Plaintiff Candidates completed the testing part of the selection process.

54. 77 total candidates completed the testing portion of the process: 43 whites, 19 blacks and 15 Hispanics.

55. Of those, 34 total candidates passed: 25 whites, 6 blacks and 3 Hispanics.

56. The promotional examination was never validated nor has a validation report ever been prepared.

57. The City of New Haven originally failed to certify the eligibility lists which resulted in protracted litigation that was finally resolved by United States Supreme Court decision on June 29, 2009.

58. Based upon that decision, it is impending that the City of New Haven will certify the eligibility lists from the promotional tests, and it must do so before promoting from those lists by its own charter.

59. On October 15, 2009, the City stated publicly that it intends to certify the eligibility lists for these promotional examinations and make promotions therefrom.

60. Intervenor/Plaintiffs could not have filed any action relating to the promotional tests until the City decided to certify the promotional examinations as prior to that time, there was no adverse action upon which to base such a complaint, and no pending litigation in which Intervenor/Plaintiffs at that time could intervene.

61. Promotion from those tests will have an adverse impact on blacks and Hispanic candidates.

62. Upon information and belief, at least 10 promotions will be made from the promotional list for Lieutenant – all of these promotions will be white candidates.

63. The impact ratio will be less than 80%, or less than the 4/5s Rule as provided by the Uniform Guidelines on Employee Selection, 29 C.F.R. 1607, et seq.

64. The promotional tests are not valid and cannot be validated as they do not sample the job domain for the rank of Lieutenant on the New Haven Fire Department.

65. The promotional examinations do not determine which candidates are the most qualified to be promoted based upon merit.

66. There are alternative measures that are available that are more effective at selecting promotional candidates and that have less adverse impact than that observed in these promotional examinations.

67. These types of promotional examinations have been used in New Haven since the 1980s and have had a documented history of adverse impact towards blacks and other minorities.

68. The City has knowingly violated its charter by using a promotional process that does not measure the attributes for the ranks being promoted.

69. Despite this history of adverse impact and the fact that there are alternative measures that are routinely used in promotional examinations in fire service in other municipalities that have demonstrably less adverse impact, the City has continued to discriminate by abiding by an agreement that it knows has a discriminatory effect on minorities while not promoting the most qualified candidates with the least amount of adverse impact.

70. To the date of the filing of this complaint, the promotional examination's validity and the disparate and discriminatory treatment of Intervenor/Plaintiffs have never been fully or fairly litigated in this or any other court.

71. Intervenor/Plaintiffs' not having the opportunity to exercise their rights means that there is no preclusive effect by any court decision on the merits of their claims under the Fifth and Fourteenth Amendment of the United States Constitution.

72. To the date of the filing of this complaint, the promotional examinations' validity remains in question and, as such, facially impacts the rights of Intervenor/Plaintiffs.

73. The Intervenor/Plaintiffs also have been harmed by the City's discarding of the examinations without sufficient basis for doing so.

74. The actions by the City have resulted in irrevocable delays in the promotional process and cycles over the years of the litigation between the City and the original Plaintiffs, as well as unlawful denials of promotion to Plaintiffs and lost opportunity for promotions to more senior ranks.

75. Any certification of the examinations and resultant promotions of other examination candidates will result in irrevocable harm to Intervenor/Plaintiffs, as set forth in the above averments.

76. Due to the various acts and omissions of Defendant directed towards Plaintiff/Intervenors, they have suffered and will suffer damages in terms of loss of compensation, entitling them to the award of back pay.

77. Due to the various acts and omissions of Defendant directed towards Plaintiff/Intervenors, they have suffered and will suffer damages in terms of loss of promotions, with all the rights and privileges appurtenant thereto.

78. Due to the various acts and omissions of Defendant directed towards Plaintiff/Intervenors, they have suffered and will suffer damages in terms of emotional distress, entitling them to the award of general compensatory damages.

79. Plaintiff/Intervenors are entitled to the award of their reasonable attorneys fees and costs incurred to prosecute this action.

JURISDICTION

80. This Court has jurisdiction over Plaintiff/Intervenors federal claims pursuant to 42 U.S.C. 1988 and 28 U.S.C. 1331, federal question jurisdiction.

81. This Court has jurisdiction over Plaintiff/Intervenors state law claims pursuant to 28 U.S.C. 1367, supplemental jurisdiction.

82. Plaintiff/Intervenors have each filed charges of race discrimination, disparate impact and disparate treatment, with the EEOC, which are pending at the time of the filing of this complaint.

COUNT I
42 U.S.C. 1983 – Equal Protection, Fourteenth Amendment

83. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

84. Defendant's various acts and omissions directed towards Plaintiff/Intervenors constitute violation of 42 U.S.C. 1983, based upon the denial of equal protection of the law due to race in violation of the Fourteenth Amendment to the United States Constitution.

COUNT II
42 U.S.C. 1983 – Substantive Due Process, Fourteenth Amendment

85. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

86. Defendant's various acts and omissions directed towards Plaintiff/Intervenors in making promotions from eligibility lists that Defendants know have an adverse impact and without establishing validity thereof constitute violation of 42 U.S.C. 1983, based upon the denial of substantive due process due to race under the Fourteenth Amendment to the United States Constitution.

COUNT III
42 U.S.C. 1983 – Procedural Due Process, Fourteenth Amendment

87. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

88. Defendant's various acts and omissions directed towards Plaintiff/Intervenors constitute violation of 42 U.S.C. 1983, based upon the denial of procedural due process under the Fourteenth Amendments to the United States Constitution.

COUNT IV
42 U.S.C. 2000e-2, et seq. – Race Discrimination, Disparate Treatment

89. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

90. Intervenor/Plaintiffs could not maintain this action until Defendant City either certified the eligibility list or stated publicly that it intended to certify the eligibility lists, which did not occur until on or about October 15, 2009, as there was no adverse action prior to that date.

91. Defendants various acts and omissions directed towards Plaintiff/Intervenors constitutes discrimination in employment on the basis of race, disparate treatment, in violation of 42 U.S.C. 2000e-2, et seq.

COUNT V
42 U.S.C. 2000e-5, et seq. – Race Discrimination, Disparate Impact

92. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

93. Intervenor/Plaintiffs did not have standing to challenge the promotional process until such time as Defendant City certified the eligibility lists or stated that it intended to certify the eligibility lists, which did not occur until on or about October 15, 2009.

94. Defendants various acts and omissions directed towards Plaintiff/Intervenors constitutes discrimination in employment on the basis of race, disparate impact, in violation of 42 U.S.C. 2000e-5, et seq.

COUNT VI
Declaratory Judgment

95. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

96. Plaintiff/Intervenors are entitled to a declaratory judgment that the promotional examinations do not measure the attributes necessary to be an effective officer in the New Haven Fire Department, are not merit based and are therefore in violation of the Charter of the City of New Haven.

COUNT VII
Writ of Prohibition

97. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 80 of this complaint as if fully rewritten herein.

98. Plaintiff/Intervenors are entitled to a writ of prohibition precluding Defendant from making any promotions from the eligibility lists due to their lack of compliance with the Charter of City of New Haven and failure to measure the candidates seeking promotion based upon merit.

Wherefore, Plaintiff/Intervenors pray this Court grant them judgment against the Defendant and seek the following relief:

a) Declaratory judgment that the 2003 Fire Lieutenant and Captain promotion examinations do not adequately measure the attributes of being an officer in the New Haven Fire Department to warrant being used as part of the selection process for promotion;

b) an order permanently enjoining the Defendant from making any promotions to either the rank of Fire Lieutenant or Captain from any eligibility lists created from the 2003 promotional examinations;

c) an order permanently enjoining Defendant from using the 2003 Fire Lieutenant and Captain promotional examinations as part of the promotional process;

d) in the alternative, award of promotions to the respective ranks with in-grade seniority sought by each Plaintiff/Intervenor in the 2003 promotional process;

e) in the alternative, award of back pay, including pension contributions, overtime, acting time compensation and any general increases awarded from date of in-grade seniority through present;

f) general compensatory damages;

g) reasonable attorneys fees incurred to prosecute this action;

h) costs;

i) any other relief deemed necessary and just by the Court.

/s/ Dennis R. Thompson
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JURY DEMAND

Intervenor/Plaintiffs demand a jury trial for each of their claims and causes of action to the extent permitted by law.

/s/ Dennis R. Thompson
Dennis R. Thompson

CERTIFICATE OF SERVICE

A copy of the foregoing was sent to all counsel of record via ecf electronic notification this ____ day of November, 2009.

_____

One of the Attorneys for
Intervenor/Plaintiffs

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LEXSEE 2005 U.S. DIST. LEXIS 36014

GILBERT GRAHAM, Plaintiff, v. ALBERTO GONZALES et al., Defendants.

Civil Action No. 03-1951 (RWR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2005 U.S. Dist. LEXIS 36014

September 30, 2005, Decided
September 30, 2005, Filed

SUBSEQUENT HISTORY: Motion denied by, Sanctions disallowed by *Graham v. Mukasey, 2008 U.S. Dist. LEXIS 4030 (D.D.C., Jan. 22, 2008)*

PRIOR HISTORY: *Graham v. Ashcroft, 360 U.S. App. D.C. 124, 358 F.3d 931, 2004 U.S. App. LEXIS 3390 (2004)*

CASE SUMMARY:

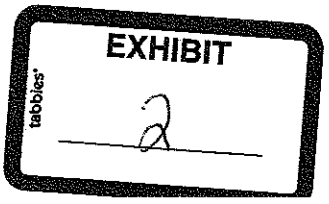
PROCEDURAL POSTURE: Pro se plaintiff retired Federal Bureau of Investigation Special Agent filed sued defendants, the United States Attorney General and other federal officers and agencies, alleging his former federal employer unlawfully discriminated against him based on his race and age, retaliated against him, violated his *Fifth Amendment* equal protection and due process rights, and constructively discharged him. Defendants moved to dismiss.

OVERVIEW: Issue preclusion barred consideration of the equal protection and due process counts. These counts presented the same constitutional issues arising from the same facts that were raised and litigated by the parties to a final judgment on the merits by a court of competent jurisdiction in an earlier case. Claim preclusion barred Title VII and Age Discrimination in Employment Act (ADEA) counts. The nucleus of facts regarding a certain episode gave rise to both the *Fifth Amendment* claims in the earlier case and to the Title VII and ADEA claims in the instant action, and the earlier case resulted in a final judgment on the merits of claims based on the same cause of action giving rise to the Title VII and ADEA counts. The Special Agent could have brought his age discrimination and Title VII claims in the earlier case. The Special Agent could not pursue his two constructive discharge counts in the instant court, as his termination was a discrete act, and he was required, but failed, to exhaust his administrative remedies as to that act. Finally, the complaint alleged facts sufficient to support a claim of a hostile work environment in retaliation for engaging in protected activities.

OUTCOME: The motion to dismiss was denied as to the retaliation count, but the motion was granted as to the remaining counts.

CORE TERMS: hostile work environment, res judicata, administrative remedies, constructive discharge, retaliation, exhaust, retaliatory, preclusion, protected activities, litigated, hostile, mandatory, nucleus, competent jurisdiction, cause of action, declaratory, equal protection, claim preclusion, prior action, injunctive relief, discrete, episode, pro se, continuing violations, process rights, civil action, preclusive effect, citation omitted, final judgment, legal theory

LexisNexis(R) Headnotes



Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN1] The doctrine of res judicata is designed to prevent both repetitive and piecemeal litigation and subsumes both the doctrine of issue preclusion and the doctrine of claim preclusion. The goal of both forms of preclusive effect are the same: to promote the finality of judicial determinations, to foster reliance on judicial decisions by minimizing the possibility of inconsistent decisions, to conserve judicial resources, and to spare adversaries the vexation and expense of redundant litigation.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN2] Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits even if it is based on a different cause of action involving a party to the prior litigation.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN3] There are three elements required to establish a preclusive effect of a prior determination of an issue: First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily decided by a court of competent jurisdiction in that prior case. Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN4] The general rule that declaratory judgments are limited in preclusive effect to the matters declared and do not bar a subsequent action for damages -- a rule that is dictated by the plain language of the declaratory judgment statute, *28 U.S.C.S. § 2202* -- does not apply where relief in addition to declaratory relief is sought in the earlier litigation.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN5] Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because it should have been advanced in an earlier suit.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN6] Claim preclusion bars a claim that could have been brought in a prior suit based on the same nucleus of facts, but was not. Parties may not relitigate any ground for relief which they already have had an opportunity to litigate -- even if they chose not to exploit that opportunity in the prior suit. An action based on the same nucleus of facts as that of a prior action is said to share the same cause of action, and therefore is barred by res judicata, even if the latter action is predicated on a different legal theory.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN7] For claim preclusion to apply, there must be (1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) the same cause of action in both suits.

Labor & Employment Law > Discrimination > Age Discrimination > Remedies > General Overview
[HN8] Administrative remedies are optional, not mandatory, under the Age Discrimination in Employment Act.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN9] Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN10] There is no principle of law or equity which sanctions the rejection by a federal court of the salutory principles of res judicata.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > General Overview
Labor & Employment Law > Wrongful Termination > Constructive Discharge > Statutory Application > Title VII of the Civil Rights Act of 1964
[HN11] Constructive discharge claims are cognizable under Title VII when an employee's decision to resign is an objectively appropriate response to intolerable working conditions. However, a federal court may not entertain a constructive discharge claim brought by a federal employee if the plaintiff has failed to exhaust his available administrative remedies.

Labor & Employment Law > Discrimination > Actionable Discrimination
Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > General Overview
[HN12] The key to determining whether a claim must meet the procedural hurdles of the exhaustion requirement itself, or whether it can piggy-back on another claim that has satisfied those requirements, is whether the claim is of a "discrete" act of discrimination or retaliation or, instead, of a hostile work environment. Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are individual acts that occur at a fixed time. Accordingly, plaintiffs alleging such discriminatory action must exhaust the administrative process regardless of any relationship that may exist between those discrete claims and any others.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN13] A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* should not be granted unless it is clear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN14] In ruling on a motion to dismiss, a court accepts as true the facts alleged by the plaintiff and grants the plaintiff every reasonable inference from those facts.

Civil Procedure > Parties > Self-Representation > Pleading Standards
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN15] A plaintiff, whether pro se or represented, is not required to present a prima facie case in his pleadings or even match facts to every element of a legal theory or allege all that must be eventually proved. While a pro se plaintiff is subject to the requirements set forth in the Federal Rules of Civil Procedure, his pleadings are subject to less stringent standards than formal pleadings drafted by lawyers. It is an abuse of discretion for a court to fail to consider a pro se plaintiff's complaint in light of his other filings.

Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Title VII of the Civil Rights Act of 1964 > General Overview

[HN16] Title VII proscribes retaliation against an employee who engages in protected activity. *42 U.S.C.S. § 2000e-3(a).*

Labor & Employment Law > Discrimination > Retaliation > Elements > General Overview
[HN17] In order to maintain a retaliation claim, a plaintiff must show (1) that he engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action against him; and (3) that a causal link connects the protected activity and adverse action.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Retaliation > Elements > Adverse Employment Actions
[HN18] An adverse action is one which has materially adverse consequences affecting the terms, conditions, or privileges of a plaintiff's employment or future employment opportunities. An adverse employment action need not be proved through a single incident. To the contrary, a hostile work environment can amount to an adverse employment action to satisfy the second element of a retaliation claim.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN19] To establish the existence of a hostile work environment that is cognizable under Title VII, a plaintiff must show that the harassing incidents were sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Whether the evidence describes a hostile work environment depends on the frequency, severity, form and nature of the harassment, and whether it unreasonably interferes with an employee's work performance. If the cumulative effect of the harassing incidents is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive, then it does not come within the scope of wrongs for which Title VII provides a remedy.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview
[HN20] A hostile work environment is composed of a series of separate acts that collectively constitute one unlawful employment practice. Where a plaintiff has alleged an act contributing to the claim that occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview
[HN21] Provided a plaintiff can establish that the acts are a part of the same actionable unlawful employment practice of hostile environment, acts that fall outside the limitations period may be considered as contributing incidents to a hostile environment claim.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN22] An act that falls within the filing period does not have to be the last act in the series that establishes a hostile work environment.

COUNSEL: [*1] For GILBERT M. GRAHAM, Plaintiff: GILBERT M. GRAHAM, Hughesville, MD.

For JOHN D. ASHCROFT, In his official capacity as Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, ROSCOE C. HOWARD, JR., Defendants: Benton Gregory Peterson, ASSISTANT UNITED STATES ATTORNEY, Washington, DC.

JUDGES: RICHARD W. ROBERTS, United States District Judge.

OPINION BY: RICHARD W. ROBERTS

OPINION

MEMORANDUM OPINION AND ORDER

Pro se plaintiff Gilbert Graham, a 54-year-old African-American retired Special Agent for the Federal Bureau of Investigation ("FBI"), filed an amended complaint against the Attorney General [1] and other federal officers and agencies, alleging that his former federal employer unlawfully discriminated against him based on his race and age, retaliated against him for filing complaints of discrimination by creating a hostile work environment through continuing violations, violated his *Fifth Amendment* equal protection and due process rights, and constructively discharged him. Defendants moved to dismiss plaintiff's claims [2] because they are either barred by res judicata, barred by plaintiff's failure to exhaust mandatory administrative [*2] remedies, or fail to state a claim. Defendants seek in the alternative judgment as a matter of law. Because Counts One, Two, Four and Five rely on the same nucleus of facts as did claims already raised and litigated in a prior action, those counts will be dismissed as precluded under the doctrine of res judicata. Because plaintiff did not exhaust his administrative remedies with respect to the two claims of constructive discharge, Counts Six and Seven will be dismissed. Because plaintiff has sufficiently stated a new and separate claim for hostile work environment in retaliation for his participation in protected activities that does not arise from the same nucleus of facts that supported the claims in the prior litigation, defendants' motion as to Count Three will be denied.

1 Attorney General Alberto Gonzales is substituted as a defendant in place of former Attorney General John Ashcroft. *See Fed. R. Civ. P. 25(d).*

2 Defendants' motion was filed before plaintiff amended his complaint by adding two constructive discharge claims as Counts Six and Seven. Defendants' Opposition to Plaintiff's Motion for Leave to File Amended Complaint is being treated as a motion to dismiss Counts Six and Seven, in accord with the Minute Order of August 15, 2005.

[*3] *BACKGROUND*

Plaintiff worked as a Special Agent for the FBI for 25 years in the Washington Field Office. He asserts that during his career in that office, he "was unjustly singled out for investigation, interrogation, unlawfully sanctioned, subjected to a hostile work environment and constructively discharged solely because he is an African American, his participation in protected activities and his age." (First Am. Compl. ("Am. Compl.") P 1.) Graham filed an EEO complaint against his employer in 1985, and then a civil action in 1992, alleging disparate treatment and disparate impact racial discrimination and retaliation. (*Id.* P 92.) He also actively participated in a class action against his employer filed in 1993. (*Id.*) In 1999, Graham was the subject of an investigation by the Intelligence Oversight Board ("IOB"), an action that plaintiff alleges was racially discriminatory as well as procedurally defective. (*Id.* PP 28-39, 67.) Graham filed an EEO complaint about the IOB episode in November 2000. (*Id.* P 10; Def.'s Mem. in Supp. of Mot. to Dismiss, or in the Alt., for Summ. J. ("Def.'s Mem.") at 3.) The IOB investigation resulted in a determination to suspend [*4] Graham for three days without pay. Graham appealed the punishment by letter dated April 2, 2002 (Am. Compl. P 67; Def.'s Mem. Ex. 6.), and filed a second EEO complaint alleging race and age discrimination. (Am. Compl. P 12; Def.'s Mem., Ex. 7.) The discipline was reduced to an official letter of censure by letter dated May 22, 2002. (Am. Compl. P 69; Def.'s Mem. at 3 n.3 & Ex. 6.) Soon thereafter, Graham complained to the Justice Department's Office of Inspector General about what he viewed as mismanagement and abuse of authority reflected in his workload assignment and the conduct of the IOB investigation. In addition, he reported unauthorized use of electronic surveillance relating to a public corruption investigation. (Am. Compl. P 72.)

In June 2002, Graham filed a civil action in this court, alleging that the agency's handling of the IOB investigation and determination violated the Administrative Procedures Act ("APA"), *5 U.S.C. § 706 (2000)* and his *Fifth Amendment* equal protection and due process rights. *See Graham v. Ashcroft*, No. Civ. A. 02-1231 (ESH) (D.D.C. June 21, 2002) ("*Graham I*") (Complaint). After filing the *Graham I* complaint, [*5] Graham requested administrative leave in Sep-

tember 2002 to address matters related to his April 2002 EEO complaint, a request defendants used to scrutinize Graham's time and attendance history, but did not grant. (Am. Compl. P 71(a).) On November 13, 2002, Graham filed another EEO complaint, adding mental harassment to his list of grievances, and identifying November 8, 2002 as the date of the most recent act in support of that claim. (Def.'s Mem. at 3 & Ex. 8.) Two weeks later, the court dismissed *Graham I* with prejudice, finding that neither his APA nor his *Fifth Amendment* claims were viable. *See Graham I*, 2002 U.S. Dist. LEXIS 27419, 2002 WL 32511002 (D.D.C. Nov. 20, 2002). [3]

3 The court dismissed plaintiff's APA claims for lack of jurisdiction, finding that the Civil Service Reform Act ("CSRA"), *5 U.S.C. § 7511*, foreclosed any judicial review under the APA of the agency's handling of the IOB investigation and resulting employment action. *See Graham I*, 2002 WL 32511002, *2-3 (D.D.C. Nov. 20, 2002). Further determining that the CSRA did not preclude consideration of Graham's request for equitable relief on the alleged constitutional violations, the court concluded that Graham had not suffered a loss of either a property or liberty interest, and dismissed his constitutional due process claim for that reason. *Id.* at *4-5. In addition, the court found that Graham's constitutional equal protection claim was foreclosed by the remedies afforded under Title VII, *42 U.S.C. § 2000e. Id.* at *5-6. Plaintiff appealed and the court of appeals affirmed the decision in all respects. *Graham v. Ashcroft, 2003 U.S. App. LEXIS 16108, No. 03-5025, 2003 WL 21939757 (D.C. Cir. Aug. 5, 2003); Graham v. Ashcroft, 360 U.S. App. D.C. 124, 358 F.3d 931 (D.C. Cir. 2004).*

[*6] In January 2003, Graham was transferred to another squad and assigned a bureau vehicle "with an inoperable door locking mechanism, an inoperable heating and air conditioning system, a dead battery, very high mileage and delinquent parking tickets," a transfer and assignment plaintiff alleges to be retaliatory. (Am. Compl. P 71(b).) Plaintiff asserts that in 2003, the FBI threatened to prosecute him for the unauthorized disclosure of classified information (*id.* at P 71 (c)). In response, plaintiff alleged that the threats were made to impede an official proceeding and requested that the Justice Department's Office of Professional Responsibility ("OPR") investigate. (*Id.* at P 74.) Plaintiff met with OPR staff in July 2003 to review his allegations and other complaints -- a meeting which, according to plaintiff, "quickly turned into a hostile interrogation and threats of administrative action [that could be] taken against the plaintiff." (*Id.* at P 76.) Plaintiff retired from the FBI on September 3, 2003 and filed the complaint in this action on September 22, 2003.

Count One alleges that defendants discriminated against him based on his race in violation of Title VII by [*7] assigning him a larger caseload than white agents received, targeting him for the IOB investigation and then unduly punishing him, and subjecting him to an unwarranted investigation by the FBI's OPR. (Am. Compl. P 81.) Count Two alleges that defendants assigned him a larger caseload than younger agents received, investigated him for purported IOB violations influencing his decision to retire, and notified him that defendants intended to conduct an OPR investigation six days before his fiftieth birthday, all in violation of the Age Discrimination in Employment Act ("ADEA"), *29 U.S.C. § 633a*. (Am. Compl. P 88.) Count Three, expressly alleged as a continuing violation, charged defendants with retaliating against him for his participation in protected activities by creating a hostile work environment when they subjected him to undue scrutiny in response to his request for administrative leave yet never acted on the leave request, assigned him a defective bureau car and threatened him with sanctions for using unclassified information in other litigation. (Am. Compl. PP 2, 71 (a), 92-93.) Count Four claims that defendants violated plaintiff's *Fifth Amendment* equal [*8] protection rights in their IOB and OPR investigations by targeting black employees, failing to give him the right to explain his position while giving white agents the opportunity to explain theirs, unduly harshly punishing him, and threatening to prosecute him for exercising his rights. (Am. Compl. PP 98-99.) Count Five alleges that in barring plaintiff from explaining his position during the IOB investigation, and failing to follow their internal FBI regulations, defendants violated plaintiff's *Fifth Amendment* liberty interests and procedural due process rights. (Am. Compl. PP 106-07.) Count Six alleges that plaintiff was compelled by the hostile environment to take early retirement, five years before plaintiff's mandatory retirement date in 2007. (Am. Compl. PP 112-114.) Count Seven alleges that defendants' prior acts of retaliation compelled plaintiff to take early retirement to avoid further retaliation for his involvement in protected activities and whistle-blowing. (Am. Compl. PP 116-118.)

Defendants have moved to dismiss all claims, arguing that some of plaintiff's claims are precluded by the doctrine of res judicata because of the disposition in *Graham I*, that some are [*9] barred by plaintiff's failure to exhaust his mandatory administrative remedies, and that any remaining claims fail to state a claim upon which relief may be granted or entitle defendants to judgment as a matter of law.

DISCUSSION

I. RES JUDICATA: COUNTS ONE, TWO, FOUR AND FIVE

[HN1] The doctrine of res judicata is designed to prevent both repetitive and piecemeal litigation and subsumes both the doctrine of issue preclusion and the doctrine of claim preclusion. *Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)*. The goal of both forms of preclusive effect are the same: to promote the finality of judicial determinations, to foster reliance on judicial decisions by minimizing the possibility of inconsistent decisions, to conserve judicial resources, and to spare adversaries the vexation and expense of redundant litigation. *See Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*. Both forms of preclusion apply to this case.

A. *Issue Preclusion*

[HN2] "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra, 465 U.S. at 77 n.1* [*10] (citation omitted). "Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits [even if it is] based on a different cause of action involving a party to the prior litigation." *Montana, 440 U.S. at 153*. [HN3] There are three elements required to establish a preclusive effect of a prior determination of an issue:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily decided by a court of competent jurisdiction in that prior case. . . . Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

Yamaha Corp. of America v. United States, 295 U.S. App. D.C. 158, 961 F.2d 245, 254 (D.C. Cir. 1992) (citations and footnote omitted).

Issue preclusion operates in this case to bar consideration of plaintiff's *Fifth Amendment* equal protection (Count Four) and due process (Count Five) claims. Counts Four and Five in this action present the same constitutional issues arising from the same facts [*11] that were raised and litigated by the parties to a final judgment on the merits by a court of competent jurisdiction in *Graham I*. There, the court determined that plaintiff's treatment and discipline with the IOB episode implicated neither a liberty nor a property interest of constitutional dimensions, and plaintiff had not been wrongly deprived of either without due process. *See Graham I*, 2002 WL 32522002, at *4-5. That decision disposed of the issue presented in Count Five in this case. Similarly, the issue of whether plaintiff's *Fifth Amendment* right to equal protection had been violated was litigated and resolved in *Graham I*. As to that issue, the court determined that plaintiff could not be heard on a *Fifth Amendment* equal protection claim for an employment grievance against his federal employer, because Title VII is the exclusive remedy for such employment grievances. *Id.* at *5-6. Because the issues were previously litigated to resolution and plaintiff is precluded from obtaining a second opinion on the same issues of fact and law, Counts Four and Five will be dismissed. [4]

> 4 It does not matter that plaintiff now seeks money damages and injunctive relief where he sought declaratory and injunctive relief in *Graham I*. [HN4] The general rule that declaratory judgments are limited in preclusive effect to the matters declared and do not bar a subsequent action for damages -- a rule that is dictated by the plain language of the declaratory judgment statute, *28 U.S.C. § 2202* -- does not apply where relief in addition to declaratory relief is sought in the earlier litigation. *See Am. Forest Research Council v. Shea, 172 F. Supp. 2d 24, 29-30 (D.D.C. 2001)* (holding that res judicata applied where both declaratory *and* injunctive relief were sought in prior action). Plaintiff's reliance on *Burgos v. Hopkins, 14 F.3d 787 (2d Cir. 1994)* is misplaced. (Pl.'s Mem. in Supp. of Mot. in Opp'n to Def.'s Mot. to Dismiss, or in the Alt. for Summ. J. ("Pl.'s Opp'n") at 23-24.) In *Burgos*, res judicata did not apply because the court did not have the power to award damages in the prior matter, a petition for habeas relief. *14 F.3d at 790-91*. Here, the district court was empowered to award monetary damages and/or injunctive relief in *Graham I*.

[*12] B. *Claim Preclusion*

Claim preclusion, unlike issue preclusion, aims to prevent piecemeal litigation and "claim splitting." [HN5] "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that **never has been litigated**, because . . . it **should** have been advanced in an earlier suit." *Migra, 465 U.S. at 77 n.1* (citation omitted; emphasis added). *See also* 18 Wright, Miller & Cooper, *Fed. Prac. & Proc.* §§ 4402, 4416. [HN6] Claim preclusion bars a claim that **could** have been brought in a prior suit based on the same nucleus of facts, but was not. Parties "may not relitigate any ground

for relief which they already have had an **opportunity** to litigate -- even if they chose not to exploit that opportunity" in the prior suit. *Page v. United States, 234 U.S. App. D.C. 332, 729 F.2d 818, 820 (D.C. Cir. 1984)* (emphasis added). An action based on the same nucleus of facts as that of a prior action is said to share the same cause of action, and therefore is barred by res judicata, even if the latter action is predicated on a different legal theory. *See id.* ("It is the facts surrounding the transaction or occurrence which [*13] operate to constitute the cause of action, not the legal theory upon which a litigant relies.").

[HN7] For claim preclusion to apply, there must be "(1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) the same cause of action in both suits." *Coleman v. Potomac Electric Power Co., 310 F. Supp. 2d 154, 2004 WL 532192, at *2 (D.D.C. 2004)* (quoting *Polsby v. Thompson, 201 F. Supp. 2d 45, 48 (D.D.C. 2002))*. Here, there is no dispute that the parties are identical in both actions for res judicata purposes. There is also no dispute that the judgment was rendered by a court of competent jurisdiction. The court in *Graham I* issued a final judgment on the merits of the *Fifth Amendment* claims. The nucleus of facts regarding the IOB episode gave rise both to the *Fifth Amendment* claims in *Graham I* and to the Title VII and ADEA claims in Counts One and Two of this action. Because *Graham I* resulted in a final judgment on the merits of claims based on the same cause of action giving rise to Counts One and Two in this action, claim preclusion operates to bar Counts [*14] One and Two.

Plaintiff argues that his Title VII and ADEA claims, about which he had filed an EEO complaint in April 2002, were not available to him in June 2002 when he initiated *Graham I* because he had not yet exhausted his mandatory administrative remedies. Therefore, he reasons, res judicata should not bar those claims which he now seeks to bring in this action. (Pl.'s Opp'n at 25-26.) Plaintiff's premise is incorrect as to his ADEA-based age discrimination claim in Count Two. [HN8] Administrative remedies are optional, not mandatory, under the ADEA, so plaintiff could have brought his age discrimination claim in *Graham I. Wrenn v. Derwinski, 791 F. Supp. 11, 13 (D.D.C. 1992)* (ADEA plaintiff can forego administrative process to avoid piecemeal litigation) (citing *Kennedy v. Whitehurst, 223 U.S. App. D.C. 228, 690 F.2d 951, 957 (D.C. Cir. 1982))*. As to the Title VII claims, plaintiff could have, and should have, brought them in his prior action. He had at least three options in this respect. Plaintiff could have waited until after October 6, 2002 to file his complaint in order to include his Title VII claim in the original complaint. [5] Alternatively, he could have [*15] filed an action in advance of his right to sue on the Title VII claims, but moved to stay proceedings until his right-to-sue date had passed. Or, he could have requested, after October 6, 2002, to add his Title VII claim by amendment to the complaint he filed in June. *See Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 714-15 (9th Cir. 2001)* ("We now join our sister circuits in holding that [HN9] Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims.") (collecting similar decisions from the First, Second, Third, Sixth, Seventh and Eleventh Circuits); *Davis v. Dallas Area Rapid Transit, 383 F.3d 309, 315-16 (5th Cir. 2004)* (applying res judicata and noting that plaintiffs could have and should have requested a stay of the district court proceedings until their administrative remedies were exhausted); *Wilkes v. Wyoming Dep't of Employment, 314 F.3d 501, 505-06 (10th Cir. 2003)* (applying res judicata and noting that [*16] plaintiff could have and should have either sought a stay or amended her complaint). In short, Graham could and should have avoided violating the principles res judicata serves. Res judicata is an unforgiving doctrine that "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. [HN10] There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutory principles of res judicata.'" *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)*. Accordingly, Counts One and Two in this action will be dismissed in their entirety.

5 Plaintiff filed his EEO complaint on April 9, 2002 (Def.'s Mem. Ex. 7), and thus was entitled to file suit under Title VII after 180 days had passed, namely, on October 6, 2002. *See 42 U.S.C. § 2000e-5(f)(1).*

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES: COUNTS SIX AND SEVEN

Plaintiff's amended complaint includes two counts of constructive [*17] discharge: discriminatory constructive discharge (Count Six) and retaliatory constructive discharge (Count Seven). (Am. Compl. P 111-18.) [HN11] Constructive discharge claims are cognizable under Title VII when an employee's decision to resign is an objectively appropriate response to intolerable working conditions. *See Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S. Ct. 2342, 2347, 2351-52, 159 L. Ed. 2d 204 (2004)*. However, a federal court may not entertain a constructive discharge claim brought by a federal employee if the plaintiff has failed to exhaust his available administrative remedies. *See Brown v. General Servs. Admin., 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976)* (federal employee alleging race discrimi-

nation by an employer must exhaust administrative remedies before filing a lawsuit). Defendant alleges -- and plaintiff does not deny -- that plaintiff did not pursue, let alone exhaust, his administrative remedies with respect to a constructive discharge claim. Graham, however, argues that the exhaustion requirement should not apply to his constructive discharge claims because those claims are the culmination of, and part of, the continuing hostile work environment claim as to which [*18] he did exhaust his administrative remedies. (Pl.'s Reply Mem. in Opp'n to Def.'s Motion to Dismiss Counts VI and VII of Plaintiff's First Am. Compl. at 8-9.) Case law does not support plaintiff's interpretation.

> [HN12] The key to determining whether a claim must meet the procedural hurdles of the exhaustion requirement itself, or whether it can piggy-back on another claim that has satisfied those requirements, is whether the claim is of a "discrete" act of discrimination or retaliation or, instead, of a hostile work environment. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" are individual acts that "occur" at a fixed time. . . . Accordingly, plaintiffs alleging such discriminatory action must exhaust the administrative process regardless of any relationship that may exist between those discrete claims and any others.

Coleman-Adebayo v. Leavitt, 326 F. Supp. 2d 132, 137-38 (D.D.C. 2004) (quoting *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*. Because plaintiff's termination is a discrete act, he was required, but failed, to exhaust his administrative remedies as to that act, and [*19] he cannot now pursue his constructive discharge claims in this court. For this reason, Counts Six and Seven will be dismissed.

III. COUNT THREE: RETALIATORY HOSTILE WORK ENVIRONMENT

Defendants have moved pursuant to *Rule 12(b)(6)* to dismiss plaintiff's claim for retaliatory hostile work environment. [6] [HN13] A motion to dismiss under *Rule 12(b)(6)* should not be granted unless it is clear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. [HN14] In ruling on a motion to dismiss, a court accepts as true the facts alleged by the plaintiff and grants the plaintiff every reasonable inference from those facts. *See Browning v. Clinton, 352 U.S. App. D.C. 4, 292 F.3d 235, 242 (D.C. Cir. 2002)*. [HN15] A plaintiff, whether pro se or represented, is not required to present a prima facie case in his pleadings or even match facts to every element of a legal theory or allege all that must be eventually proved. *Sparrow v. United Air Lines, Inc., 342 U.S. App. D.C. 268, 216 F.3d 1111, 1113, 1114-15 (D.C. Cir. 2000)*. While a pro se plaintiff is subject to the requirements set forth in the [*20] Federal Rules of Civil Procedure, his pleadings are "subject to less stringent standards than formal pleadings drafted by lawyers." *Gray v. Poole, 348 U.S. App. D.C. 369, 275 F.3d 1113, 1115 (D.C. Cir. 2002)* (quoting *Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972))*. It is also an abuse of discretion for a court to fail to "consider [a] pro se plaintiff's complaint in light of his [other filings]." *Id.* (citing *Richardson v. United States, 338 U.S. App. D.C. 265, 193 F.3d 545, 548 (D.C. Cir. 1999))*.

> 6 Defendants also moved pre-discovery, in the alternative, for summary judgment. Summary judgment is not warranted where discovery may produce evidence capable of supporting plaintiff's claims or creating a genuine issue of fact. Accordingly, defendants' motion for summary judgment will be denied as premature.

[HN16] Title VII proscribes retaliation against an employee who engages in protected activity. *42 U.S.C. § 2000e-3(a)*. [HN17] In order to maintain a retaliation claim, a plaintiff must show [*21] (1) that he engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action against him; and (3) that a causal link connects the protected activity and adverse action. *See Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 454 (D.C. Cir. 1999)*. [HN18] An adverse action is one which has "materially adverse consequences affecting the terms, conditions, or privileges of [plaintiff's] employment or . . . future employment opportunities. . . ." *Brody, 199 F.3d at 457*. An adverse employment action need not be proved through a single incident. To the contrary, a hostile work environment can amount to an adverse employment action to satisfy the second element of a retaliation claim. *See Noviello v. City of Boston, 398 F.3d 76, 88-90 (1st Cir. 2005)* ("The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under *42 U.S.C. § 2000e-3(a)*.") (citing congruent opinions from the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits).

[HN19] To establish the existence of a hostile [*22] work environment that is cognizable under Title VII, Graham must show that the harassing incidents were "sufficiently severe or pervasive to alter the conditions of . . . [his employ-

ment] and create an abusive working environment." *George v. Leavitt, 366 U.S. App. D.C. 11, 407 F.3d 405, 416 (D.C. Cir. 2005)* (citations omitted); *accord Suders, 124 S. Ct. at 2347*. Whether the evidence describes a hostile work environment depends on the frequency, severity, form and nature of the harassment, and whether it "unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)*. If the cumulative effect of the harassing incidents "is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive," then it does not come within the scope of wrongs for which Title VII provides a remedy. *Id. at 21*; *Singletary v. District of Columbia, 359 U.S. App. D.C. 1, 351 F.3d 519, 526 (D.C. Cir. 2003)*.

Under these standards, plaintiff has pled a claim for a retaliatory hostile work environment that meets the pleading [*23] requirements of *Federal Rule of Civil Procedure 8*. Plaintiff's allegations need not be, and do not pretend to be, exhaustive. To the contrary, plaintiff expressly states that the factual allegations stated in Count Three of the complaint are "among others" (Am. Compl. P 93 ("inter alia")), and elsewhere mentions other possible retaliatory acts. (*See, e.g.*, Am. Compl. P 113 (c) ("making false accusation that plaintiff fabricated an interview of Iran-Contra Special Prosecutor, Judge Lawrence E. Walsh"); Pl.'s Opp'n at 13 (delay of badge and credential presentation ceremony).)

Plaintiff has pled that continuing violations created a hostile work environment. [HN20] "A hostile work environment is composed of a series of separate acts that collectively constitute one unlawful employment practice." *National R.R. Passenger Corp. v. Morgan, 536 U.S. at 117*. Where, as here, a plaintiff has alleged "'an act contributing to the claim [that] occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.'" *Singletary, 351 F.3d at 526-27* [*24] (quoting *Morgan, 536 U.S. at 117*). [HN21] Provided a plaintiff can establish that the acts are a part of the same actionable unlawful employment practice of hostile environment, acts that fall outside the limitations period may be considered as contributing incidents to the hostile environment claim. *See id. at 527-28* (citing and quoting *Morgan, 536 U.S. at 117, 120-21)*. Furthermore, [HN22] the act that falls within the filing period does not have to be the last act in the series that establishes a hostile work environment. *Morgan, 536 U.S. at 117* ("Subsequent events . . . may still be a part of the one hostile work environment claim. . . ."). Thus, although Graham's constructive discharge claims cannot stand alone to support a Title VII race or retaliation claim because he did not exhaust his mandatory administrative remedies, the facts that plaintiff would have used to support his constructive discharge claims may be considered as incidents supporting the retaliatory hostile work environment claim. Acts prior to, contemporaneous with, and subsequent to the IOB episode may be considered in determining whether the cumulative effect of the [*25] acts constitutes a hostile work environment created to harass plaintiff in retaliation for his participation in protected activities, as plaintiff alleges. Further, assuming that all the facts marshaled to support the retaliatory hostile work environment claim are sufficiently distinct from the nucleus of facts concerning the IOB incident to avoid res judicata problems, there is no bar to considering even the IOB incident itself as one of the series of separate acts that collectively constitute the hostile environment that violates Title VII. Because the complaint alleges facts sufficient to support a claim of a hostile work environment in retaliation for engaging in protected activities, defendants' motion to dismiss will be denied as to Count Three.

CONCLUSION AND ORDER

Plaintiff seeks to re-litigate issues in Counts Four and Five that already have been litigated and decided. Res judicata bars these claims from being re-litigated. Plaintiff also seeks to litigate claims in Counts One and Two that could and should have been raised and litigated along with the prior civil action. These claims, too, are barred by res judicata. Counts Six and Seven will be dismissed because plaintiff [*26] did not exhaust his mandatory administrative remedies. Because plaintiff has sufficiently stated a claim for retaliatory hostile work environment, defendants' motion to dismiss Count Three for failure to state a claim will be denied. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss [Dkt. 5, 14] be, and hereby is, GRANTED in part and DENIED in part. Defendants' motion to dismiss is GRANTED as to Counts One, Two, Four, Five, Six and Seven, and is DENIED as to Count Three. It is further

ORDERED that plaintiff's motion to conduct limited discovery on jurisdictional issues [Dkt. 13] be, and hereby is, DENIED AS MOOT. It is further

ORDERED that plaintiff's motion for expedited proceedings [Dkt. 22] be, and hereby is, GRANTED with the disposition in this Order of the pending motions. It is further

ORDERED that plaintiff's motion for a Rule 16 conference [Dkt. 17] be, and hereby is, GRANTED. Defendants are directed to respond to the amended complaint, after which a separate order setting an initial scheduling conference will issue.

SIGNED this 30th day of September, 2005.

RICHARD W. ROBERTS

United States District Judge