UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS
APPEAL NUMBER 12-1874

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PLAINTIFF-APPELLANTS' **REVISED** BRIEF WITH SHORT APPENDIX

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I. CIRCUIT RULE 26.1 AMENDED DISCLOSURE STATEMENT

Further to the disclosures in their Docketing Statement, the Plaintiff-Appellants state that the following law firm has appeared exclusively on their behalf in all phases of the present litigation, including this appeal: Lee, Cossell, Kuehn & Love, LLP, which later became known as Lee, Cossell, Kuehn, Crowley & Turner, LLP, and which is now known as Lee & Fairman, LLP, which firm is principally located at 127 East Michigan Street, Indianapolis, IN 46204. The aforementioned law firm represents all of the Plaintiff-Appellants, which are: Kendale L. Adams; Danny C. Anderson; Marta E. Bell; Russell Burns; Vincent C. Burke; LeEtta Davenport; Anthony W. Finnell; John T. Green; Derrick Harris; Michael Jefferson; Timothy A. Knight; Yolanda R. Maddrey-Patterson; Ron Mills; Kendall J. Moore, Sr.; Arthur Rowley, Jr.; Matthew Steward; Ida Williams; Kimberly Young; Ron Anderson; Mario Garza; Eric Grissom; Dei Passon; Eric L. Simmons; Larry Tracy; Brian White; Chris Womock; Brownie Coleman; Jeffery Taylor; John Walton; and Curtis Hanks. All are individuals.

Lee & Fairman (and its predecessor entities) also previously represented the National Association for the Advancement of Colored People ("NAACP") in the current lawsuit. The District Court dismissed the NAACP from the lawsuit, citing a lack of standing. The individual attorneys who have appeared in the litigation to represent the Plaintiff-Appellants are: Cherry Malichi (Marion Superior Court and U.S. District Court); Gregory P. Gadson (U.S. District Court and the current Appeal); and Nathaniel Lee (Marion Superior Court and U.S. District Court).

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IV. JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

Having been removed from the Marion County (Indiana) Superior Court, the jurisdiction ("federal question jurisdiction") of the U.S. District Court for the Southern District of Indiana arose under 28 U.S.C. §§ 1331 and 1343, and further pursuant to 42 U.S.C. §§1981 and 1983, Article I §§ 12 and 23 of the Indiana State Constitution, and 42 U.S.C. §§2000e *et. seq*. ("Title VII").

B. Jurisdiction of the Circuit Court

The jurisdiction of the U.S. Court of Appeals for the Seventh Circuit arises under Title 28 of U.S.C., Section 1291, pertaining to, *inter alia*, final decisions of the district courts.

C. The Orders Appealed and Their Dispositions

In the present appeal, the Plaintiff-Appellants appeal from the following Orders of the Honorable Sarah Evans Barker of the U.S. District Court for the Southern District of Indiana: 1) Order on Motion for Partial Judgment on the Pleadings dated September 16, 2010 (Document 135), which granted partial judgment on the pleadings in favor of the Defendants, and which was not made a final order at the time; 2) Order on Pending Motions dated May 6, 2011 (Document 159), which denied the Plaintiffs' Motion to Alter or Amend Judgment and denied the Plaintiffs' Motion for Leave to File Second

Amended Complaint, and which was not made a final order at the time; 3) Order Granting Defendant's Motion for Summary Judgment dated March 13, 2012 and filed March 14, 2012 (Document 190), which granted summary judgment in favor of the Defendants; and 4) Final Judgment entered on March 13, 2012 (Document 191) in favor of the Defendants.

D. The Notice of Appeal

The Notice of Appeal was concurrently filed on April 11, 2012.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Plaintiff-Appellants respectfully aver that the numerous issues properly presented for review before this Honorable Court are as follows:

1) Whether, after granting the Defendant-Appellees' Motion for Partial Judgment on the Pleadings, the District Court abused its discretion when it denied the Plaintiff-Appellants' Motion for Leave to Amend the Complaint;

2) Whether in reviewing the adequacy of pleadings under Federal Rule of Civil Procedure 8, a court may solely rely on judicial opinions reviewing summary judgment proceedings or trial results for the appropriate standards;

3) Whether a plaintiff must plead a *prima facie* case in a complaint to meet the requirements of Rule 8;

4) Whether an analysis of the sufficiency of a pleading should take into account the circumstances and presumed knowledge and sophistication of the parties;

5) Whether a Defendant represented by counsel who alleges that a complaint is insufficient under Rule 8, is estopped from making that assertion, when it is revealed to the trial court that during the discovery process, the defendant made inquiries and asked specific deposition questions indicating that it was on sufficient notice as to the nature of the claims being asserted against it, and was sufficiently able to prepare an adequate defense;

6) Whether, pursuant to Rule 12(d), the District Court erred when it refused to convert the Defendant-Appellees' Motion for Partial Judgment on the Pleadings to a

motion for summary judgment as a result of the conduct of the Defendant-Appellees in attaching to their Answer, copies of EEOC charges of some of the Plaintiff-Appellants, and their reliance on those charges as part of their argument for partial judgment on the pleadings;

7) Whether the District Court erred in concluding that the Plaintiff-Appellants' Amended Complaint inadequately pleaded their disparate impact claim;

8) Whether the District Court erred in failing to address the Plaintiff-Appellants' arguments during the summary judgment procedure that the intentional element of disparate treatment discrimination claims may be proven by knowledge that a promotion process has a disparate impact on a protected group, coupled with the callous continued use of the process; and

9) Whether the District Court erred in granting summary judgment in favor of the Defendant-Appellees.

VI. STATEMENT OF THE CASE

Several African-American police officers and African-American firefighters (with one Latino firefighter) filed this action on January 30, 2009 in the Marion County (Indiana) Superior Court seeking legal and equitable relief from ongoing discriminatory promotion processes (more fully described in the Statement of Facts section, *infra*). The Defendant-Appellees removed the case to the Federal District Court for the Southern District of Indiana. The Plaintiff-Appellants' claims included: discrimination under 1) disparate impact (42 U.S.C. §1983 and Title VII) and 2) disparate treatment (Title VII) theories; 3) violation of provisions of the Indiana Constitution (Sections 12 and 23); 4) violation of 42 U.S.C. §1981; 5) hostile work environment under title VII (one plaintiff); 6) discrimination in pension benefits; and 7)violation of the Age Discrimination in Employment Act (one plaintiff).

The Defendant-Appellees filed a Motion for Partial Judgment on the Pleadings on October 1, 2009. According to the case management order, the deadline for seeking leave to amend pleadings was March 3, 2010. The District Court did not rule on the aforementioned motion (granting it in substantial part, including dismissing all of the Plaintiff-Appellants' disparate impact claims and others, and dismissing some individual plaintiffs and the individual defendants) until September 16, 2010—approximately two weeks shy of one year later. Five months between the aforementioned motion filing date and the deadline for leave to amend existed when the motion was filed.

The Plaintiff-Appellants sought leave to amend the complaint on October 12, 2010, and proffered a new 48-page complaint. In denying the motion for leave, the District Court essentially adopted the Defendant-Appellees' arguments that because the deadline for amending the pleadings had passed, the Plaintiff-Appellants needed to demonstrate (and allegedly did not) excusable neglect and good cause, and further that the proposed amendments would be futile anyway, given the related legal theories involved in the case.

The Defendant-Appellees filed a Motion for Summary Judgment on the remaining claims, which included the disparate treatment claims. After the Plaintiff-Appellants duly opposed the motion, the District Court granted the motion in favor of the Defendant-Appellees on all of the remaining claims.

The Plaintiff-Appellants are hereby appealing the District Court's rulings which: granted partial judgment on the pleadings in the Defendant-Appellees' favor; denied motion for leave to amend the complaint; denied the Plaintiff-Appellants' motion to alter or amend judgment; and granted summary judgment entirely in favor of the Defendant-Appellees.

VII. STATEMENT OF FACTS

The general facts for consideration in the current appeal, as should have been viewed by the District Court are primarily as follows, which is reprinted (for convenience) from the Plaintiff-Appellants' Brief in support of opposition to the Defendant-Appellees' motion for summary judgment:

A. Brief History

The current dispute arises out of a decades-long problem of notable lack of diversity in the hiring as well as promotion processes with respect to public safety personnel in Indianapolis, Indiana and Marion County, Indiana. Partial judicial resolution addressing the paucity of African-Americans in upper merit rank positions stretches back to 1978, when the City of Indianapolis and other named defendants entered into a consent decree with the U.S. Government.

Along with acknowledging that hiring practices had indeed adversely impacted African-Americans with respect to the police and fire departments, the City of Indianapolis agreed to the long-term goal of increasing the number of African-American police officers and firefighters so as to more nearly reflect the African-American population in Indianapolis and Marion County. The City agreed to the short-term goal of having at least twenty-five percent (25%) of African-Americans in police and firefighter recruitment classes. (Spears Deposition 23:7-11)

The dismal and highly discriminatory public safety promotion processes were also addressed in the aforementioned Consent Decree. In recognizing the past and present effects of promotion-based discrimination, the City agreed to the goal of "promoting blacks to the ranks of Sergeant, Lieutenant and Captain within the Police Department and to the ranks of Corporal, Chauffeur, Lieutenant and Captain within the Fire Department as to attain a percentage within those ranks which is reasonably representative of the percentage in the ranks from which promotions are traditionally made."

At no time does it appear that the aforementioned hiring and promotion goals were ever met. (Spears Deposition 24:15-19)

B. IMPD and IFD Promotion Process Primer

New promotion processes for IMPD and IFD have occurred roughly every two years, although not exclusive. The promotion processes for Indianapolis Metropolitan Police Department ("IMPD") and Indianapolis

Fire Department ("IFD") and the evaluation of candidates for promotion have included: taking and receiving a score for an oral examination component; taking and receiving a score for a written examination component; receiving a score for a candidate profile in which attributes of a candidate's background are converted into numbers and said numbers are combined; and combining the scores of the aforementioned components into a composite score for each candidate. The oral examination component has included an oral interview, in which a candidate is orally interviewed, an oral assessment, in which a candidate orally responds to scenarios presented, and a writing exercise, requiring the candidate to create written correspondence, and the like. The written examination component has included providing answers to written questions.

Maximum point totals are assigned to the oral examination component, the written examination component, and the candidate profile. The points and maximum points serve as weightings, causing components and sub-components of the promotion processes to have relative weights. Meanwhile, the job descriptions for each level of promotion in the IMPD and IFD have not changed in over ten years. The weightings of components and sub-components inexplicably change from process to process, are arbitrary, and are without any nexus to the job content or duties, the knowledge, skills or abilities needed for the job, or any other meaningful job-related criteria, nor are they consistent with any business necessity. (See Spears Deposition 31:8-22)

The promotion processes include for each relevant rank, placing candidates who have completed a promotion process on a candidate eligibility list, and ranking on that list, all of the candidates for promotion for the relevant rank according to their composite scores. By rule, all of the candidates on the eligibility list for a particular merit rank are eligible to be promoted to the merit rank in question, and there is no passing or failing score. The promotions of those to merit ranks are at the discretion of the IMPD Chief and the IFD Chief, with approval of the appropriate Merit Boards. At times, those promoted to merit ranks have been promoted not in order of their composite scores on the relevant eligibility list, but using the discretion of the Chiefs. At other times, and predominantly, those promoted to merit ranks have been promoted in order of their composite scores on the relevant eligibility list (e.g., the candidate with the highest composite score is promoted first, followed by the candidate with the second highest composite score, followed by the candidate with the third highest composite score, etc.).

The promotion processes in question are race neutral in the literature provided to candidates and in other documentation with respect to the development and administration of the said promotion processes, and the

administration and carrying out of the said promotion processes appears to be race neutral on the surface, while the results after promotions do have negative and unacceptably disproportional impacts on African-American and Latino candidates. Often, the difference between the scores on the promotion processes for the top twenty or so officers (or top twenty or so firefighters) is less than one point. (See IMPD Promotion Lists 2004-2008 designated as Defendant's Exhibits 9-15 and IFD's Promotion Lists for 2007 designated as Defendant's Exhibit 25).

The criteria utilized to rank and then promote candidates to merit ranks are not, nor has the City demonstrated them to show that a differentiation between the scores of promotion candidates translates to differentiation between job performances, and the promotion processes have not been validated to show that a higher ranking on the promotion eligibility list would lead one to better job performance over another with a lower ranking on the promotion eligibility list, or that such criteria utilized to rank and then promote candidates to merit ranks are consistent with any business necessity.

VIII. SUMMARY OF THE ARGUMENT

The District Court respectfully made multiple errors in its handling of the dispositive motions being reviewed in the current appeal. The failure of the District Court to grant leave to amend after granting the Defendant-Appellees' Motion for Partial Judgment on the Pleadings was an abuse of discretion, on its face according to Seventh Circuit jurisprudence requiring that a plaintiff must ordinarily be given at least one opportunity to amend his or her complaint when a court dismisses claims under FRCP 12. Abuse of discretion is also supported by the District Court's failure to invoke its equitable power to grant leave to amend the complaint when the circumstances plainly required it.

The Plaintiff-Appellants' Amended Complaint was in fact sufficiently pleaded with respect to their Title VII disparate impact claims and others using the proper Seventh Circuit pleading standards. The District Court has also improperly utilized summary judgment and trial cases to determine the sufficiency of complaints under FRCP 12, has also required *prima facie* pleading (which is not a requirement), used an inflexible approach to judging the adequacy of the complaint which did not take into account the relevant circumstances, and failed to convert the Defendant-Appellees' Motion for Partial Judgment on the Pleadings to a motion for summary judgment under Rule 12(d).

The District Court also respectfully erred when it granted summary judgment when genuine issues of material fact were demonstrated, and by not adhering to the relevant case law.

IX. ARGUMENT

A. The District Court Committed Reversible Error When it Refused to Grant the Plaintiff-Appellants' Leave to Amend Their Complaint After its Ruling on the Motion for Partial Judgment on the Pleadings

The Plaintiff-Appellants believe they will demonstrate convincingly elsewhere in this Brief, that, among other things, the District Court improperly dismissed the Plaintiff-Appellants' Title VII disparate impact claims, and that those claims were indeed sufficiently pleaded. However, setting aside the issue of the adequacy of Amended Complaint on this issue, what is clear is that the approach taken by the District Court is in direct conflict with the edicts of the U.S. Court of Appeals for the Seventh Circuit.

The Plaintiff-Appellants acknowledge that a district court's denial of a request for leave to amend a complaint is reviewed on appeal under the abuse of discretion standard. *Indiana Funeral Dirs. Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 655 (7th Cir. 2003). An abuse of discretion occurs if the district court reaches erroneous conclusions of law or premises its holding on a clearly erroneous assessment of the evidence. *Gautreaux v. Chicago Housing Authority*, 491 F.3d 649, 654-55 (7th Cir. 2007) (internal quotation marks omitted). Moreover, abuse of discretion is a standard of *varying* deference regarding the conclusions made by district courts. As this Court has noted previously: "[W]e have said many times that the term 'abuse of discretion' covers a range of degrees of deference rather than denoting a point within that range, and where a particular case falls in the range depends on the precise character of the ruling being reviewed." *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 908 (7th Cir. 1995).

Regarding the "precise character of the ruling" that dictates the level of deference to be afforded to the district courts on a case-by-case basis that this Court referenced in *Schering Corp.*, Judge Posner stated that "[d]eference is related to the nature of the issues" and is dependent on ambiguity. *Call v. Ameritech Management Pension Plan*, 475 F.3d 816, 822 (7th Cir. 2007). Essentially, the more ambiguous and complex the nature of the issues involved in a particular ruling, the more deference is given to the district court regarding that ruling. The converse is also true. If an issue is simple and clear, less deference is to be afforded to the district court regarding the issue in an abuse of discretion analysis.

But where, as here, the Seventh Circuit has already provided a clear marker of the correct procedure to follow, analysis is simple, with little of any deference that should be afforded the District Court. The case of *Bausch v. Stryker Corp*., 630 F.3d 546 (7th Cir. 2010) is both instructive and compelling. While Bausch involved issues of federal preemption with respect to medical device liability claims, it also addressed the appropriateness of a district court granting, *vel non*, leave to amend after a claim is dismissed based on the sufficiency of the related pleadings. In disagreeing with the district court's failure to grant leave to amend the complaint, the *Bausch* Court stated:

> One objective of Rule 8 is to decide cases fairly on their merits, not to debate finer points of pleading where opponents have fair notice of the claim or defense. See Fed.R.Civ.P. 8(e) ("Pleadings must be construed so as to do justice."). Generally, if a district court dismisses for failure to state a claim, the court should give the party one opportunity to try to cure the problem, even if the court is skeptical about the prospects for success. See *Foster,* 545 F.3d at 584. *Id*. at 562.

The above was stated by the *Bausch* Court as the general rule, requiring that a plaintiff be given at least one opportunity to address pleading defects identified by a court.

As was summarized in the "Statement of the Case" section, above, the Defendant-Appellees filed a Motion for Partial Judgment on the Pleadings on October 1, 2009, with March 3, 2010 being the case management plan ("CMP") deadline for seeking leave to amend the pleadings. The District Court did not rule on the aforementioned motion until almost a year later on September 16, 2010. The Plaintiff-Appellants requested leave to amend the complaint and included with their motion, the proposed 48-page Second Amended Complaint on October 12, 2010. In subsequently denying the motion for leave, the District Court essentially adopted the Defendant-Appellees' arguments that because the deadline for amending the pleadings had passed, the Plaintiff-Appellants needed to demonstrate (and allegedly did not) excusable neglect and good cause, and further that the proposed amendments would be futile anyway, given the related legal theories involved in the case.

Timing in the present case is everything. The Plaintiff-Appellants cannot be punished for having requested leave beyond the CMP deadline, when the District Court failed to rule on the motion for partial judgment on the pleadings between the time of the motion's filing and the approximate five months remaining in the CMP for seeking leave to amend. Regardless of the CMP deadline, the *Bausch* decision makes clear that "a formal motion for leave to amend was not necessary at the Rule 12(b)(6) stage, and the plaintiff was entitled to wait and see if any pleading problems the court might find could

be corrected." *Id*. at 562. Absent the wait-and-see approach, a plaintiff is otherwise required to divine what attributes and language the district court may find as meeting the plausibility standard established in *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544 (2007).

It cannot also be said that the Plaintiff-Appellants unduly delayed in seeking leave to amend the complaint, since their request was well within 30 days after the District Court's ruling on the motion for partial judgment on the pleadings, as the ruling on the motion for partial judgment on the pleadings was the first opportunity for the Plaintiff-Appellants to know that the District Court considered their complaint insufficient. In a footnote (11), the Seventh Circuit ratified the *Bausch* approach in *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), stating:

> [e]ven if we found some inadequacy in the details of the already detailed pleading, through an unusually vigorous extension of the *Iqbal* pleading standard, for example, plaintiffs would be entitled to an opportunity to amend their Complaint to remedy any perceived defects. Basic fairness and the liberal amendment policy under Federal Rule of Civil Procedure Rule 15(a)(2) would require that plaintiffs be given an opportunity to cure the defects, if they could, at least absent undue delay, bad faith, dilatory motive, or undue prejudice. See, *e.g., Bausch v. Stryker Corp*., 630 F.3d 546, 562 (7th Cir. 2010); *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007).

Thus, there appears to be no suitable rationale commensurate with Seventh Circuit requirements for the District Court's refusal to allow the Plaintiff-Appellants to amend their complaint.

The *Bausch* and *Vance* cases make clear that the Plaintiff-Appellants were not required to show excusable neglect, good cause, lack of futility, or lack of countervailing

harm to the Defendant-Appellees. Nonetheless, it is clear that the Plaintiff-Appellants meet even those unnecessary standards.

Deadlines to act can be extended pursuant to Federal Rule of Civil Procedure 6(b)(1)(B) "if the party failed to act because of excusable neglect," and such must be the case in the present circumstances. For one thing, excusable neglect can be shown in the form of the District Court's complicit contribution to the plaintiffs' failure to file the amended complaint by the CMP deadline when it failed to rule on the Defendant-Appellees' motion within the deadline itself, and unless the District Court expected the Plaintiff-Appellants to guess at what the official deficiencies were, the Plaintiff-Appellants could not have timely acted. In fact, on account of the District Court's delay of almost one year, the Plaintiff-Appellants could not competently act until approximately one year after the Defendant-Appellees' motion. Under the circumstances, the Plaintiff-Appellants' failure to seek leave to amend sooner was not neglect at all, but in any case was excusable.

During the waiting period, discovery was commenced regarding the Title VII disparate impact and disparate treatment claims, among others. This included depositions of nearly all of the named plaintiffs, officials for the City of Indianapolis and third parties, as well as extensive paper discovery, including the collection statistical data. As discovery progressed, a vast influx of testimony and statistics were brought to light, requiring more time and resources in order for the Plaintiff-Appellants to adequately build their case. By the time that the District Court had ruled on the Motion for Partial

Judgment on the Pleadings, the Plaintiff-Appellants were inundated with a massive amount of discovery material, and were given broad and vague rationales by the District Court as to why the Amended Complaint was insufficient.

The task of drafting a new complaint was therefore made much more difficult, and the District Court's holding that excusable neglect was not present was an abuse of discretion.

Good cause—to the extent that the District Court believes that it is needed for leave to amend to be granted—was also present. The (first) Amended Complaint was thirty (30) pages in length, and was not lacking in specificity or detail. The Amended Complaint alleged disparate impact under Title VII as well as a "specific, facially neutral employment policy." Both parties utilized the discovery process, and the fact that the Plaintiff-Appellants utilized a great deal of time and resources in discovery demonstrates that the Plaintiff-Appellants were diligent in prosecuting their claims. When learning that the District Court considered their 30-page Amended Complaint to be insufficiently pleaded, the Plaintiff-Appellants began drafting what resulted in a 48-page Second Amended Complaint (with great details about the promotion processes and factually how those details resulted in disparate impact against African-Americans) that they proffered to the District Court, along with their associated Motion for Leave to Amend. Equity rewards the diligent, and that maxim is applicable to the Plaintiff-Appellants.

While it is normally the non-movants whose interests are to be protected when a district court considers a motion under Rule 12, the District Court adopted the Defendant-

Appellees' argument that they would be unacceptably harmed if leave to amend were granted. The District Court adopted the view that granting leave to amend would prejudice the Defendant-Appellees "to again defend claims that the Court has already held are procedurally barred or legally unsupportable." See Order Denying Mot. to Amend Complaint at 5 (May 6, 2011). The Plaintiff-Appellants will demonstrate in Section G, *infra*, that the District Court's failure to properly consider the continuing violation doctrine was reversible error, which led to improperly dismissing their claims. And given the overwhelming notice provided to the Defendant-Appellees about the disparate impact claims, and their apparent grasp of that reality during the discovery process, it cannot be fairly maintained that the Defendant-Appellees would be prejudiced.

The Plaintiff-Appellants cited an example during the discovery depositions of the Plaintiffs that the Defendant-Appellees were fully aware of the existence and nature of the disparate impact claims that would allow them to prepare a competent defense. Citation to the deposition of Plaintiff-Appellant Kendale Adams, was one of only many similar questions asked of the Plaintiff-Appellants. For example, the Defendant-Appellees' counsel and Adams had the following exchange during Mr. Adams' deposition:

Q: So you know about the disparate impact claim? Page 35, Line 17

A: Correct. Page 35, Line 18

Thus, the Defendant-Appellees were on notice and had a fair opportunity to prepare their defense. Incidentally, the Plaintiff-Appellants offered in their Motion for

Leave to Amend, to agree to additional discovery and to revise the CMP deadlines if the Defendant-Appellees felt the need for such modifications. It is therefore the Plaintiff-Appellants and not the Defendant-Appellees who were prejudiced in not being able to pursue their legitimate claims, while the Defendant-Appellees have effectively been given immunity from suit for continuous racially discriminatory processes.

B. The District Court Committed Reversible Error When it Relied on Summary Judgment Cases and Cases after Trial as Bases for Determining the Adequacy of the Plaintiff-Appellants' Pleadings

In the still uncertain terrain of federal pleading practice following *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and later cases of the federal circuits and districts, there is a temptation to read the new pleading jurisprudence as requiring a plaintiff to allege all of the aspects of the claims that must ultimately be presented at summary judgment stage and beyond, and that short of meeting such tests, the plaintiff's complaint must fail as a matter of law. Yet, neither *Twombly* nor *Iqbal* establish such a requirement. Instead, all that is necessary at the preliminary pleading stage of litigation is an adherence to Rule 8 in a manner that rises above mere speculation to a plausible claim.

Unfortunately, the U.S. Supreme Court left few practical guides to determine when a complaint is actually sufficient, leaving a portion of the assessment to a *de facto* "eye-of-the-beholder" test reminiscent of Justice Potter Stewart's famous concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) when he stated: "I shall not today

attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…." Deciding whether pleadings are adequate is not unlike the task of ascertaining obscenity. Indeed, the aforementioned footnote in the *Vance* case further acknowledges:

> The Supreme Court's recent decisions in *Iqbal* and *Twombly* have created new uncertainties about the level of detail required in pleadings under the notice pleading regime of the Federal Rules of Civil Procedure. Circuit and district courts have not yet identified a clear boundary between what is sufficient and what is not. See, *e.g., Swanson v. Citibank N.A.,* 614 F.3d 400, 403 (7th Cir. 2010) (observing that courts are "still struggling" with "how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly,* but also *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), and [*Iqbal*]," and noting that "[t]his is not an easy question to answer"); see also *Swanson,* 614 F.3d at 411 (Posner, J., dissenting in part) (noting the "opaque language" that the Supreme Court used to establish the "plausibility" requirement). As Professor Miller has suggested, "inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible." See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure,* 60 Duke L.J. 1, 30-31 (2010) (describing "confusion and disarray among judges and lawyers" in applying *Iqbal*). Rule 1 instructs courts to construe the rules to secure the "just" determination of lawsuits, and there is a general policy in favor of allowing parties to have their cases decided on their merits. See, *e.g., Swierkiewicz,* 534 U.S. at 514, 122 S.Ct. 992; *Christensen v. County of Boone*, 483 F.3d 454, 458 (7th Cir. 2007).

Twombly and *Iqbal* do not require a plaintiff to meet the tests for summary judgment at the initial pleading stages. To steadfastly attempt to meet summary judgment standards at the initial stages of litigation when knowledge may be limited invites parties to allege facts that may not be confirmed at the time before discovery has been had, and to fall into the disfavored trap of formulaic pleading. The District Court

adopted the Defendant-Appellees' use of summary judgment and trial cases to determine the adequacy of the Plaintiff-Appellants' complaint without critically questioning whether the analysis was an appropriate one, which the Plaintiff-Appellants submit was not.

C. The District Court Committed Reversible Error When it Required that the Plaintiff-Appellants Plead a Prima Facie Case

While not using such words, there can be no doubt that the District Court required the Plaintiff-Appellants to plead a *prima facie* case in their complaint. Similar to the discussion in Section B, above (respect to the misuse of summary judgment and trial cases), such a requirement was not articulated in *Twombly* and *Iqbal*. A *de facto* insistence on using such a standard is also fraught with the same problems in conflict with the public policy reasons behind Rule 8: in the initial stage of litigation, it is important that a defendant understand the basic reason why he or she is being sued, to enable he or she to begin preparing an appropriate defense.

An insistence on substantially more at the initial pleading stage is to convert the long-lived federal notice pleading standard to an esoteric code pleading standard, including the problems that the notice pleading standard was adopted to avoid.

D. The District Court Committed Reversible Error When Not Taking into Account the Circumstances, Experience and Sophistication of the Defendant when it Dismissed the Plaintiff-Appellants' Disparate Impact Claim

An analysis of the adequacy of a pleading should not be made *in vacuo*. The attempt to analyze the adequacy of a pleading should involve more than simply ascertaining whether magic words of description have been included which entitle a plaintiff to enter a courthouse—and stay for a while. A municipality such as the City of Indianapolis—ably represented by a bevy of attorneys and other legal professionals—cannot fairly on the one hand, argue in its briefs that allegations are missing (and specifying what it considers to be the missing allegations) that are necessary to constitute disparate impact under Title VII, and demonstrating full knowledge of the legal and factual issues, while on the other hand claiming a lack of knowledge about why it is being sued.

The Plaintiff-Appellants' claim that the public safety merit promotion processes disparately and impermissibly impact racial minorities is clear from the pleadings. There can be no doubt in the City's collective mind from the pleadings, which promotion processes are involved, and given their demonstrated knowledge of case law, there can be no doubt about the additional details that the Plaintiff-Appellants would seek to substantiate with discovery. Thus, for example, declaring the Plaintiff-Appellants' complaint to be inadequate for failure to allege that the promotion processes were racially neutral on their face (as adopted by the District Court) rewards the knowledgeable as if they are ignorant.

E. The District Court Committed Reversible Error When it Dismissed the Plaintiff-Appellants' Disparate Impact Claim, Despite a Demonstration by the Defendant-Appellees that They Had Been Preparing an Aggressive Defense

In the same vein as the previous section, the Plaintiff-Appellants argued to the District Court that because of the circumstances, and the clear indication that the Defendant-Appellees were adequately placed on notice of the disparate impact claims, and pursued a defense through the discovery process that had already begun when they filed their motion, that the Defendant-Appellees should in essence be *estopped* from being able to assert a Rule 12(c) motion on the disparate impact claims. The contrary approach adopted by the District Court encourages dishonesty by those who have demonstrated full notice of the claims against them on the one hand, and allowing them to make a hyper-technical argument to pre-emptively avoid liability on the other hand.

The Plaintiff-Appellant hereby reiterates the discussion in Section A, above, with respect the Plaintiffs' depositions, using the example of Officer Kendale Adams. It is therefore clear that the Defendant-Appellees were aware of the plaintiffs' charges of disparate impact under Title VII and that the defendants would be tasked with the duty of defending against such claims. This argument not only fell of deaf ears, but received no response from the District Court.

F. The District Court Committed Reversible Error When it Refused to Convert the Defendant-Appellees' Motion for Partial Judgment on the Pleadings to a Motion for Summary Judgment

In following a path of chicanery, the Defendant-Appellees attached EEOC charges of several of the Plaintiff-Appellants to their Answer, and then subsequently argued with respect to their Motion for Partial Judgment on the Pleadings that that as a result, claims could be dismissed, along with individual defendants for among other things, failure to exhaust administrative remedies. This practice by the City of Indianapolis is a common one in its federal litigation. The Plaintiff-Appellants have argued that the approach should have converted the motion under Rule 12(c) to a motion for summary judgment pursuant to Rule 12(d). The Plaintiff-Appellants received no reply from the District Court on this issue. Reprinted below are the basic arguments the Plaintiff-Appellants presented to the District Court:

> The Defendants have employed an interesting strategy that appears to have worked in the short term: attach EEOC charges filed by the Plaintiffs to the Defendants' Answer, employ the language of Federal Rule of Civil Procedure 10(c) to make the EEOC charges a part of their Answer, and then rely on the exhibits to the Answer as part of a Rule 12(c) Motion for Judgment on the Pleadings. Rule 10(c) states:
> **Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.
>
> At first glance, this practice seems both sanctioned and innocuous. On closer scrutiny, abuse of this rule allows a defendant to attach an infinite amount of self-serving documents and other evidence that must be taken at face value by a Court as a predicate to a Rule 12(c) Motion for Judgment on the Pleadings. That is why the Defendants' use of Rule 10(c) in combination with their Rule 12(c) Motion for Judgment on the Pleadings is improper. This tactic is clearly targeted and prohibited by Rule 12(d), which states:
> **Result of Presenting Matters Outside the Pleadings.** If, on a motion under rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for

summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

This method was employed by the Defendants to argue the insufficiency of the Plaintiffs' EEOC charges with respect to their disparate impact claims. It is easy to conclude in mechanical fashion that the EEOC charges are now a part of the pleadings, and are therefore at issue. The spirit of Rule 12(d) however, dictates that the Defendants' Motion for Judgment on the Pleadings should have been converted by the Court into a Motion for Summary Judgment, allowing the Plaintiffs an opportunity to present their own evidence on the relationship between the EEOC charges and the Complaint. Using the Defendants' approach, a party in answering a complaint may attach limitless evidentiary documents while the plaintiff is relegated to his complaint only to oppose a Motion for Judgment on the Pleadings.

The Defendants' tactics also misconstrue "written instrument" within the meaning of the rule and its milieu. Black's Law Dictionary defines a written instrument as "something reduced to writing as a means of evidence, and as the means of giving formal expression to some act or contract." This is clearly directed to things that memorialize understandings, including contracts, between parties. Thus, someone's written statement (as an EEOC charge), which is not intended to formalize understandings and agreements between parties, is not a "written instrument" within the meaning of Rule 10(c).

The Defendants inclusion of EEOC charges as part of their Motion for Judgment on the Pleadings should therefore have converted their entire motion to a Motion for Summary Judgment.

Seventh Circuit Rule 50 requires that district courts provide reasons in writing or orally when dismissing claims. The spirit of this rule would also encourage district courts to address legitimately raised legal issues and arguments—at least as to why such issues and arguments are deemed unpersuasive if such is the case.

G. The District Court Committed Reversible Error When it Concluded that the Plaintiff-Appellants' Amended Complaint Inadequately Pleaded Their Disparate Impact Claims

Pursuant to its order the District Court dismissed the Plaintiff-Appellants' Title VII disparate impact claims. The appropriate standard of review regarding a district court's ruling on a motion for judgment on the Pleadings is *de novo*. See *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007).

The District Court erroneously held that dismissal of the Plaintiff-Appellants' Title VII disparate impact claims was appropriate due to their "failure to exhaust their administrative remedies." Order Granting Mot. for Partial J. on the Pleadings at 10 (Sept. 16, 2010). The District Court further explained that the Plaintiff-Appellants failed to exhaust their administrative remedies because: 1) certain plaintiffs did not timely file their disparate impact charges brought under Title VII with the EEOC; and 2) technical errors in pleading rendered the charges insufficient. *Id.* at 10-19. This dismissal was not proper because: 1) The continuing violation doctrine protects the plaintiffs' charges from dismissal, and 2) the amended complaint (as well as the second amended complaint) was sufficiently pleaded and should not have been found otherwise.

1. The Continuing Violation Doctrine Saves the Plaintiffs' Disparate Impact Claims Under Title VII

When a claimant files an EEOC suit regarding an "unlawful employment practice," the claimant must do so within the limitations period. 42 U.S.C. § 2000e-5(e). Further, when making an EEOC charge for such unlawful employment practices in Indiana, the claimant must file the EEOC charge(s) within 300 days of the unlawful practice. *Oliver-Pullins v. Associated Material Handling Industries, Inc.*, 2004 WL

2137624 at 8 (S.D. Ind. July 20, 2004). However, the continuing violation doctrine is an exception that effectively overrides the 300 day limitation period when a charge is filed concerning the cumulative impact of multiple discrete acts. See *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1012 (7th Cir. 2003). The present case falls directly within the scope of continuing violation doctrine, thus saving the Plaintiff-Appellants' disparate impact claims under Title VII from being dismissed by the 300 day limitation.

The continuing violation doctrine exception is applicable to situations involving hostile work environment and/or pattern-and-practice claims. *Davidson v. Citizens Gas & Coke Utility*, 470 F.Supp.2d 934, 944 (S.D. Ind. 2007). In *National Railroad Passenger Corporation v. Morgan*, the U.S. Supreme Court stated that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.*

The Plaintiff-Appellants have clearly alleged that the promotion processes adopted and practiced by the Defendant-Appellees are the crux of the current dispute. The District Court respectfully erred in characterizing the Plaintiff-Appellants' disparate impact claims as being based solely on separate, discrete acts which are not eligible for application of the continuing violations doctrine. That characterization is inconsistent with the circumstances, and was used as a reason to improperly grant the Motion for

Partial Judgment on the Pleadings. The District Court respectfully misapplied the U.S. Supreme Court's language in the *Morgan* case by stating: "In *Morgan*, the Supreme Court categorized 'failure to promote' as a discrete incident of discrimination to which the continuing violation doctrine does not apply." Order Granting Mot. Partial J. on the Pleadings at 12 (Sept. 10, 2010). Though the reference to *Morgan* is not incorrect in the context of that particular Supreme Court decision, it is entirely inapplicable to the case at issue.

In *Morgan*, the Supreme Court affirmed that a *single* claimant's *single* incident of being denied promotion is a discrete act that is not actionable beyond the limitations period under the continuing violations doctrine. *Id*. at 113. The present case is easily distinguishable from *Morgan* in that the charges in this case are directed at a promotion *process*; that is, a *system* that has been in place for years and remains unchanged, while having a disparate impact on African-American employees of the City of Indianapolis. It is important to understand that the Plaintiff-Appellants' Title VII disparate impact claims are not simply single, discrete incidents of a failure to promote, as the District Court concluded. Rather, they involve an *on-going* discriminatory process that has been used for years and is currently in place involving *numerous* aggrieved Africa-Americans (hence, the *multitudes* of plaintiffs in this consolidated action) and *multiple* incidents of denied promotions under a *system* that when adhered to, produces results that disparately impact African-Americans that are seeking promotions.

Ample case law supports a conclusion that the perpetual use of the promotion processes in question makes the continuing violation doctrine applicable. For example, the Seventh Circuit held in *Palmer v. Board of Education* that the application of the continuous violation doctrine was necessary so that a suit alleging a system of racial discrimination within public schools would not be dismissed for untimely filing. *Palmer v. Board of Education*, 46 F.3d 682, 686 (7th Cir. 1995). The *Palmer* Court further opined that:

> "[e]very fall the school board decides which buildings to use and which children shall be assigned to which schools. If, as plaintiffs believe, the school board's explanation for closing Deer Creek is a pretext for discrimination, then each year's decision to leave the building shuttered is a new violation – as is each assignment plan that compels black pupils to board busses for a distant junior high school that they would not be required to attend if the population of University Park had a lighter complexion . . . *and the fact that it is long past time to rectify such discrimination is a reason to put this case on a fast track to decision rather than to dismiss it as filed too late.*" *Id.* (emphasis added).

There are striking parallels between the *Palmer* case and the present case: both cases involve a governmental entity's adoption and continuous use of a decision-making process that resulted, and continues to result, in racial discrimination; and dismissing the related lawsuit under the strict EEOC charge-filing limitation period runs contrary to the purpose of the continuous violation doctrine and the underlying public policy. Like the plaintiffs in *Palmer*, the Plaintiff-Appellants in the present case deserve to litigate their Title VII disparate impact claims under the continuing violation doctrine, and not have their access to justice blocked by an inflexible and inappropriate application of the 300-day limitation.

2. <u>There are No Technical Errors in the Pleadings to Justify the Dismissal of the Plaintiffs' Title VII Charges of Disparate Impact</u>

Regardless of subsequent case law, it is important keep in mind the plain language in Federal Rule of Civil Procedure 8(a)(2), which states that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." In recent years, the Supreme Court of the United States has stated that regarding FRCP 8(a)(2), a pleader has the duty to "state a claim that is plausible on its face." See *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As was mentioned in a previous section in the *dicta* of the *Vance* decision, applying the *Twombly* and *Iqbal* standard has caused consternation among the various courts.

Realizing the confusion, the Seventh Circuit has at least clarified that *Twombly* and *Iqbal* did not create a new heightened pleading standard, nor a fact pleading standard, nor even a single pleading standard to replace Federal Rule of Civil Procedure 8, but interpret the rule, rather than tossing it out the window. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010). The Seventh Circuit has also recognized with respect to FRCP 8(a)(2), that "the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests," and that "[s]pecific facts are not necessary." *Id*. at 404 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). The

Swanson Court stated the plaintiff's Rule 8(a)(2) burden with respect to providing fair notice of what the claim is and the grounds upon which it rests:

> This is the light in which the Court's references in *Twombly,* repeated in *Iqbal,* to the pleader's responsibility to 'state a claim to relief that is plausible on its face' must be understood. See *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal,* 129 S.Ct. at 1949. 'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal,* 'the plausibility standard is not akin to a probability requirement.' 129 S.Ct. at 1949 (quotation marks omitted). As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. *Swanson v. Citibank, N.A.* at 404.

To further clarify what constitutes "plausibility," which in turn constitutes "fair notice," the *Swanson* Court used a hypothetical example:

> A plaintiff who *believes that she has been passed over for a promotion* because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an *entirely plausible* scenario, whether or not it describes what 'really' went on in this plaintiff's case. *Id*. at 404-5 (emphasis added).

The District Court in the present case found the Plaintiff-Appellants' Amended Complaint inadequate, but that Complaint did state the following with respect to the disparate impact claims (as acknowledged by the District Court):

> The ICRC form for each claimant contains a narrative stating his agency of employment, his employment title, his beginning employment date, the date he applied for promotion, the promotion for which he applied, the fact that he was denied promotion, and the identical (or strikingly similar) allegation common to all of the charges: 'I believe that I have been denied

> promotional opportunities because of testing and promotional criteria that is irrational and highly subjective which results in a racially biased impact.' Order Granting Mot. for Partial J. on the Pleadings at 16 (Sept. 16, 2010).

Comparing the allegations in the Plaintiff-Appellants' Amended Complaint with the *Swanson* hypothetical, it is clear that there is little difference (and none that are distinguishable with respect to adequacy) between the two, both are nearly identical in form and substance, and both allege a failure to promote. The *only* differences are: 1) the hypothetical example involves sex discrimination while the case at issue involves race discrimination—which is not a material difference in that the same outcome results in the analysis of the "Plausibility" standard; and 2) the Plaintiff-Appellants have not only alleged *everything* stated by the hypothetical plaintiff; in addition to fully encompassing the statements of the hypothetical plaintiff, but they have stated *more* than the hypothetical plaintiff. Logically, if the hypothetical complaint is adequate for maintaining an action, and the Plaintiff-Appellants' Amended Complaint was more detailed, then the Amended Complaint is also adequate to maintain an action.

The District Court's approach and conclusions with respect to the adequacy of the Plaintiff-Appellants' Amended Complaint should therefore respectfully be rejected.

H. The District Court Committed Reversible Error When it Failed to Address and Adopt the Plaintiff-Appellants' Summary Judgment Arguments that Disparate Treatment Claims Can be Proven by Demonstrating Knowledge that a Promotion Process has a Disparate Impact on a Protected Group, Coupled with the Callous Continuous Use of the Process

During the summary judgment proceedings the Plaintiff-Appellants submitted the following arguments to the District Court in a surreply, and the District Court never addressed them in its Order granting the Defendant-Appellees' Motion for summary judgment (reprinted here for convenience):

> Although the disparate impact claim was dismissed, courts have recognized that disparate treatment can be demonstrated at summary judgment by a showing of knowledge of disparate impact, coupled with a continuing use of a discriminatory process. *See, United States v. City of New York*, 683 F. Supp.2d 225 (E.D.N.Y. 2010). In *City of New York*, the court held that interveners (black Fire Department of New York applicants) presented sufficient statistical evidence the city had a pattern or practice of discriminating against black applicants based on the City of New York's use of written examinations to screen and rank applicants for entry-level firefighter positions. *Id 268.* The court also stated that "the city has been aware for years that blacks have tended to perform worse than whites on the firefighter selections exams, both in terms of pass rates and ranking." *Id. 265.* "The evidence therefore suggests that, while the challenged policies were being implemented, the City was on notice of their discriminatory effects but took no corrective action." *Id*. 265-266. Furthermore, the courts stated that the fact that the City's top officials exhibited an attitude of deliberate indifference to the discriminatory effects of the hiring policies that they were charged with overseeing raises a strong inference that intentional discrimination was the City's "standard operating procedure." *Id.* at 266.
>
> In the case at hand, it is clear that the City's promotion of African Americans has fallen well below the 80 percent guidelines established by the EEOC. See EEOC Uniform Guidelines Regarding Disparate Impact §1607.4(d). According to Exhibit C1 Attached to Bruce Henry's Deposition Transcript at 20-22, the following is evident: As of 1/10/10, 1) African Americans make up approximately 25 percent of the Marion County workforce; 2) African American IMPD officers make up only 12 percent, 6.67 percent, and 17.65 percent of the merit ranks of sergeant, lieutenant, and captain, respectfully. These represent only 48 percent, 26.7 percent and 70.6 percent (that is, $12 \div 25 \approx .48$ or 48%, $6.67 \div 25 \approx .267$ or 26.7%, and $17.65 \div 25 \approx .706$ or 70.6%) respectively, of their projected selection rates in discrimination-free processes, which are well below the 80 percent rule. A sample from the relevant statistical evidence is presented below:

Rank	Rank Total	White	Black
Sergeant	226	197	27
Lieutenant	94	87	7
Captain	21	18	3
Total Sworn	341	302	37

> Exhibit C1 Attached to Bruce Henry's Deposition Transcript at 22. IFD promotional ranks fare slightly better, but are far from adequate, especially for the ranks of Battalion Chief and Lieutenant. *Id.* at 23. The statistics presented by the Plaintiffs above and in connection with their opposition to the Defendants' motion for summary judgment are simple, powerful and un-refuted by the Defendants, and the pattern persists throughout the promotion processes as illustrated by the statistics attached to the Henry Deposition Transcript.
>
> Moreover, as stated in the Plaintiffs' Response, the Defendants' vendor who provided the promotional process, Dr. Jeffrey C. Savitsky, testified that he had informed the Defendants that the written portion of the promotional process had an adverse impact on African-Americans and that the process was not changed to correct this problem. (Savitsky Deposition 49:15-19; 50:4-13). Similar to the evidence presented in *United States v. City of New York,* Dr. Savitsky put the City of Indianapolis on notice regarding the discriminatory impact of their promotional processes. Nevertheless, the defendants have yet to properly address this reality, leaving the Plaintiffs and other African American police and firefighters to be callously and continuously discriminated against.

Incidentally the *City of New York* case and its relevance to the summary judgment proceedings was also raised in the Plaintiff-Appellants' Brief in support of their opposition. The Plaintiff-Appellants believe the above discussion was directly relevant to the summary judgment proceedings, and even if the District Court believed that the *City of New York* case was only persuasive authority (which it was and is), the Plaintiff-Appellants believe they were entitled to a statement from the Court as to why the rationale in *City of New York* was flawed, and thus inapplicable to the present case.

I. The District Court Committed Reversible Error When it Granted Summary Judgment on Plaintiff-Appellants' Disparate Treatment Claims

It is now axiomatic that the review of summary judgment proceedings by an appeals court is to be carried out *de novo*. The appropriate standards for a district court to follow during summary judgment procedure have been well articulated by the District Court in the present case. The problem is not with the articulation of the general standards to be used, but in the District Court's erroneous applications of the standards. The Plaintiff-Appellants received no inferences drawn in their favor, no presumptions in their favor, and in fact, impermissible evidentiary weighing occurred.

With respect to the Plaintiff-Appellants' claims of disparate treatment in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment, "[d]iscrimination may be proven either directly, such as by an admission by the defendant, or indirectly under the burden-shifting method established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Scaife v. Cook County*, 446 F.3d 735, 739 (7th Cir. 2006). Here, the analysis regarding the indirect method of proof is appropriate, as shown by the record and agreed upon by both parties as well as the District Court.

"[T]he indirect method of proving discrimination . . . applies equally to discrimination claims under Title VII . . . and § 1983." *Rodgers v. White*, 657 F.3d 511, 517 (7th Cir. 2011) (citing *Egonmwan v. Cook Cnty. Sheriff's Dep't,* 602 F.3d 845, 850 n. 7 (7th Cir. 2010)). Under the indirect method, the plaintiff can overcome summary

judgment by establishing a *prima facie* case of discrimination. *Naik v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 627 F.3d 596, 599 (7th Cir. 2010).

To establish a prima facie case in a failure-to-promote context, the plaintiffs must show that 1) they belong to a protected class, 2) they applied for and were qualified for the position sought, 3) they were rejected for that position, and 4) the employer granted the promotion to someone outside of the protected group that was similarly situated. *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003). The first three (3) elements of the prima facie case need not be discussed as they are undisputed in favor of the Plaintiff-Appellants, and this lack of dispute was noted by the District Court. This leaves *only* element four (4), the issue of whether the Plaintiff-Appellants are *similarly situated* to the Defendant-Appellees' Caucasian employees that received promotions over the Plaintiff-Appellants.

The issue of whether the Plaintiff-Appellants are similarly situated to the City of Indianapolis' Caucasian public safety employees that received promotions over the them requires a lenient analysis in favor of finding that the comparators are similarly situated, as evidenced by the relevant and binding case law. For example, the Seventh Circuit declared that "the similarly-situated analysis calls for a 'flexible, common-sense' examination of all relevant factors." *Coleman v. Donahoe*, No. 10-3694 (7th Cir. Jan. 6, 2011) (quoting *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2007)). The *Coleman* Court further stated that "[w]e are looking for comparators, not 'clone[s].'" *Coleman*, No. 10-3694 (citing *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 916 (7th Cir. 2010))

and "[s]o long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied." *Coleman*, No. 10-3694 (citing *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008).

At summary judgment stage, it is the Defendant-Appellees' burden to demonstrate an absence of evidence to support the Plaintiff-Appellants' contention that they and their Caucasian coworkers who received promotions are similarly situated. Failure to meet this burden—as was the case—should have been cause to deny the motion for summary judgment since there is clearly a genuine issue of material fact present.

In keeping with the Seventh Circuit's edict that liberal interpretation is to be used for "similar situation" analysis, the record is replete with indicia reflecting that the Plaintiff-Appellants and promoted Caucasian police officers and firefighters were similarly situated. The District Court acknowledges in its order granting summary judgment that "[i]t is true with respect to at least some of the plaintiffs the differences in point values between their scores and the lowest scoring applicants who were promoted were *minimal or even negligible*." Order Granting Mot. Summ. J. Mar. 14, 2012 (emphasis added). Additionally, the plaintiffs are similarly situated with the Caucasian police officers and firefighters that received promotions in that they all share the same employer, perform comparable (if not identical) job functions, and selflessly risk life and limb to protect and serve the community. To suggest that the plaintiffs are not similarly situated to their Caucasian co-workers that received promotions is not supported by the

record. Therefore, a genuine issue of material fact exists, and the Defendant-Appellees were not entitled to a judgment as a matter of law. That is where the analysis should have ended, since a single genuine issue of material fact is enough to deny summary judgment. It is not the role of a district court to weigh evidence or make credibility determinations at summary judgment.

X. CONCLUSION

The Plaintiff-Appellants have presented a myriad of issues for resolution on appeal by this Honorable Court. There are multiple, compelling reasons why the District Court should not have granted the Defendant-Appellees' Motion for Partial Judgment on the Pleadings (and should not have dismissed the Plaintiff-Appellants' disparate impact claims, among other errors). There are also compelling reasons why the District Court should not have granted the Defendant-Appellees' Motion for Summary Judgment.

The Plaintiff-Appellants also believe they have amply demonstrated that the District Court abused its discretion in failing to grant them leave to amend their complaint in response to the order granting the partial judgment on the pleadings. The Plaintiff-Appellants have also called upon this able Court to address several issues that are important to the correct standards and procedures for a district court to follow during Rule 12 motions to dismiss or motions for judgment on the pleadings. Many of the issues involved appear either to not have been addressed by this Court, or remain unresolved. Guidance to the current parties, and to litigants in general in the Seventh Circuit would therefore be much appreciated.

Respectfully submitted,
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XI. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,095 words, excluding the parts of the brief exempted by 32(a)(5) and the style requirements of (B)(iii); and 2) This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally space typeface using Microsoft Word, 13 point Times New Roman style.

/s/Gregory P. Gadson
Gregory P. Gadson, Esq.

XII. CERTIFICATE OF COMPLIANCE WITH RULE 30(d)

The undersigned hereby certifies that the Short Appendix to this Brief includes all materials required by Circuit Rule 30(a), and the separately filed Appendix includes all materials required by Circuit Rule 30(b).

/s/Gregory P. Gadson
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XIII. CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2021, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS
APPEAL NUMBER 12-1874

KENDALE L. ADAMS, DANNY C. ANDERSON, MARTA E. BELL, RUSSELL BURNS, VINCENT C. BURKE, LEETTA DAVENPORT, ANTHONY W. FINNELL, JOHN T. GREEN, DERRICK HARRIS, MICHAEL JEFFERSON, TIMOTHY A. KNIGHT, YOLANDA R. MADDREY-PATTERSON, RON MILLS, KENDALL J. MOORE, SR., ARTHUR ROWLEY, JR., MATTHEW STEWARD, IDA WILLIAMS, KIMBERLY YOUNG, RON ANDERSON, MARIO GARZA, ERIC GRISSOM, DEI PASSON, ERIC L. SIMMONS, LARRY TRACY, BRIAN WHITE, CHRIS WOMOCK, BROWNIE COLEMAN, JEFFREY TAYLOR, JOHN WALTON, and CURTIS HANKS, Plaintiff-Appellants, v. GREGORY A. BALLARD, Mayor of the City of Indianapolis, CITY OF INDIANAPOLIS, and MICHAEL T. SPEARS, Chief of the Indianapolis Metropolitan Police Department, Defendant-Appellees.	Appeal from the U.S. District Court for the Southern District of Indiana, Indianapolis Div., Hon. Sarah Evans Barker, J. Case No. 1:09-cv-0175

PLAINTIFF-APPELLANTS' SHORT APPENDIX

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SHORT APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GREATER INDIANAPOLIS CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	CASE NO. 1:09-cv-0175-SEB-DML
v.	)	
GREGORY A. BALLARD, CITY OF INDIANAPOLIS, and MICHAEL T. SPEARS,	)	
Defendants.	)	

Order on Motion for Partial Judgment on the Pleadings

This matter is before the court on the motion for partial judgment on the pleadings of defendants City of Indianapolis, Indianapolis Mayor Gregory A. Ballard, and Chief of the Indianapolis Metropolitan Police Department, Michael T. Spears, (collectively, "the City"). (Dkt. 30). The plaintiffs are the Greater Indianapolis Chapter of the National Association for the Advancement of Colored People ("NAACP") and individual members of the Indianapolis Metropolitan Police Department ("IMPD") and the Indianapolis Fire Department ("IFD"). The plaintiffs allege in their Amended Complaint (Dkt. 45) that their respective departments use promotion criteria and procedures that discriminate against them and other African-Americans. The City's motion for partial judgment on the pleadings includes challenges to most of the plaintiffs' claims. The City moves to dismiss: (1) all claims of the NAACP for lack of standing; (2) all state constitutional claims seeking damages; (3) certain plaintiffs' Title VII disparate treatment claims for failure to exhaust administrative remedies; (4) all plaintiffs' Title VII disparate impact claims; (5) all section 1981 claims against the City; (6) all disparate impact

claims brought under section 1983; (7) one plaintiff's hostile work environment claim; (8) one plaintiff's Age Discrimination in Employment Act (ADEA) claim; (9) certain Title VII claims for failure to obtain right to sue letters; (10) individual and official capacity claims against Mayor Ballard and Chief Spears; and (11) Count II of the Amended Complaint relating to pension benefits. The City does not challenge, at this stage, certain plaintiffs' disparate treatment claims under Title VII and section 1983 or the state constitutional claims to the extent they seek prospective injunctive relief. The City's motion for partial judgment on the pleadings is GRANTED IN PART and DENIED IN PART.

Analysis

Fed.R.Civ.P. 12(c) allows a party to move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. *Cuatle v. Torres*, 2010 WL 2545627 at *1 (S.D. Ind. June 15, 2010). A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Id*. That analysis in turn implicates Fed.R.Civ.P. 8, *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 619 (7th Cir. 2007), which requires a "short plain statement of the claim showing that the pleader is entitled to relief." "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). And a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. at 1949.

Two principles guide these determinations. First, the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. *Iqbal*, 129 S.Ct. at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*. at 1950. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id*. (quoting Fed.R.Civ.P. 8(a)(2)).

I. The NAACP's Standing to Assert Claims

Before addressing the substantive merits of the City's motion for judgment on the pleadings, the court must first determine whether the NAACP has standing to invoke the jurisdiction of this court. *See Disability Rights Wisconsin, Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008). The NAACP has the burden of establishing its standing. *Id.* Both the City and the NAACP focus on whether the NAACP has associational standing.[1]

The City argues that the NAACP does not have associational standing because it has not alleged that any of the individually named plaintiffs is a member of the NAACP. (Defendants' Opening Brief at 7 (Dkt. 33) ("Defs.' Br.")). The NAACP contends that it has associational standing because its claims advance interests central to its mission, and it is seeking, in part, injunctive relief. (Plaintiffs' Opposition Response Brief at 6-7 (Dkt. 57) ("Pls.' Resp.")).

[1] Neither the Amended Complaint nor the plaintiffs' Response Brief alleges that the NAACP itself has suffered an injury in fact caused by the City's conduct. *See Disability Rights Wisconsin*, 522 F.3d at 801 (association failed its burden to show it had standing to sue in its own right where the association did not allege in its complaint any injury in fact to itself).

Although associational standing does not require that a member of the association is also a named plaintiff, it is not enough that the association is merely advancing its core interests and seeking injunctive relief.

An organization has associational standing to sue on behalf of its members only if it satisfies each of three requirements, known as the *Hunt* requirements, derived from the Supreme Court's decision in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977):

(1) the organization's members would have standing to sue in their own right;

(2) the interests the organization seeks to protect are germane to its purpose; ***and***

(3) neither the claims nor the requested relief requires the participation of individual members in the lawsuit.

Disability Rights Wisconsin, 522 F.3d at 801-02 (citing *Hunt*, 432 U.S. at 343); *Sanner v. Board of Trade*, 62 F.3d 918, 922 (7th Cir. 1995) (association "must satisfy" all three prongs of *Hunt*). *Hunt's* first and second prongs for associational standing are of Constitutional dimension, and are required to satisfy Article III's limit on federal jurisdiction to "Cases" or "Controversies." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555-56 (1996). The third prong, addressing whether the claims asserted or the requested relief requires participation by the organization's individual members, falls within prudential limits on federal jurisdiction. *Id.* at 555.

As explained below, it is clear that the NAACP has not satisfied all three *Hunt* prongs. The City's motion for judgment on all claims brought by the NAACP is therefore GRANTED.

A. The NAACP does not satisfy the first *Hunt* factor.

The first prong of *Hunt* reflects an Article III requirement that an associational suit be representative – that is, the association must establish an "actual injury" to its members. Promoting only abstract interests is not enough to establish associational standing where the

association has not alleged that its members could have sued in their own right. In *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 (1976), the Supreme Court held that the requirements for associational standing are met only when plaintiff organizations

> can establish [their] standing as representatives of those of *their members* who have been injured in fact, and thus could have brought suit in their own right.

(emphasis added). *Hunt* addresses the Article III standing requirements of injury in fact, causation, and redressability "by requiring an organization suing as a representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *Brown Group*, 517 U.S. at 555. To "include at least one member" does not mean that the member who could have brought suit on her own must be a party to the action or named in the complaint. Instead, a member on whose behalf suit is brought may be "unnamed by the organization. . . ." *Disability Rights Wisconsin*, 522 F.3d at 802 (citing *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999)); *Indiana Protection and Advocacy Services Comm'n*, v. *Commissioner, Indiana Dep't of Correction*, 642 F.Supp.2d 872, 879-880 (S.D. Ind. 2009) (Seventh Circuit does not require that the organization name the members suffering injury). At the least, however, the complaint must sufficiently allege injury in fact to the organization's members caused by the defendants' conduct and capable of being redressed by a favorable decision. *Disability Rights Wisconsin*, 522 F.3d at 802; *Indiana Protection*, 642 F.Supp.2d at 879.

The NAACP has not alleged that any of its members suffered harm as a result of the City's conduct nor has it alleged that it has members who are officers of the IMPD or IFD. Rather, it merely argues in conclusory terms that "[The NAACP] is extremely likely to have

members affected by the outcome of the present litigation." (Pls.' Resp. at 8). This does not satisfy the first requirement of *Hunt.*

B. Assuming that the NAACP satisfies the second *Hunt* factor, that alone does not suffice to establish standing.

The NAACP's argument in favor of standing focuses on the strength of its mission to eliminate racial discrimination. The Amended Complaint alleges, and the City does not challenge, that the NAACP's fundamental mission is advancing and improving the political, educational, social, and economic status of minority groups, and eliminating racial prejudice, including through litigation. (Pls.' Resp. at 6-7; Amended Complaint, ¶¶ 12-13). Assuming that that showing satisfies the second requirement of *Hunt*—that the interests the NAACP seeks to protect by this lawsuit are germane to the NAACP's purpose—it is not enough to confer standing.

The NAACP relies on *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1259 (7th Cir. 1983), in which the Seventh Circuit noted that "[a]ssociational standing is particularly appropriate when the association is seeking to represent interests which are central to the purpose of the organization." The NAACP has misconstrued the Seventh Circuit's observation as supplanting the requirements of *Hunt*, but this observation is simply a restatement of the second of the *Hunt* factors. *Peick* does not eliminate the other requirements of *Hunt. See id.* at 1259.

C. The fact that the NAACP is seeking injunctive relief does not obviate the need to meet all three *Hunt* requirements.

Hunt's third requirement, that the asserted claims and the requested relief do not require the participation of individual members in the lawsuit, consistently has been applied to deny associational standing to assert claims for monetary relief, except where federal legislation authorizes an organization to sue for its members' damages. *Brown Group,* 517 U.S. at 554 and 558 (1996) (holding that prong three of the *Hunt* associational standing test is a prudential

limitation on jurisdiction that Congress can abrogate); *Sanner v. Board of Trade*, 62 F.3d 918, 923 (7th Cir. 1995) (when suit requires calculation of individual members' damages, prong three is not met). Thus, the NAACP's damages claims falter at prong three as well.

The NAACP's argument that it has standing because it also seeks prospective, injunctive relief ignores that all *Hunt* prongs must be met, not just one or two of them. In its brief, the NAACP quotes part of a sentence from *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 602-03 (7th Cir. 1993), for this proposition: "[p]rospective relief will usually inure to the benefit of the members actually and thus individualized proof of damages is often unnecessary." First, even the quoted excerpt on which the NAACP relies contemplates that the injunctive relief will benefit "members," and the NAACP has not shown that the City's wrongful conduct has harmed its members or that its members could have brought the suit. Second, the NAACP misconstrues the decision, because the Seventh Circuit was only explaining, in the context of the third element of the *Hunt* test, that when injunctive relief is sought, it is less likely to require the participation of individual members. Contrary to the NAACP's assertion, *Retired Chicago Police Ass'n* provides no support for the position that an association need not establish all the elements of *Hunt* if it is seeking injunctive relief.

Because the NAACP has not met each of the *Hunt* prongs, it does not have associational standing and the court does not have jurisdiction over its claims.

II. Claims Based on the Indiana Constitution

Counts I and IV of the plaintiffs' Amended Complaint allege that the City's promotion processes have a discriminatory impact on minority police officers (Count I) and firefighters (Count IV) and violate Article I, Sections 12 and 23 of the Indiana Constitution, for which the

plaintiffs seek damages and injunctive relief.[2] The City maintains that the plaintiffs may seek only injunctive relief for alleged violations of the Indiana Constitution because (1) there is no private right of action for damages for a violation of either Section 12 or 23; and (2) even if there were a private right of action for damages, the plaintiffs' state constitutional claims are subject to the Indiana Tort Claims Act ("ITCA"), with which the plaintiffs did not comply. The plaintiffs ask the court to imply a civil damages remedy for violations of the Indiana Constitution, and—acknowledging that any tort claim requires compliance with the ITCA—assert that the individual plaintiffs' EEOC charges constituted "substantial compliance" with the notice requirements of the ITCA.

Indiana's courts have not recognized a civil damages remedy for alleged violations of Sections 12 and 23 of the Indiana Constitution. Section 12, known as the "open courts" provision, states:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

IND. CONST. art. I, § 12.[3] Section 23, the privileges and immunities provision, states:

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[2] Counts I and IV also cite 42 U.S.C. § 1981 as a legal basis for relief. The plaintiffs' section 1981 claims are addressed in Section V of this Order.

[3] Neither the plaintiffs' Amended Complaint nor their opposition to the City's Rule 12(c) motion explains their theory for relief under Section 12. The Indiana Supreme Court has been clear that Section 12 does not create new substantive rights; rather, its promise is that the courts will be open when the law otherwise creates a right to recover for harms done. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977, 979 (Ind. 2000) ("If the law provides no remedy, Section 12 does not require that there be one."); *see also Smith v. Indiana Dep't. of Correction*, 871 N.E.2d 975, 985 (Ind. Ct. App. 2007) (citing *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 511 (Ind. 2005)) (Section 12 does not provide a substantive right to bring a particular cause of action to remedy an asserted wrong).

> The General Assembly shall not grant to any citizen, or class of citizen, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

IND. CONST. art. I, § 23.

In *Cantrell v. Morris*, 849 N.E.2d 488 (Ind. 2006), the Indiana Supreme Court answered a certified question from the Northern District of Indiana regarding private rights of action for damages under Indiana constitutional provisions. The Court declined to address the broad question whether a private right of action should be implied for any or none of Indiana's constitutional provisions. Instead, it stated that at least where a state tort law remedy is generally available to redress a purported constitutional wrong, "it is unnecessary to find a state constitutional tort." *Id.* at 506. The court further recognized that "[t]here is no explicit language in the Indiana Constitution providing any specific remedy for violations of constitutional rights." *Id.* at 499.

Going back to at least 2000, and after *Cantrell*, the judges of this District have refused to recognize implied rights of action under the Indiana Constitution. *See, e.g., Boczar v. Kingen,* 2000 WL 1137713 at *24-25 (S.D. Ind., Mar. 9, 2000), *aff'd.*,6 Fed. Appx. 471 (7th Cir. 2001); *Baker v. Washington Bd. Of Works*, 2000 WL 33252101 at *8 (S.D. Ind., June 8, 2000); *Willits v. Wal-Mart Stores, Inc.*, 2001 WL 1028778 at *15 (S.D. Ind., July 30, 2001); *Estate of O'Bryan v. Town of Sellersburg*, 2004 WL 1234215 at *21 (S.D. Ind., May 20, 2004); *McConnell v. McKily's*, 573 F.Supp.2d 1090, 1103 (S.D. Ind. 2008).

The undersigned judge agrees with her colleagues that recognizing an implied right of action is a step to be taken, if at all, by the Indiana courts and not the federal courts. *E.g., McConnell v. McKily's*, 573 F.Supp.2d 1090 (S.D. Ind. 2008); *Estate of O'Bryan*, 2004 WL 1234215 at *21 (S.D. Ind., May 20, 2004). The court declines to find that a private right of

action exists for purported violations of Sections 12 and 23 of the Indiana Constitution. For this reason, it is not necessary to address the City's alternative ground for dismissing plaintiffs' state constitutional damages claim – that the plaintiffs' EEOC charges do not constitute substantial compliance with the ITCA.

The court GRANTS the City's request to dismiss all claims for damages under the Indiana Constitution, leaving only claims for injunctive relief.

III. Title VII Claims

A. The Title VII claims of some plaintiffs must be dismissed for failure to exhaust their administrative remedies.

The City argues that the Title VII claims of particular plaintiffs must be dismissed for failure to exhaust administrative remedies because their EEOC charges were untimely or did not allege adverse employment actions. In addition, the City maintains that several other plaintiffs' claims should be dismissed because they have not yet received right to sue letters from the EEOC. Finally, the City argues that no plaintiffs can maintain disparate impact claims because their EEOC charges did not assert them. The court will address in turn below each of these arguments.

1. Certain plaintiffs who allege a failure to promote did not timely file charges with the EEOC.

Congress declared in the text of Title VII that the limitations period for filing an EEOC complaint commences with the date of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); *see Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). As the Supreme Court made clear, the claimant must file his EEOC suit within the limitations period from the time of the alleged "unlawful employment practice." 42 U.S.C. § 2000e-5(e); *see Ricks*, 449 U.S. at 259. The limitations period serves the dual purposes of guaranteeing the protection of

civil rights laws to claimants who promptly assert their rights, while also protecting employers from defending stale claims. *Ricks*, 449 U.S. at 256-57.

In Indiana, a claimant must file an EEOC charge within 300 days after the allegedly unlawful practice occurred. *See Oliver-Pullins v. Associated Material Handling Industries, Inc*., 2004 WL 2137624 at *8 (S.D. Ind. July 20, 2004). Alleged actions that occurred prior to the limitations period generally cannot form the basis for a Title VII claim. *Bannon v. University of Chicago*, 503 F.3d 623, 628 (7th Cir. 2007).

The point at which the City in its promotions process tabulated the points and notified a particular plaintiff of the denial of promotion is the alleged adverse employment action that is discrete and actionable. *See Davidson v. Citizens Gas & Coke Utility*, 470 F.Supp.2d 934, 949-50 (S.D. Ind. 2007). Each plaintiff had 300 days from that notification to file their EEOC charges. For plaintiffs Grissom, Young, Rowley, Moore, and Bell, their EEOC charges show that they did not file them within 300 days of being notified of the adverse action.[4] The failure to file their EEOC charges within 300 days of the adverse action subjects their Title VII claims to dismissal. These plaintiffs contend, however, that the continuing violation doctrine serves to save their claims.

The continuing violation doctrine is intended to address the cumulative impact of many discrete acts, some of which occur outside the limitations period and none of which are necessarily actionable in themselves. *Reese v. Ice Cream Specialties, Inc*., 347 F.3d 1007, 1012 (7th Cir. 2003). The continuing violation doctrine applies only to remediate hostile work environment or pattern-and-practice claims. *Davidson*, 470 F.Supp.2d at 944. The continuing

[4] Grissom, Young, Rowley, Moore, and Bell filed their EEOC charges on January 20, 2009, October 27, 2008, October 28, 2008, October 24, 2008, and October 27, 2008, respectively, based on acts occurring in 2002 (Young), 2006 (Rowley, Moore, Bell) and 2007 (Grissom). (*See* Answer Exs. U, A, B, C, and D).

violation doctrine does not apply to adverse employment actions that are actionable as discrete events themselves.

Plaintiffs claim that the continuing violation doctrine saves their claims because the alleged discrimination in promotion has continued and prevents them from re-applying for promotion. The Supreme Court has specifically rejected this argument. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), addressed the question of when an unlawful employment practice "occurred" for purposes of the limitations period. The Court declared that, "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened'." *Id*. at 110. It then reiterated, "We have repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts." *Id*. at 111.

The substance of each of these plaintiffs' charges is discrimination based on a failure to promote. The failure to promote was the discrete act that would give rise to Title VII liability. In *Morgan*, the Supreme Court categorized "failure to promote" as a discrete incident of discrimination to which the continuing violation doctrine does not apply. *See Morgan*, 536 U.S. at 113. *See also Reese*, 347 F.3d at 1012. Thus, the continuing violation doctrine has no application to the plaintiffs' failure to promote claims.

The cases that plaintiffs cite in urging application of the continuing violation doctrine do not advance their position. (Pls.' Resp. at 10). *Patterson v. Youngstown Sheet and Tube Co.*, 475 F.Supp. 344, 356 (N.D. Ind. 1979), did not find a continuing violation, and in fact, the court dismissed certain putative class members who could not have timely filed their EEOC charges. In *Davidson v. Citizens Gas & Coke Utility*, 470 F.Supp.2d 934 at 950 (S.D. Ind. 2007), the court did not apply the continuing violation doctrine and found that the plaintiff had alleged a discrete act of discrimination. The opinion in *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344-45

(7th Cir. 1999), held that the continuing violation doctrine did not apply when the plaintiff believed that she was the victim of harassment long before she filed her administrative complaint.

Because plaintiffs Grissom, Young, Rowley, Moore, and Bell did not timely file their EEOC charges, the court GRANTS the City's motion to dismiss all their Title VII claims.

2. The EEOC charges of Williams and Mills failed to allege an adverse employment action.

The City moves to dismiss the claims of plaintiffs Williams and Mills on the grounds that their EEOC charges do not allege any adverse employment action.[5] In response, these plaintiffs contend they "have effectively been chilled from even seeking promotion because of the pattern and practice that the Defendants have continued." (Pls.' Resp. at 10). They too, therefore, rely on a continuing violation theory to supply the adverse employment action missing from their EEOC charges.

Plaintiff Mills's EEOC charge states:

> I began my employment with the Indianapolis Metropolitan Police Department on [date], as a patrolman. I am currently a patrolman and my supervisor is [rank and name]. I believe that I and other African-American officers have been discriminated against because of our race, African-American, in violation of Title VII of the Civil Rights Act of 1964, as amended, my allegations regarding this discrimination are listed below.

(Defs.' Answer, Ex. Q).

The referenced allegations concerning discrimination state:

> Claimant is part of a group of African-Americans for which the racial make-up of the Indianapolis Metropolitan Police Department is disproportionately low as compared to the racial make-up of the community of Marion County.

[5] The City's motion also seeks dismissal of the claims of plaintiffs Toliver, VanCleave, Moon, and Reynolds. These four plaintiffs, along with plaintiffs Allison and Middleton, have since dismissed their claims without prejudice. (*See* Dkt. 107, 131).

> Claimant is part of a group of African-Americans of which the racial make-up of the Indianapolis Metropolitan Police Department supervisory ranks is disproportionately low as compared to the racial make-up of supervisory ranks of Caucasian descent on the Indianapolis Metropolitan Police Department and the racial make-up of the community of Marion County.
>
> Claimant is a part of African Americans for which the racial make-up of the officers on Indianapolis Metropolitan Police Department in investigative or specialty units is disproportionately low as compared to officers of Caucasian descent.

(*Id.*).

Plaintiff Williams's EEOC charge, dated October 24, 2008, asserts that she has "been denied promotional opportunities because of testing and promotional criteria that is irrational and highly subjective which results in a racially biased impact." (Defs.' Answer, Ex. O). Her charge does not identify any particular promotional opportunity denied her, or indicate when any such denial may have occurred.[6]

None of the cases plaintiffs rely upon (which were discussed in the previous subsection) supports the application of the continuing violation doctrine to allow recovery when the plaintiff has not experienced and alleged a discrete, adverse employment action. The EEOC charges of these plaintiffs who claimed they were "chilled" from seeking promotion are nothing more than general charges that do not preserve any claims. *See Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992) (general "open-ended charge" of racial discrimination without specifying adverse employment action is insufficient to preserve any claim).

[6] According to the plaintiffs' response brief, Williams was not in fact denied a promotion; instead, she is claiming to have been "effectively 'chilled' from applying for promotions at all." (Pls.' Resp. at 10).

The court therefore finds that the EEOC charges of Williams and Mills did not embrace or preserve Title VII claims, and accordingly, GRANTS the City's motion to dismiss all their Title VII claims.

3. The court will not dismiss at this time the claims of plaintiffs who had not yet received their right to sue letters.

The City also moves to dismiss the Title VII claims of several plaintiffs who purportedly had not yet received right to sue letters at the time they filed their complaint. (Defs.' Br. at 10). The plaintiffs respond that all plaintiffs shortly should receive their letters. (Pls.' Resp. at 11). Indeed, the City's reply acknowledges that some plaintiffs received their letters between the time the motion for partial judgment on the pleadings was filed and the City filed its reply. (Defs.' Reply at 10 n. 2). Because it is likely that most, if not all, of these plaintiffs now have obtained right to sue letters, the court directs the City to file a separate motion to raise this issue for any plaintiffs for whom this deficiency may still exist.

4. The plaintiffs' EEOC charges did not assert disparate impact claims.

The City argues that the plaintiffs cannot bring Title VII disparate impact claims because their EEOC charges did not allege such. Unfortunately, plaintiffs have not responded to this argument. This failure to respond alone is a sufficient reason for dismissing their disparate impact claims. *Mink v. Barth Elec. Co., Inc.*, 685 F.Supp.2d 914, 935 (S.D. Ind. 2010) (failure to respond to arguments results in waiver). The application of waiver is especially appropriate here. This case consists of many plaintiffs each of whom filed individual complaints, and a discussion of the charges by counsel was thus necessary. Failure to respond forces a court into the inappropriate role of an "'auxiliary lawyer.'" *Sweeney v. West*, 149 F.3d 550, 555 n.3 (7th Cir. 1998) (quoting *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 230 (7th Cir. 1992)).

Even if the plaintiffs had not waived their disparate impact claims by failing to respond to the City's argument, an examination of the merits of the claims reveals a failure to exhaust administrative remedies. Title VII of the Civil Rights Act allows individuals who have suffered discrimination to seek relief by bringing suit, but only after exhausting administrative remedies. *Teal v. Potter*, 559 F.3d 687, 691 (7th Cir. 2009). Exhaustion is a condition precedent to bringing a claim under the Act, and generally, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in the EEOC charge. *Id*.

Although each of the plaintiffs filed his or her own EEOC charge, those charges contain certain common language, make nearly identical allegations, and appear to have been drafted with the assistance of counsel. Each charge consists of the form filed with the Indiana Civil Rights Commission ("ICRC"). Specificity and detail is expected when counsel represents a plaintiff in the filing of EEOC charges. *Rush v. McDonald's Corp*., 966 F.2d 1104, 1110 (7th Cir. 1992); *see also Teal*, 559 F.3d at 691; *Welch v. Eli Lilly & Co*., 2009 WL 2461119 at *5 (S.D. Ind. 2009) (finding that the typical rule of applying a liberal construction to EEOC charges is inapplicable when the charges are drafted by counsel). Regardless of how liberally they are read, however, the EEOC charges in this case allege no more than disparate treatment.

The ICRC form for each claimant contains a narrative stating his agency of employment, his employment title, his beginning employment date, the date he applied for promotion, the promotion for which he applied, the fact that he was denied promotion, and the identical (or strikingly similar) allegation common to all of the charges: "I believe that I have been denied promotional opportunities because of testing and promotional criteria that is irrational and highly subjective which results in a racially biased impact." Attached to almost all of the ICRC forms are "EEOC Complaint Allegations" that also are nearly identical among all claimants. In fact,

two claimant firefighters who allege that they were denied promotions in rank in the fire department include allegations about the police department promotions process, which suggests that the allegations were not only prepared by counsel, but were standard templates. (*See* Defs.' Answer, Exs. U, V). Most of the police officer claimants, in addition to the "EEOC Complaint Allegations," also include separate "EEOC Complaint Allegations II."

A review of the allegations convinces us that plaintiffs have not exhausted administrative remedies with respect to their disparate impact claims. Another decision from this district, *Welch v. Eli Lilly & Co.*, 2009 WL 2461119 at *1, is particularly instructive. In *Welch*, Judge Young had previously dismissed disparate impact claims from the suit after he had found that the administrative charges had not preserved a disparate impact claim because the claimants had failed to allege a "specific neutral employment policy that disproportionately affect African American employees, an essential element of a disparate impact claim." *Id*. at *3. In an attempt to correct the deficiencies, the plaintiffs named new class representatives who had filed new administrative complaints. Each charge contained identical allegations:

> The excessive subjectivity of Lilly's Performance Management-Annual Review Process, has had a disproportionate negative impact on African-Americans at Lilly in terms of pay and promotion. Specifically, the annual ratings govern pay raises and the ability to obtain in-line and other promotions. Predominantly white Lilly supervisors have unfettered discretion to rate employees on the reviews; these ratings dictate employee compensation and promotions. As a result, this policy, even though not racist on its face, has a disparate impact on African Americans in pay and promotion opportunities, and has caused them to be historically considered second class employees at the Company.

Id. at *6, quoting *New Class Representatives' EEOC Charges*, ¶ 2. Judge Young found that these plaintiffs had failed to allege a disparate impact claim because the newly filed charges failed to identify a neutral employment practice and alleged the "identical boilerplate allegations

of excessive subjectivity" as the earlier dismissed charges. *Id*. at *5-6. Thus, the plaintiffs had failed to exhaust their administrative remedies, and the Title VII disparate impact allegations were dismissed. *Id*. at *6.

The charges of the plaintiffs here are strikingly similar to those of the *Welch* plaintiffs. Similar to the charge of "excessive subjectivity" in *Welch*, the plaintiffs here allege the application of "irrational and highly subjective" criteria. So, rather than alleging a specific *neutral* employment policy that results in unintended but adverse consequences, *see Remien v. EMC Corp*, 2008 WL 821887 at *5 (N.D. Ill. 2008), the plaintiffs here instead allege a practice that results in *intended* consequences through the application of "irrational and highly subjective" criteria. A neutral employment policy is the "cornerstone" of any disparate impact investigation. *Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2005). When the challenged practice facially allows for consideration of subjective criteria when those criteria are unascertainable and undefined, it is not specific, not neutral, and (depending on the circumstances) likely not unintentional.

The fact that some of the charges contain the word "impact" does not transform them into assertions of disparate impact claims. *See Teal v. Potter*, 559 F.3d 687, 692-93 (7th Cir. 2009) (determining that a claimant does not state a claim in an administrative charge by language alone without providing factual support); *Welch*, 2009 WL 2461119 at *6 (finding that an administrative charge failed to allege disparate impact even when it contained the phrase "disparate impact"); *see also Hackney v. Texas Dept. of Criminal Justice*, 2009 WL 2391232 (E.D. Tex. 2009) (ruling that using a legal term of art is not enough to preserve administrative claims). Similarly, alleging that other members of the same race are affected does not save claims that do not identify a specific, facially neutral employment policy. *See Gordon v. Peters*,

489 F.Supp.2d 729, 736 (S.D. Tex. 2007). Finally, the allegation of being subjected to tests that are "culturally biased," ¶ 8 of "EEOC Complaint Allegations," does not state a disparate impact claim because cultural bias is not a facially neutral employment policy. *See McClain v. Lufkin Industries*, 519 F.3d 264, 274 (5th Cir. 2008) (finding that a "cultural problem" cannot be understood as a neutral employment policy).

The plaintiffs' charges allege nothing more than disparate treatment. A charge that alleges disparate treatment and does not identify a neutral employment policy does not preserve a disparate impact claim. *Pacheco*, 448 F.3d at 791-92. Because the plaintiffs' EEOC charges did not contain a disparate impact claim, the plaintiffs did not administratively exhaust such a claim and cannot now maintain one. Accordingly, the City's motion to dismiss the Title VII disparate impact claims in the Amended Complaint is GRANTED.

B. The plaintiffs' Title VII disparate impact allegations also fail to state a claim upon which relief can be granted.

The City moves to dismiss the plaintiffs' disparate impact claims brought under Title VII and section 1983.[7] The plaintiffs respond that their Amended Complaint sufficiently alleges these claims by describing the circumstances under which the promotion tests were administered and stating that African-Americans were "impermissibly impacted." For the same reasons the plaintiffs' EEOC charges fail to assert disparate impact claims, the court finds that the Amended Complaint fails to allege disparate impact claims. The plaintiffs have not alleged a specific, facially neutral employment policy – a requirement for pleading a disparate impact claim under Title VII. For this reason as well, the City's motion to dismiss the disparate impact claims must be granted.

[7] The plaintiffs' disparate impact claims under section 1983 are addressed at section IV *infra*.

C. Plaintiff Danny Anderson has failed to state a hostile environment claim.

The City moves to dismiss plaintiff Danny Anderson's hostile work environment allegation for failure to state a claim. Mr. Anderson responds that the "notice pleading standard" requires only a short and plain statement showing that the pleader is entitled to relief. (Pls.' Resp. at 14).

The totality of Mr. Anderson's hostile work environment claim is contained in one sentence in paragraph 34 of the Amended Complaint: "Plaintiff Danny Anderson was also denied promotion to a Helicopter Pilot position and was subjected to harassment and a hostile work environment by his supervisor, Sgt. James Todd because of his race."

The court agrees that Mr. Anderson has failed to state a claim for a hostile work environment. Mr. Anderson's one sentence allegation is exactly the type of conclusory allegation that is not entitled to the assumption of truth and should be rejected. *See Iqbal*, 129 S.Ct. at 1951. Merely alleging that a plaintiff has been subjected to "harassment" does not put a defendant on notice of the claims asserted against him. Accordingly, the court GRANTS the City's motion to dismiss Mr. Anderson's hostile work environment claim.

IV. Disparate Impact Claims Brought Under Section 1983

In determining whether plaintiffs have stated a claim for disparate impact under section 1983, the court is mindful that there is no exhaustion requirement for section 1983 claims as there is for Title VII claims. *See Lawson v. Metropolitan Sanitary District of Greater Chicago*, 102 F.R.D. 783, 790 (N.D. Ill. 1983). Thus, the court must consider whether the plaintiffs have stated a disparate impact claim under section 1983 separately from the foregoing analysis. Even so, a disparate impact theory of liability is not available under section 1983. *Dugan v. Ball State University*, 815 F.2d 1132, 1135-36 n.1 (7th Cir. 1987); *Armstrong v. Chicago Park District*, 693 F.Supp. 675, 678 (N.D. Ill. 1988); *see Bennett v. Roberts*, 295 F.3d 687, 699 (7th Cir. 2002) (to

prevail on section 1983 claim, applicant must prove that the government engaged in intentional discrimination). The City's motion to dismiss the plaintiffs' disparate impact claims brought under 42 U.S.C. § 1983 is therefore GRANTED.

V. Section 1981 Claims

The City contends that the plaintiffs' claims brought under 42 U.S.C. § 1981[8] must be dismissed because section 1981 does not provide a separate cause of action against local government entities. The NAACP relies on cases from another circuit and one from a district court in Wisconsin that allowed section 1981 claims against government entities.

The Supreme Court held in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), that section 1983 constitutes the exclusive remedy against state actors for section 1981 violations. Following the *Jett* decision, the Civil Rights Act of 1991 amended section 1981, and courts were faced with the issue of whether these amendments overturned *Jett*. This court has held that the 1991 amendments did not affect the holding in *Jett*, and that section 1983 remains the sole avenue of relief against state actors for alleged violations of section 1981. *See Tevebaugh v. City of Indianapolis*, 2010 WL 987726 (S.D. Ind. Mar. 15, 2010); *McPhaul v. Bd. of Comm'rs of Madison Co*., 976 F.Supp. 1190, 1192-95 (S.D. Ind. 1997). As *Tevebaugh* recounted, a majority of circuit courts and the Northern District of Indiana have reached the same conclusion. *McGovern v. City of Philadelphia*, 554 F.3d 114, 118-21 (3d Cir. 2009); *Arendale v. City of Memphis*, 519 F.3d 587, 598-99 (6th Cir. 2008), *reh'g denied; Bolden v. City of Topeka, Kansas*, 441 F.3d 1129, 1137 (10th Cir. 2006); *Oden v. Oktibbeha County*, 246 F.3d 458, 462-65 (5th Cir. 2001); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995); *Sims v. Fort Wayne Cmty. Schs.*, 2005 WL 3801461 at *8-9 (N.D.Ind. Feb. 2, 2005).

[8] Count I seeks relief under section 1981 for police officers, and Count IV seeks that relief for firefighters.

The plaintiffs have not presented any argument with respect to the legal viability of their section 1981 claims that have not previously been rejected. This court affirms its prior decisions that section 1983 remains the only avenue of relief against state actors for violation of rights contained in section 1981. Thus, the court GRANTS the City's motion to dismiss the plaintiffs' section 1981 claims.

VI. ADEA Claim

The City also moves to dismiss plaintiff John Walton's Age Discrimination in Employment Act ("ADEA") claim. Similarly to Mr. Anderson, Mr. Walton responds that the court should consider only whether the defendants have been placed on notice of the ADEA claim. (Pls.' Resp. at 15).

Mr. Walton's ADEA claim is alleged in paragraph 40 of the Amended Complaint. Paragraph 40 states: "That in addition to the allegations stated in paragraph 37 [describing the content of EEOC charges filed by Mr. Walton and other police officers], Walton also alleged that points were deducted for use of sick time and that this had a disparate impact on older officers."

The court is mindful that at this stage it is reviewing only the sufficiency of the allegations of the Amended Complaint and not the merits of Mr. Walton's claim. *United States v. Clark County, Ind.*, 113 F.Supp.2d 1286, 1290 (S.D. Ind. 2000). Mr. Walton does specify the City's actions that form the basis for his allegation. Paragraph 40 claims that deducting points for use of sick time in the promotions process has an impermissible impact on older officers. Although he omits two important elements of an ADEA claim (alleging that he is a member of the protected class and that younger members were not adversely affected), Mr. Walton need only allege sufficient facts to provide the defendants with notice of the substance of the facts that he asserts against them. *See James v. Heartland Health Services*, 2005 WL 678732 at *2-3

(N.D. Ill. 2005). Because Mr. Walton has, albeit in a limited fashion, gone beyond mere conclusory allegations and has identified the specific conduct alleged to violate the ADEA, his claim suffices to place the City on notice.

The court does deem it advisable to clarify the claim it finds cognizable here. Mr. Walton has used the phrase "disparate impact" and does not make any claim of intentional misconduct necessary to allege a disparate treatment claim. *See Smith v. City of Jackson*, 544 U.S. 228, 231 (2005) (distinguishing between disparate impact and disparate treatment ADEA claims). Thus, we conclude that Mr. Walton has alleged only a disparate impact claim under the ADEA and DENY the City's motion to dismiss Mr. Walton's ADEA claim.

VII. Individual and Official Capacity Claims Against Mayor Ballard and Chief Spears

A. Individual Capacity Claims

The City moves to dismiss individual capacity claims against Mayor Ballard and Chief Spears on the grounds that the plaintiffs failed to state claims against them, or in the alternative, that they are entitled to qualified immunity. The plaintiffs made no response to the City's arguments. Again, plaintiffs' failure to respond to the City's argument alone is a sufficient basis for dismissing any individual liability claims against Mayor Ballard and Chief Spears. *See Mink v. Barth Elec. Co., Inc.*, 685 F.Supp.2d 914, 935 (S.D. Ind. 2010).

The allegation against Mayor Ballard consists of the repeated claim, "[u]nder the leadership of Mayor Ballard there has been a significant setback in the diversity of the [IMPD or IFD (as applicable)]." (Am. Compl., ¶¶ 51, 71, 86, 101). The allegation against Chief Spears is not any claim at all, but only a recital that he "is the current Chief of IMPD…" (Am. Compl., ¶ 10). There are no allegations that either Mayor Ballard or Chief Spears engaged in misconduct. The recitals in the Amended Complaint against these two individual defendants do not satisfy even basic requirements of notice pleading. It is unclear whether plaintiffs even intend to assert

individual capacity claims against Mayor Ballard and Chief Spears.[9] To the extent any individual capacity claims are made against Mayor Ballard and Chief Spears, the motion to dismiss those claims is GRANTED.[10]

B. Official Capacity Claims

The City also moves to dismiss any alleged official capacity claims against Mayor Ballard and Chief Spears. Naming people in their "official capacities" is redundant because, "insofar as they acted in their 'official' capacities, they *are* the City (or the agency)." *Myles v. City of Indianapolis*, 213 F.Supp.2d 962, 967 (S.D. Ind. 2002) (emphasis in original). Accordingly, the Court GRANTS the City's motion and dismisses any and all official capacity claims made by the plaintiffs against Chief Spears and Mayor Ballard.

VIII. Count II of the Amended Complaint

Count II of the plaintiffs' Amended Complaint alleges that the merger of the Indianapolis Police Department with the Marion County Sheriff's Department, creating the IMPD, had an adverse discriminatory effect on African-American police officers in terms of pension benefits. The plaintiffs allege that the Sheriff's Department, whose officers are predominantly Caucasian, had a more lucrative pension plan than the Indianapolis Police Department. In the merger, the officers in the former Sheriff's Department were allowed to keep their pension plan, creating a disparate effect on African-American officers in the IMPD.

The City moves to dismiss Count II on the grounds that when IMPD was created and until March 1, 2008, IMPD was under the control of Marion County Sheriff Frank Anderson. According to the City, this means that any complaint about disparate effect flowing from the

[9] If the plaintiffs did not intend to allege any individual liability claims against Mayor Ballard and Chief Spears, they should have said so in their response brief.

[10] The court therefore does not need to address the City's qualified immunity argument.

merger and creation of IMPD necessarily must be brought only against the Sheriff's Department and Sheriff Frank Anderson. Again, plaintiffs did not respond to the City's arguments.

In what might be deemed an excess of caution, the court finds that it would be premature to dismiss Count II. It is not clear that the City cannot be a proper defendant in Count II, and the City does not contend that Count II is deficient under *Twombly*. Further developments in this case may flesh out the legal bases for Count II and the City's defenses, which neither side has yet clearly articulated. For now, we shall let it stand.

Conclusion

The court GRANTS in substantial part the City's motion for partial judgment on the pleadings. All claims by the NAACP are dismissed because the NAACP lacks standing. The plaintiffs' state constitutional claims for damages are dismissed. All claims under 42 U.S.C. § 1981 are dismissed. All disparate *impact* claims under 42 U.S.C. § 1983 and Title VII are dismissed. All claims against Mayor Ballard and Chief Spears are dismissed. Plaintiff Danny Anderson's hostile work environment claim is dismissed. The Title VII disparate treatment claims by plaintiffs Grissom, Young, Rowley, Moore, Bell, Williams, and Mills are dismissed.

The claims remaining in this case are: (1) the plaintiffs' state constitutional claims in Counts I and IV, but only to the extent they seek injunctive relief; (2) Count II relating to pension benefits; (3) the plaintiffs' Section 1983 claims, but only to the extent they are disparate treatment claims, described in Counts III and V; (4) the Title VII disparate treatment claims alleged in Count VI by plaintiffs Danny Anderson, Ron Anderson, Adams, Burns, Burke, Coleman, Davenport, Finnell, Green, Hanks, Harris, Jefferson, Knight, Maddrey-Patterson,

Passon, Steward, Simmons, Taylor, Tracy, Walton and White;[11] and (5) plaintiff Walton's ADEA claim.

So ORDERED.

Date: 09/16/2010

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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[11] The plaintiffs' response brief states that plaintiffs Garza and Womock are not making Title VII claims. (Pls.' Resp. at 11).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KENDALE L. ADAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	1:09-cv-175-SEB-DML
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Defendant.	)	

ORDER ON PENDING MOTIONS

This cause is before the Court on Plaintiffs' Motion for Leave to File Second Amended Complaint [Docket No. 143], filed on October 12, 2010, pursuant to Rules 15(a) and (c) of the Federal Rules of Civil Procedure, and Plaintiffs' Motion to Alter or Amend Judgment [Docket No. 144], filed on October 15, 2010, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. For the reasons detailed in this entry, we DENY Plaintiffs' Motion to Alter or Amend Judgment and DENY Plaintiffs' Motion for Leave to File Second Amended Complaint.

Motion to Alter or Amend Judgment

A motion to alter or amend judgment pursuant to Rule 59(e) allows the movant to bring to the Court's attention manifest errors of law or fact or newly discovered evidence. United States v. Resnick, 594 F.3d 562, 568 (7th Cir. 2010) (citation omitted). Manifest error is the "wholesale disregard, misapplication, or failure to recognize controlling

precedent." Oto v. Metro Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (internal quotation marks and citation omitted). The purpose of a Rule 59(e) motion is to have the court reconsider matters "properly encompassed in a decision on the merits." Osterneck v. Ernst & Whinney, 489 U.S. 169, 174 (1989). A Rule 59(e) motion "'does not provide vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.'" Resnick, 594 F.3d at 568 (quoting Bordelon v. Chicago School Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000)).

Plaintiffs' Rule 59(e) motion is directed to the Court's September 16, 2010 Order Granting in Part Defendant's Motion for Judgment on the Pleadings [Docket No. 135], specifically our rulings with respect to the following claims: (1) claims brought pursuant to the Indiana State Constitution; (2) the disparate impact claims, under both Title VII and Section 1983; (3) Plaintiff Anderson's hostile work environment claim; (4) the Section 1981 claims; and (5) the standing of the NAACP. In their brief in support of their Rule 59(e) motion, Plaintiffs both rehash prior arguments that were already addressed and rejected by the Court as well as present new arguments that could have and should have been advanced prior to entry of our September 16, 2010 Order. However, Plaintiffs neither present newly discovered evidence nor establish a manifest error of law or fact in the Court's Order. There simply is no evidence to suggest that we misapprehended Plaintiffs' claims or misapplied the law to those claims in light of the applicable law. Accordingly, we DENY Plaintiffs' Motion to Amend or Alter Judgment.

Motion for Leave to File Second Amended Complaint

Plaintiffs' Motion for Leave to Amend seeks permission to revise Plaintiffs' claims though one amendment has already been filed and a further amendment would be untimely under the Case Management Plan, which set March 3, 2010, as the date by which amendments needed to be filed. Plaintiffs' Motion to File a Second Amended Complaint was filed October 12, 2010, more than seven months late, even though neither party moved to extend the March 3rd deadline. Thus, Plaintiffs must establish excusable neglect under Federal Rule Procedure 6, in addition to "good cause" pursuant to Rule 6 and Federal Rule of Civil Procedure 16(b)(4) before the amendments can be allowed.

Plaintiffs do not address the excusable neglect standard, but argue that there is good cause for the Court to accept the Second Amended Complaint, "given the lapse of time that has taken place from the original date of filing of the amended complaint, the scope of discovery and the time it took for the Court to rule on Defendants' Motion for Judgment on the Pleadings." Mot. at 5. Plaintiffs further contend that preventing them from filing their Second Amended Complaint would be improper "given the complexity of the case." Id. at 6. In support of this contention, Plaintiffs cite to the Northern District of Indiana's decision in Boyer v. Gildea, 2008 WL 5156661 N.D. Ind. Dec. 8, 2008, in which the court granted the plaintiff's motion to file a second amended complaint in light of "the complexity of [the] case, the motion practice of the parties, and the delays in the discovery process ... ." Id. at *5. In Boyer, the court emphasized that the plaintiff's "new and revised factual allegations appear to result from discovery that has occurred during

the last year." Id. The court went on to conclude that, because the plaintiff's counsel had previously indicated that many of the necessary facts related to the claims alleged in the amended complaint awaited discovery, "it would have been fair for the parties to anticipate that the Plaintiff would eventually seek to amend his Complaint to include new and revised factual allegations." Id.

Here, however, Plaintiffs do not point to facts that they learned during the discovery process that were unknown to them at the time they filed their original and first amended complaints. In fact, Plaintiffs state in their Motion to Amend that their proposed Second Amended Complaint contains "essentially the same" factual assertions as were contained in the original complaint and the first amendment. Mot. at 2. Thus, although Plaintiffs were apparently aware of those same facts in January 2009 and August 2009 when they filed their first two complaints, they failed either to amend their pleadings within the CMP deadline or to move to extend that deadline pending the Court's ruling on Defendants' Motion for Judgment on the Pleadings. Such circumstances do not constitute excusable neglect or good cause.

Moreover, even if Plaintiffs' Motion to Amend had been timely filed, the majority of Plaintiffs' proposed amendments would be futile. According to Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." However, a district court may deny leave to file an amended complaint in the case of "'undue delay, bad faith or dilatory motive on the part of the movant, repeated

failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment ... .'" Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 666 (7th Cir. 2007) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962) (emphasis removed)).

In their Motion, Plaintiffs assert that "[t]he allegations and facts to be contained in the Second Amended Complaint for Damages are essentially the same as those set out in the Plaintiffs' original and Amended Complaints for Damages, except that the disparate/adverse impact claims, the 42 U.S.C. § 1981 claims, and the hostile environment claims of Plaintiff Danny Anderson will be clarified." Motion at 2-3. Defendants rejoin that, because the Court has previously addressed and dismissed the majority of these claims for reasons that cannot be remedied by amending the pleadings, they would be prejudiced if the Motion were granted and they were forced to again defend claims that the Court has already held are procedurally barred or legally unsupportable.

We agree with Defendants in most respects. For example, in our September 16, 2010 Order Granting in Part Defendants' Motion for Judgment on the Pleadings ("the Order"), we dismissed the individual Plaintiffs' disparate impact claims brought pursuant to Title VII not only because Plaintiffs failed to state a claim in their pleading, but also because they failed to exhaust their administrative remedies in their EEOC charges, which is a prerequisite to filing a Title VII claim in federal court. No amendment of the pleading can remedy this failure.

In the Order, the Court also dismissed Plaintiffs' disparate impact claims brought pursuant to § 1983, holding that such a theory is not available under the statute because, to prevail on a § 1983 claim, a plaintiff must prove that the government engaged in intentional discrimination. Docket No. 135 at 20-21 (citations omitted). Thus, amendment would be futile given that it is the legal elements of the disparate impact claim, not the underlying facts pled, that makes relief under § 1983 unavailable. Similarly, amendment will not save Plaintiffs' § 1981 claims, because, in line with other decisions from this court, the Northern District of Indiana, and a majority of circuit courts, we held that § 1983 is the sole avenue of relief against state actors for alleged violations of § 1981. Id. at 21 (citations omitted).

In light of Plaintiffs' failure to establish excusable neglect or good cause or to overcome the futility of amendments due to the legal deficiencies in their theories of relief, and the likelihood of prejudice to Defendants if the Motion were granted, we DENY Plaintiffs' Motion for Leave to File Second Amended Complaint.

IT IS SO ORDERED.

Date: 05/06/2011

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KENDALE L. ADAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	1:09-cv-175-SEB-DML
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause is now before the Court on Defendant's Motion for Summary Judgment [Docket No. 164], filed on June 27, 2011.[1] We dismissed a number of Plaintiffs' original claims in our September 16, 2010 Order Granting in Part Defendant's Motion for Judgment on the Pleadings. The remaining claims, all of which are addressed in the instant motion, are the following: (1) Plaintiffs' claims of intentional race discrimination arising from the Marion County Sheriff Department's administration of their pension plan; (2) Plaintiffs Danny Anderson, Ron Anderson, Adams, Burns, Burke, Coleman, Davenport, Finnell, Green, Hanks, Harris, Jefferson, Knight, Maddrey-Patterson, Passon, Steward, Simmons, Taylor, Tracy, Walton, and White's disparate treatment claims

[1] On June 7, 2011, Plaintiffs filed a Motion for Certificate of Appealability [Docket No. 160], requesting that the Court certify the following rulings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) Docket No. 135 and (2) Docket No 159. For the reasons detailed below, we GRANT Defendant's Motion for Summary Judgment in its entirety; therefore, Plaintiffs' motion is DENIED AS MOOT, because the entire case can now be appealed.

brought pursuant to Title VII; (3) all Plaintiffs' disparate treatment claims brought pursuant to 42 U.S.C. § 1983; (4) Plaintiff Walton's discrimination claim brought pursuant to the Age Discrimination in Employment Act ("ADEA"); and (5) all Plaintiffs' state constitutional claims for injunctive relief. For the reasons detailed in this entry, we GRANT Defendant's Motion for Summary Judgment.

Factual Background[2]

Formation of the Indianapolis Metropolitan Police Department

In 2006, the Indianapolis Police Department ("IPD") and 400 deputies from the Marion County Sheriff's Department ("MCSD") were consolidated into a single law enforcement department thereafter referred to as the Indianapolis Metropolitan Police Department ("IMPD"). The IMPD was overseen by former Marion County Sheriff Frank Anderson from its inception in 2006 through March 1, 2008, at which point supervision was transferred to Defendant, the City of Indianapolis ("the City"). Prior to the consolidation, the MCSD had determined that all 400 of its deputies would retain their pension plan benefits to which each had contributed during their tenures with the MCSD.

IPD/IMPD Promotional Processes

The three merit ranks that IMPD officers can seek to achieve during their careers with the department are captain, lieutenant, and sergeant. In order to progress through

[2] For reasons detailed below, we find that Plaintiffs have waived a number of their remaining claims, including the IMPD Plaintiffs' pension discrimination claims and Plaintiff Walton's ADEA claims. Accordingly, we have not discussed the facts relevant to those waived claims.

these ranks, an IMPD officer must sign up for and participate in a promotional process. During the time period relevant to this lawsuit, the IPD/IMPD offered three such promotional processes in 2004 (before the IMPD was created), 2006, and 2008. A Development Committee was established for each promotional process that was responsible for creating and overseeing the process. Each promotional process was comprised of the following three components: a written examination, an oral interview/assessment exercise, and the candidate's personnel profile. All members of the IPD/IMPD were notified of the processes at the same time and in the same manner and all candidates who were eligible to participate were given the same amount of time to sign up for the process. The Development Committees for each process created an Information Booklet relating to each of the merit ranks that outlined the specifics of the promotional process. All candidates who participated in the promotional processes were given a copy of the Information Booklet at the time they completed the sign-up procedure.

After each promotional process was completed, post-test review sessions were held for all ranks tested at which candidates were given the opportunity to review the promotion materials and ask questions or state any concerns they may have had with the process. Each candidate who chose to attend the post-test review session was given a copy of his or her written examination answer sheet, a list of the written test questions that he or she answered incorrectly, a reference of the source for each written question on the examination, a copy of the oral interview and assessment exercises rating anchors, and a listing of the overall score received for each assessment or rating. After reviewing

those materials, candidates were permitted to submit written appeals if they believed their score had been affected by a procedural difficulty, such as the quality or substance of the testing materials, the procedures used during the testing process, the conduct of raters, or the conduct of the process staff. However, candidates were not permitted to appeal their individual interview and/or assessment scores merely because they believed their scores should have been higher.

2008 IMPD Promotions

In 2008, a total of eight IMPD officers were promoted to the rank of captain. Seven of the eight were promoted on March 5, 2008, as a result of the IMPD's 2006 promotional process and one officer was promoted on September 3, 2008, following the 2008 process. None of the IMPD Plaintiffs participated in the 2006 promotional process for captain; therefore none of them were eligible for the March 5, 2008 promotions to captain. The only IMPD officer promoted to the rank of captain on September 3, 2008 following the 2008 promotional process was Caucasian and received the highest total score of the officers eligible for promotion, which was 78.82.[3] Plaintiffs Walton and Coleman – the only two plaintiffs eligible for promotion to captain – were ranked sixteenth and seventeenth with scores of 67.42 and 64.83, respectively.

Twelve IMPD officers (eleven Caucasian, one African-American) were promoted

[3] Additional promotions to captain were made on October 6, 2010 and December 29, 2010, after this lawsuit was filed. The four officers who were promoted in 2010 were ranked second through fifth with scores of 78.49, 75.09, 74.72, and 74.60. Because Plaintiffs did not amend their pleadings to include disparate treatment claims for promotions that were made after 2008, we need not further address these promotions.

to the rank of lieutenant as a result of the 2008 process, nine of whom were promoted on March 5, 2008, with the remaining three officers promoted to lieutenant on April 2, 2008. The twelve officers promoted received the top twelve scores in the promotional process, ranging from 84.96 to 78.76. Plaintiffs Knight, Taylor, Steward, Hanks, Jefferson, Young, and Burke were all eligible to be promoted to lieutenant in 2008, but none received a promotion. These Plaintiffs received scores of 78.23 (14th), 77.51 (16th), 76.19 (21st), 74.40 (26th), 73.95 (28th), 71.97 (40th), and 70.09 (50th), respectively.

Twenty-one officers were promoted to the rank of sergeant: nine on March 5, 2008 and twelve on May 7, 2008. The officers promoted on March 5, 2008 were as follows: the top six scoring officers, all of whom were Caucasian, who received scores ranging from 88.06 to 78.59; the fifteenth and the seventeenth ranked officers, both Caucasian, who received scores of 76.95 and 75.90, respectively; and Plaintiff Finnell, who was ranked twenty-eighth with a score of 73.52.[4] All of the remaining officers in the top twenty who did not receive promotions on March 5 were promoted on May 7, 2008. These officers – all Caucasian – posted scores ranging between 77.88 and 74.99. Plaintiffs Adams, Green, Mills, Rowley, Bell, and Moore were all eligible for promotion to sergeant in 2008, but they did not receive promotions. Plaintiffs received scores of 71.83 (36th), 71.14 (42nd), 69.79 (49th), 69.40 (53rd), 68.44 (55th), and 66.29 (75th),

[4] Plaintiff Finnell was the only eligible plaintiff who received a promotion in 2008.

respectively.[5]

Indianapolis Fire Department Promotional Processes

The three merit ranks that firefighters in the Indianapolis Fire Department ("IFD") can earn during their tenures with the department are battalion chief, captain, and lieutenant. In order to progress through these ranks, a firefighter must sign up for and participate in a promotional process. During the time period relevant to this lawsuit, the IFD offered two promotional processes: the first in 2004 and the second in 2007. Each process was comprised of four components, to wit, a written examination, an oral interview, a practical exercise, and the candidate's "personnel profile." All members of the IFD were notified of the processes at the same time and in the same manner and all candidates who were eligible to participate were given a set amount of time to sign up for the process.[6] Each candidate who chose to be a part of the promotional process in 2004 and/or 2007 were given a copy of an Information Booklet, which outlined the specifics of

[5] The remaining IMPD Plaintiffs (Danny Anderson, Burns, Davenport, Harris, Maddrey-Patterson, and Williams) were not eligible to be promoted in 2008 because none of these officers participated in the 2008 promotional process for the rank of captain or in the 2006 promotional processes for the ranks of lieutenant or sergeant.

[6] The sign-up period for eligible candidates for the 2007 promotional process was originally set to run from July 16, 2007 through August 31, 2007. However, after the original sign-up period ended, the 2007 Development Committee reevaluated the components of the process as well as the manner in which each component was weighted and decided to modify certain criteria, namely, the amount of time required to earn full credit for seniority in each rank. As a result of that change, pages one through eight of the Information Booklets for each rank were updated. All IFD candidates who had previously registered for the 2007 process and still wanted to participate following the change were required to re-register between September 19, 2007 and October 8, 2007. At that time, each candidate was given the updated pages to the Information Booklet corresponding to the rank for which he or she was applying.

the promotional process for the rank for which he or she was applying.

After each promotional process was completed, post-test review sessions were held for all ranks tested at which candidates were given the opportunity to review the promotion materials and ask questions or state any concerns they may have had with the process. Each candidate who chose to attend the post-test review session was given a copy of his or her written examination answer sheet, a list of the written test questions that he or she answered incorrectly, a reference to the source for each written question on the examination, a copy of the oral interview and assessment exercises rating anchors, and a listing of the overall score received for each assessment or rating. After reviewing those materials, candidates were permitted to submit written appeals if they believed their score had been affected by a procedural difficulty, such as the quality or substance of the testing materials, the procedures used during the testing process, the conduct of raters, or the conduct of the process staff. However, candidates were not permitted to appeal their individual interview and/or assessment scores merely because they believed their scores should have been higher.

2008 IFD Promotions

In 2008, ten firefighters were promoted to the rank of battalion chief, nine firefighters were promoted to the rank of captain, and twenty-five firefighters were promoted to the rank of lieutenant. All of these promotions were made between April 25, 2008 and April 28, 2008. Each of the IFD Plaintiffs – Ron Anderson, Tracy, Passon, Garza, White, Simmons, Grissom, and Womack – were eligible to be promoted in 2008,

but none were selected for promotions.

The top ten scoring candidates for battalion chief were promoted in April 2008.[7] Of the ten candidates who received promotions, eight were Caucasian and two were African-American. Their scores ranged from 84.068 to 76.787. Plaintiff Anderson, the only plaintiff eligible for promotion to battalion chief in 2008, was ranked nineteenth, with a score of 74.204. The nine captain candidates who were promoted in 2008[8] received the top nine scores, ranging from 86.299 to 80.839. Seven of those candidates were Caucasian and two were African-American. Plaintiffs Tracy, Passon, Garza, White, and Simmons were all on the list of eligible candidates, but none received promotions. Their scores were 75.116 (25th), 75.015 (26th), 73.903 (31st), 66.999 (51st), and 58.589 (66th), respectively. The top twenty-seven candidates eligible for a promotion to lieutenant were promoted in 2008,[9] which included six African-American and twenty-one Caucasian firefighters. Their scores ranged from 89.686 to 83.043. Plaintiffs Womock and Grissom were both eligible for promotion to lieutenant, but neither was promoted. They received scores of 80.743 (42nd) and 78.174 (61st), respectively.

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[7] Three additional Caucasian candidates were promoted in 2009, after this lawsuit was filed. They were ranked eleventh through thirteenth and had scores ranging from 76.300 to 75.926.

[8] In 2009, after this lawsuit was filed, six additional promotions to captain were made. The candidates who received promotions had received the next six highest scores, which ranged from 79.457 to 78.070. Five of the individuals were Caucasian and one was African-American.

[9] One additional Caucasian candidate was promoted in 2009, who was ranked twenty-eighth, with a score of 83.021.

As a result of these promotional decisions, Plaintiffs have brought disparate treatment claims pursuant to Title VII and § 1983, alleging that Defendant intentionally discriminated them in making its decisions regarding promotions. On June 27, 2011, Defendant filed the instant summary judgment motion.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See id. at 255. However, neither the "mere existence of some alleged factual dispute between the parties," id., 477 U.S. at 247, nor the existence of "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes

demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party's case. Id. at 325.

Summary judgment is not a substitute for a trial on the merits nor is it a vehicle for resolving factual disputes. Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994). Therefore, after drawing all reasonable inferences from the facts in favor of the non-movant, if genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. See Shields Enterprises, Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992); Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only appropriate, but mandated. See Celotex, 477 U.S. at 322; Ziliak v. AstraZeneca LP, 324 F.3d 518, 520 (7th Cir. 2003). Further, a failure to prove one essential element "necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

A plaintiff's self-serving statements, which are speculative or which lack a foundation of personal knowledge, and which are unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment. Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001); Stagman v. Ryan, 176 F.3d 986, 995 (7th Cir. 1999); Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

The summary judgment standard is applied rigorously in employment discrimination cases, because intent and credibility are such critical issues and direct evidence is rarely available. Seener v. Northcentral Technical Coll., 113 F.3d 750, 757 (7th Cir. 1997); Wohl v. Spectrum Mfg., Inc., 94 F.3d 353, 354 (7th Cir. 1996). To that end, we carefully review affidavits and depositions for circumstantial evidence which, if believed, would demonstrate discrimination. However, the Seventh Circuit has also made clear that employment discrimination cases are not governed by a separate set of rules, and thus remain amenable to disposition by summary judgment so long as there is no genuine dispute as to the material facts. Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997).

II. Waived Claims

In their response brief, Plaintiffs respond to the majority of Defendant's arguments with nothing more than one or two conclusory statements, entirely omitting any citation to the record or legal authority. These cursory responses are insufficient to demonstrate the existence of a genuine issue of material fact necessary to defeat a proper motion for summary judgment. Plaintiffs have utterly failed to develop these claims in their briefing, and we remind them that it is not the responsibility of the Court to develop these arguments for them. Judge v. Quinn, 612 F.3d 537, 557 (7th Cir. 2010) ("[I]t is not the obligation of [a] court to research and construct legal arguments open to parties, especially when they are represented by counsel.") (citation omitted). It is well-settled under Seventh Circuit law that "'perfunctory and undeveloped arguments, and arguments

that are unsupported by pertinent authority, are waived.'" Id. (quoting United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003)). Accordingly, we GRANT Defendant's Motion for Summary Judgment on the following claims: Plaintiffs' race discrimination claim relating to the administration of their pension plan; Plaintiff Finnell's discrimination claims brought pursuant to Title VII and § 1983; Plaintiff Walton's ADEA claim; and Plaintiffs' state constitutional claims for injunctive relief.

III. Statute of Limitations

As a result, the only remaining claims in this case are Plaintiffs' § 1983 claims and the Title VII claims of Plaintiffs Danny Anderson, Ron Anderson, Adams, Burns, Burke, Coleman, Davenport, Green, Hanks, Harris, Jefferson, Knight, Maddrey-Patterson, Passon, Steward, Simmons, Taylor, Tracy, Walton, and White. Specifically, Plaintiffs allege that they received disparate treatment as a result of the IMPD's and IFD's promotional processes. Before turning to the merits of these claims, we shall first address Defendant's contention that Plaintiffs' disparate treatment claims, brought pursuant to § 1983 and Title VII seeking relief for promotional decisions that occurred in 2005 and 2006, are outside the applicable statute of limitations, and thus, procedurally barred.[10] Plaintiffs have again failed to adequately respond to this argument. In their response, without citation to any authority, Plaintiffs state only that their "disparate treatment

[10] As a result of the IPD's 2004 promotional process, the last promotions from the eligibility list for the ranks of lieutenant and sergeant were made on January 20, 2005. The last promotions made from the IFD's 2004 promotions list were on December 21, 2006.

claims are not time barred, as they have demonstrated a continuing pattern of discrimination." Pls.' Resp. at 8. However, again pursuant to well-established Seventh Circuit law, a failure to promote, which is the substance of Plaintiffs' charges of discrimination, is a discrete incident of discrimination to which the continuing violation doctrine does not apply. See Pruitt v. City of Chicago, Illinois, 472 F.3d 925, 927 (7th Cir. 2006); Davidson v. Citizens Gas & Coke Utility, 470 F. Supp. 2d 934, 949-50 (S.D. Ind. 2007). Plaintiffs have failed to put forth any argument to persuade the court that their claims somehow are distinguishable from this clear precedent, nor do they challenge the fact that the applicable limitations periods for claims brought pursuant to § 1983 is two years or that a charge of employment discrimination must be filed with the EEOC within 300 days of the alleged unlawful employment practice.

Accordingly, we GRANT Defendant's Motion for Summary Judgment on all disparate treatment claims brought pursuant to § 1983 that relate to promotions made in 2005 and 2006 as those promotions occurred more than two years before Plaintiffs filed the instant litigation. The designated evidence also shows that Plaintiffs Burke, Burns, Coleman, Hanks, Taylor, Davenport, Green, Ron Anderson, Tracy, Passon, White, and Simmons failed to file their EEOC charges within 300 days of promotions made in 2005 and 2006. Thus, we GRANT Defendant's Motion for Summary Judgment on their Title VII claims based on those promotions.

IV. Disparate Treatment Claims for 2008 Promotional Decisions

Plaintiffs allege that they suffered disparate treatment as a result of the promotions

of Caucasian police officers and firefighters put into effect in 2008 from lists that were generated by the IMPD's 2006 and 2008 promotional processes and the IFD's 2007 process, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. Under these laws (including specifically, § 1983) a plaintiff may prove discrimination either via direct evidence of discrimination or indirectly through the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006). The parties here have limited their analysis solely to the indirect method, so we follow their lead and discuss only that method of proof.

The indirect method of proving discrimination applies similarly to claims brought under Title VII and § 1983. Rodgers v. White, 657 F.3d 511, 517 (7th Cir. 2011) (citation omitted). To survive summary judgment under this framework, a plaintiff must begin by establishing a *prima facie* case of discrimination. If such a showing can be established, the burden shifts to the defendant to articulate a nondiscriminatory reason for the actions it took against the plaintiff. If the defendant succeeds in offering a legitimate, nondiscriminatory reason for the employment decision, the burden reverts to the plaintiff to show that there is a genuine dispute of material fact that the proffered reason for the employment action is pretextual. Naik v. Boehringer Ingelheim Pharmaceuticals, Inc., 627 F.3d 596, 599-600 (7th Cir. 2010) (citations omitted).

To establish a *prima facie* case of race discrimination based on a failure to promote, a plaintiff must show: (1) that he belongs to a protected class; (2) that he was

qualified for the position; (3) that he was rejected for the position sought; and (4) that the position was given to a person outside of the protected class who is similarly or less qualified than the plaintiff. Jordan v. City of Gary, Ind., 396 F.3d 825, 833 (7th Cir. 2005) (citations omitted). It appears from the briefing that the only element of the *prima facie* case that is disputed in this context is whether the Caucasian police officers and firefighters who received promotions are similarly situated to Plaintiffs. Accordingly, we focus our discussion on this element.

Defendants argue that, because Plaintiffs all received lower scores than the Caucasian and African-American applicants who received promotions, they have failed to establish that they were similarly qualified for the positions. It is undisputed that every plaintiff scored lower than the candidates who were promoted as a result of the 2007 and 2008 promotional processes.[11] Plaintiffs nevertheless maintain that they have established a *prima facie* case of discrimination because the differences in point values among all of the applicants are sufficiently minimal as to be inconsequential. Thus, they argue that the closeness of the scores indicates that Plaintiffs were in fact similarly qualified to those who were selected for promotion.

It is true that with respect to at least some of the plaintiffs the differences in point values between their scores and the lowest scoring applicants who were promoted were minimal or even negligible. However, even if we assume that the closeness of the scores

[11] Plaintiff Finnell actually received a promotion despite scoring lower than certain individuals who were not promoted.

creates a genuine issue of material fact as to whether certain plaintiffs were similarly qualified to candidates who did receive promotions, our inquiry does not end there. The evidence establishes that the IMPD and the IFD must limit the number of promotions that occur after each process because of budgetary concerns and other staffing issues. Thus, it is clear that not all qualified candidates who apply can receive promotions. An employer has discretion to choose among equally qualified candidates as long as its decision is not based on unlawful criteria. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). Here, Defendant has met its burden of providing a legitimate, non-discriminatory reason for its promotional decisions, to wit, that it made the promotions based on the final scores and ranks that were achieved by the promotion candidates and without regard to race.

Plaintiffs have failed to come forth with any evidence establishing that Defendant's reliance on the candidates' scores in making its promotional decisions was merely a pretext for discrimination. In all but one case, Defendant simply promoted the top-scoring candidates and those promoted included both Caucasian and African-American applicants. The only exception was Plaintiff Finnell's promotion. He was one of twenty-one IMPD candidates promoted to sergeant despite having the twenty-seventh best score. However, because Plaintiff Finnell is African-American, the fact that he was promoted over Caucasian candidates who received higher scores does not support Plaintiffs' contention that Defendant was intentionally discriminating *against* minority applicants.

Plaintiffs cursorily allege that components of the promotional processes are "arbitrary" and "without any nexus to the job content or duties, the knowledge, skills or abilities needed for the job, or any other meaningful job-related criteria," (Pls.' Resp. at 3),[12] but they do not specify which components they are challenging or how those components are racially discriminatory or reveal a racially discriminatory animus. Instead, Plaintiffs rely almost exclusively on non-expert statistical evidence regarding the relatively small percentage of African-Americans who are promoted in the IMPD and IFD, compared to the overall percentage of African-Americans working in those departments, in an effort to prove their claims. However, the Seventh Circuit has rejected such efforts to use statistics as the primary means of establishing discrimination in disparate treatment situations. See Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 349 (7th Cir. 1997) ("[S]tatistics are improper vehicles to prove discrimination in disparate treatment (as opposed to disparate impact) cases. ... Standing virtually alone, ... statistics cannot establish a case of individual disparate treatment.") (citations and internal quotations omitted).

It is true that, "[i]n conjunction with other evidence of disparate treatment ... statistics can be probative of whether the alleged disparity is the result of discrimination."

[12] Plaintiffs cite to an excerpt from the deposition of former IMPD Chief Michael Spears in support of this allegation. However, the cited portion of Chief Spears's deposition testimony, merely states that when he himself participated in the promotional processes as he was coming up in the police department, his personal belief was that some components of the tests had "little relevance" to the work of the police department. Spears Dep. at 31. He further testified that the processes have been changed since that time. Therefore, we accord no weight to this testimony because it has no relevance to the promotional processes at issue in this litigation.

Bell v. E.P.A., 232 F.3d 546, 552-53 (7th Cir. 2000) (citations omitted). Here, however, Plaintiffs have failed to properly develop any other compelling evidence of disparate treatment so that the statistical evidence, standing alone, falls short of Plaintiffs' goal to survive summary judgment. Accordingly, we GRANT Defendant's Motion for Summary Judgment as to Plaintiffs' disparate treatment claims brought pursuant to Title VII and § 1983.

V. Conclusion

For the reasons detailed above, Defendant's Motion for Summary Judgment is GRANTED in its entirety. Plaintiffs' Motion for Certificate of Appealability is DENIED AS MOOT. Final judgment shall enter accordingly.

IT IS SO ORDERED.

Date: 03/13/2012

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KENDALE L. ADAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	1:09-cv-175-SEB-DML
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the Court's ruling simultaneously entered on this date, final judgment is hereby entered in favor of Defendant and against Plaintiffs.

IT IS SO ORDERED.

Date: 03/13/2012

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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