IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 12-1874

KENDALE ADAMS, et al.,	)	**Appeal from the United States**
	)	**Court Southern District of Indiana**
	)	**Indianapolis Division**
Plaintiffs-Appellants,	)	
	)	**District Court Cause Number**
	)	**1:09-CV-00175-SEB-DML**
vs.	)	
	)	
	)	
CITY OF INDIANAPOLIS,	)	
	)	**Sarah Evans Barker, Judge**
Defendant-Appellee	)	

BRIEF OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

I. TABLE OF CONTENTS.....ii

II. TABLE OF AUTHORITIES.....v

III. JURISDICTIONAL STATEMENT.....1

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....1

V. STATEMENT OF THE CASE.....2

A. Nature of the Case.....2

B. Course of the Proceedings.....3

VI. STATEMENT OF THE FACTS.....7

VII. SUMMARY OF THE ARGUMENT.....20

VIII. ARGUMENT.....21

A. The District Court properly granted the Government's Motion for Partial Judgment on the Pleadings.....21

a. Standard of Review.....21

b. The District Court correctly dismissed the Officers' disparate impact claims.....22

i. The continuing violation doctrine does not apply to adverse employment action claims.....23

ii. No EEOC charge adequately alleged sufficient claims to exhaust disparate impact claims.....25

iii. The Amended Complaint did not plausibly state Title VII disparate impact claims.....28

c. The Officers' did not develop cogent arguments on appeal.....30

B. The District Court properly denied the Officers' Motion for Leave to file a Second Amended Complaint.....33

a. Standard of Review.....33

b. The District Court did not act without justification when it denied the Officers' Motion for Leave.....34

i. The Officers did not show excusable neglect or good cause supporting leave to file a third complaint.....34

ii. The Officers proposed second amended pleading was futile.....37

C. The District Court properly granted the City's Motion for Summary Judgment.....40

a. Standard of Review.....40

b. Summary judgment was proper on the claims of disparate treatment under 42 U.S.C. 1983, Title VII, and Indiana Constitution Art. I, § 23 for 2008 promotional decisions in IMPD and IFD.....41

i. Officer Finnell suffered no adverse employment action.....43

ii. IMPD Officers were not similarly situated to candidates selected for promotion.....44

1. September 8, 2008, Promotion to Captain.....45

2. March 5 and April 2, 2008 Promotions to Lieutenant.....46

3. March 5 and May 5, 2008 Promotions to Sergeant.....47

iii. IFD Officers were not similarly situated to candidates selected for promotion as the promoted firefighters were more qualified.....48

1. April 26, 2008 to April 28, 2008 Promotions to Battalion Chief.....49

2. April 26, 2008 to April 28, 2008 Promotions to Captain.....50

3. April 26, 2008 to April 28, 2008 Promotions to Lieutenant.....51

iv. The City legitimately chose to promote higher scoring IMPD/IFD candidates, which was not discrimination based on race.....52

c. The Officers were not entitled to a surreply.....54

IX. CONCLUSION.....56

X. CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH FED. R. APP. 32(A)(7)(C).....57

XI. CERTIFICATE OF SERVICE.....58

TABLE OF AUTHORITIES

Cases:

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....32

Bane v. Chappell, 2010 WL 989898 (S.D. Ind. 2010).....55

Bausch v. Stryker Corp., 630 F.3d 546 (7th Cir. 2010), *cert. denied*, 132 S.Ct. 498 (2011).....38

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).....32

Bennett v. Roberts, 295 F.3d 687 (7th Cir. 2002).....28

Brosted v. Unum Life Ins. Co. of Am., 421 F.3d 459 (7th Cir. 2005).....35

Buchanan-Moore v. Cnty. Of Milwaukee, 570 F.3d 824 (7th Cir. 2009).....21, 22

Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93 (2d Cir. 2001).....27

Chaudhry v. Nucor Steel-Indiana, 546 F.3d 832 (7th Cir. 2008).....44

Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497 (7th Cir. 1994).....25-26

Cleveland v. Porca Co., 38 F.3d 289 (7th Cir. 1994).....33

Crestview Village Apts. v. United States Dep't Of Housing & Urban Dev., 383 F.3d 552 (7th Cir. 2004).....37

Dass v. Chicago Bd. of Educ., 675 F.3d 1060 (7th Cir. 2012).....40

Fisher v. Transco Services-Milwaukee, Inc. 979 F.2d 1239 (7th Cir. 1992).....28

Foman v. Davis, 371 U.S. 178 (1962).....37, 38

Fulcher v. City of Wichita, 445 F. Supp. 2d 1271 (D. Kan. 2006).....30

Goodman v. National Sec. Agency, Inc., 621 F.3d 651 (7th Cir. 2010).....40

Hayes v. City of Chicago, 670 F.3d 810 (7th Cir. 2012).....21, 22

Hous. Auth. Risk Retention Group, Inc. v. Chi. Hous. Auth., 378 F.3d 596 (7th Cir. 2004).....31

Int'l Broth. Of Teamsters v. United States, 431 U.S. 324 (1977).....28, 56

Irvine v. American Nat. Bank and Trust Co. of Chicago, 1991 WL 134182 (N.D. Ill. 1991).....29

Israel v. Glenmark Constr. Co., 2006 U.S. Dist. LEXIS 92213 (S.D. Ind. 2006).....55

Issacs v. Colgate-Palmolive Co., 2006 U.S. Dist. 96053 (S.D. Ind. 2006), *aff'd in part, rev'd in part*, 485 F.3d 383 (7th Cir. 2007).....32

Jewett v. Anders, 521 F.3d 818 (7th Cir. 2008).....41

Johnson v. Cypress Hill, 641 F.3d 867 (7th Cir. 2011).....33

Jordan v. City of Gary, 396 F.3d 825 (7th Cir. 2005).....42

Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961 (7th Cir. 2004), *cert. denied*, 124 S.Ct. 2876 (2004).....32

Lyerla v. AMCO Ins. Co., 536 F.3d 684 (7th Cir. 2008).....33

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....42

Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016 (7th Cir. 1992).....33, 37, 38

Mozee v. American Commercial Marine Service Co., 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S.Ct. 207 (1992), and *reh'g denied*.....25

Muhich v. C.I.R., 238 F.3d 860 (7th Cir. 2001).....32

N. Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449 (7th Cir. 1998).....31

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).....23, 24, 25

Pacheco v. Mineta, 448 F.3d 783 (5th Cir. 2005), *cert. denied*, 123 S.Ct. 299 (2006).....26, 27

Palmer v. Board of Education, 46 F.3d 682 (7th Cir. 1995).....24

Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002).....37

Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991).....37

Pittman v. General Nutrition Corp., 515 F.Supp.2d 721 (S.D. Tex. 2007).....26

Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 509 (1983).....41

Poole v. Spagnolo, 2000 WL 1720217 (N.D. Ill. 2000).....41

Pugh v. City Of Attica, 259 F.3d 619 (7th Cir. 2001).....43

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).....28

Rioux v. City of Atlanta, 520 F.3d 1269 (11th Cir. 2008), *reh'g denied* and *reh'g en banc*, 285 Fed. Appx. 741 (11th Cir. 2008).....41

Roach v. Pedigo Holdings, Inc., 2005 WL 2253590 (S.D. Ind. 2005).....34, 35

Scott v. Astrue, 2009 WL 211122 (S.D. Ind. 2009).....31

Scott v. City of Indianapolis, 2009 WL 4907021 (S.D. Ind. 2009).....34

Sheehan v. Daily Racing Form, Inc., 104 F.3d 940 (7th Cir. 1997), *cert. denied*, 117 S.Ct. 2480 (1997).....42

Shotts v. Bombardier, 2006 WL 1663837 (S.D. Ind. 2006).....35

Smith v. City of Jackson, 544 U.S. 228 (2005).....28-29

Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010).....29, 30

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).....30

Talbot v. Robert Matthews Distributing Co., 961 F.2d 654 (7th Cir. 1992).....33

Thomas v. Guardsmark, Inc., 381 F.3d 701 (7th Cir. 2004).....22

Tierney v. Vahle, 304 F.3d 734 (7th Cir. 2002).....31

Trustmark Ins. Co. v. General & Cologne Life Re of Am., 424 F.3d 542 (7th Cir. 2005).....36

United States, et. al. v. City of New York, et. al., 683 F.Supp.2d 225 (E.D.N.Y. 2010).....54, 55

Vitug v. Multistate Tax Comm'n, 88 F.3d 506 (7th Cir. 1996).....42, 43

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989).....28, 29

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).....42, 56

Weinstein v. Schwartz, 422 F.3d 476 (7th Cir. 2005).....32

Welch v. Eli Lilly & Co., 2009 WL 2461119 (S.D. Ind. 2009).....25, 26

Woodman v. WWOR-TV, 293 F.Supp.2d 381 (S.D.N.Y. 2003), *aff'd* 411 F.3d 69 (2d Cir. 2005).....26

Statutes and Trial Rules

Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1074.....28

Federal Rule of Civil Procedure 6(b)(1).....34, 35

Federal Rule of Civil Procedure 10(c).....31

Federal Rule of Civil Procedure 15(a)(2).....37

Federal Rule of Civil Procedure 16(b)(4).....34, 36

Federal Rule of Civil Procedure 16(f).....36

Southern District of Indiana Local Rule 56.1(d).....54-55

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CITY OF INDIANAPOLIS,	)	
	)	**Sarah Evans Barker, Judge**
Defendant-Appellee	)	

I. Jurisdictional Statement

The Plaintiffs-Appellants' Jurisdictional Statement is complete and correct, except that it omitted to state that the District Court had supplemental jurisdiction over the claims asserted under the Indiana Constitution.

II. Statement of the Issues Presented for Review

1. Whether the District Court properly granted the Government's Motion for Partial Judgment on the Pleadings when it applied binding Supreme Court precedence and held that the continuing violation doctrine does not apply to adverse employment discrimination cases, and therefore, did not save the Officers' untimely EEOC charges.

2. Whether the District Court properly granted the Government's Motion for Partial Judgment on the Pleadings when it determined that none of the Officers' EEOC charges or Amended Complaint alleged a facially neutral employment practice, and therefore, were deficient as a matter of law.

3. Whether the District Court abused its discretion when it denied the Officers' Motion for Leave to Amend the Amended Complaint because the Officers did not establish excusable neglect or good cause, and the proposed pleading could not cure the procedural and legal deficiencies previously found by the court.

4. Whether the District Court properly granted the City's Motion for Summary Judgment when the Officers failed to present sufficient evidence to establish a *prima facie* case for disparate treatment, as the record proves the Officers were not similarly situated to the Caucasian and African American candidates who were promoted in 2008, and the City's proffered reason for the promotions was not pretextual, but legitimate and non-discriminatory.

III. Statement of the Case

A. Nature of the Case

This is an appeal from three of the District Court's findings in favor of the City: the District Court's granting, in substantial part, of the Government's Motion for Partial Judgment on the Pleadings, the District Court's denial of the Officers' Motion for Leave to File a second Amended Complaint, and the District Court's granting of the City's Motion for Summary Judgment.

B. Course of the Proceedings

On January 30, 2009, the Plaintiffs-Appellants ("the Officers") filed a Complaint for Damages in the Marion County Superior Courts against the City of Indianapolis and Mayor Gregory A. Ballard.[1] (Dkt. No. 1.) On February 17, 2009, the Government removed the case to the United State District Court for the Southern District of Indiana. (Dkt. No. 1.) On March 3, 2009, the Government filed a Motion to Dismiss, asking the District Court to dismiss the Officers' Section 1981 and state law claims. (Dkt. Nos. 14, 15.) In response, the Officers' filed their first Motion for Leave to Amend Complaint on August 10, 2009, informing the court that if permitted to amend their complaint, they would remove the Section 1981 claim and alternatively, plead a Section 1983 claim. The Officers also wanted to add additional Plaintiffs/Officers, an additional Defendant, as well as a new claim under Title VII. (Dkt. No. 23.)

On October 1, 2009, the Government filed an Answer with Affirmative Defenses, as well as a Motion for Partial Judgment on the Pleadings. (Dkt. Nos. 29, 30, 33.) On November 2, 2009, the court granted the Officers' first Motion for Leave to Amend Complaint. (Dkt. No. 44.) On November 10, 2009, the District Court approved the parties' Case Management Plan which set the deadline to amend the pleadings on March 3, 2010, and the deadline to file dispositive motions on October 3, 2010. (Dkt. No. 53, pp. 3, 5.) On August 26,

[1] Hereinafter, Defendant-Appellee, the City of Indianapolis, will be referred to as "the City" while Defendants, City of Indianapolis and Mayor Gregory A. Ballard, will collectively be referred to as "Government."

2010, the court, *sua sponte*, indefinitely stayed the dispositive motion deadline. (Dkt. No. 130.)

On September 16, 2010, Judge Sarah Evans Barker granted, in substantial part, the Government's Motion for Partial Judgment on the Pleadings, thereby dismissing: (1) All claims by the NAACP; (2) all the Officers' state constitutional claims; (3) all claims under 42 U.S.C. section 1981; (4) all disparate impact claims under both 42 U.S.C. section 1983 and Title VII; (5) all claims against Mayor Ballard and Chief Spears; (6) Plaintiff Danny Anderson's hostile work environment claim; and (7) the Title VII disparate treatment claims of Officers Grissom, Young, Rowley, Moore, Bell, Williams, and Mills. (Dkt. No. 135.) Specifically, the District Court found, in relevant part, that some of the Officers failed to exhaust their administrative remedies under Title VII due to untimely filed EEOC charges. (Dkt. No. 135, pp. 10-13.) The court rejected the Officers' contention that the continuing violation doctrine saved their claims, stating that "[t]he continuing violation doctrine applies only to remediate hostile work environment or pattern-and-practice claims," not "adverse employment actions that are actionable as discrete events." (Dkt. No. 135, pp. 11-12.) The District Court also found that the Officers' claims of disparate impact under Title VII failed because their EEOC Charges and the Amended Complaint did not allege a facially neutral employment practice.[2] (Dkt. No. 135, pp. 15-19.) Finally, the court concluded that the Officers could not

[2] The Court also noted that the Officers' failure to respond to the City's argument that their EEOC Charges failed to assert disparate impact claims was sufficient to dismiss their claims. (Dkt. No. 135, p. 15.)

maintain their disparate impact claims under Section 1983 because such relief is not available. (Dkt. No. 135, pp. 20-21.)

On October 12, 2010, the Officers filed a second Motion for Leave to File an Amended Complaint, asking the court to resurrect (1) all the Officers' disparate impact claims under both 42 U.S.C. section 1983 and Title VII; (2) the Officers' 42 U.S.C. section 1981 claims; and (3) Officer Anderson's hostile work environment claim. (Dkt. No. 143.) Three days later, on October 15, 2010, the Officers also filed a Motion to Alter or Amend Judgment. (Dkt. Nos. 144, 145.) The City filed separate responses to both motions on November 12, 2010. (Dkt. Nos. 155, 156.)

On May 6, 2011, the District Court denied the Officers' Motion for Leave to File an Amended Complaint and Motion to Alter or Amend Judgment. (Dkt. No. 159.) With respect to the Motion for Leave to File an Amended Complaint, the District Court concluded the Officers were not entitled to file a third pleading "[i]n light of [their] 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 the [City]." (Dkt. No. 159, p. 6.)

On June 27, 2011, the City filed a Motion for Summary Judgment, Memorandum in Support, and Designation of Evidence. (Dkt. Nos. 164, 165, 166.) Therein, the City requested the District Court deny the Officers' remaining claims: (1) of intentional race discrimination relating to the Marion County Sheriff's Department's administration of their pension plan benefits; (2)

of disparate treatment based on promotions that occurred prior to January 30, 2007; (3) of disparate treatment under 42 U.S.C. section 1983, Title VII, and Indiana Constitution Article I, Section 23 for 2008 promotional decisions; (4) Officer Walton's disparate impact claim under the ADEA; and (5) for injunctive relief under Article I, Section 12 of the Indiana Constitution. (Dkt. Nos. 164, 165.) On September 20, 2011, the Officers filed a brief in opposition to the City's Motion for Summary Judgment and designation of evidence. (Dkt. Nos. 175, 176.) The City filed a reply brief in support on October 14, 2011, and on October 21, 2011, the Officers filed a Motion for Leave to File Surreply, attaching their proposed surreply thereto. (Dkt. Nos. 185, 186, 186-2.) The City objected to the Officers' Motion for Leave to File Surreply on October 26, 2011. (Dkt. No. 187.)

On March 14, 2012, the District Court granted the City's Motion for Summary Judgment in its entirety and entered final judgment in favor of the City. (Dkt. Nos. 190, 191.) The District Court concluded that the Officers had waived their intentional race discrimination claims related to the administration of their pension plan benefits, Officer Finnell's discrimination claims, Officer Walton's ADEA claim, and the Officers' state constitutional claims for injunctive relief. (Dkt. No. 190, pp. 11-12.) The District Court also concluded that the Officers' disparate treatment claims under Section 1983 for promotions made in 2005 and 2006 were time barred, and that Officers Burke, Burns, Coleman, Hanks, Taylor, Davenport, Green, Ron Anderson, Tracy,

Passon, White, and Simmons failed to file EEOC Charges within 300 days of promotions made in 2005 and 2006. (Dkt. No. 190, pp. 12-13.)

Finally, the District Court held that the Officers' disparate treatment claims for the 2008 promotions failed because the City "met its burden of providing a legitimate, nondiscriminatory 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." (Dkt. No. 190, p. 16.) The court also found that the Officers "failed to come forth with any evidence establishing that [the City's] reliance on the candidates' scores in making its promotional decisions was merely a pretext for discrimination." (*Id.*) The court rejected the Officers' non-expert statistical evidence, stating that such evidence alone without any additional compelling evidence of disparate treatment "falls short of [the Officers'] goal to survive summary judgment." (Dkt. No. 190, p. 18.)

On April 11, 2012, the Officers filed a timely Notice of Appeal.

IV. Statement of Facts

A. Indianapolis Metropolitan Police Department

i. IPD/IMPD Promotional Processes

Indianapolis Metropolitan Police Department ("IMPD") police officers can earn three different merit ranks during their tenures with the department: captain, lieutenant, and sergeant. (Dkt. Nos. 166-1, ¶¶ 4-6; 166-2, ¶¶ 4-6.) To earn those ranks, a police officer must sign-up for and participate in a

promotional process that is offered by IMPD. (Dkt. Nos. 166-1, ¶ 16; 166-2, ¶ 14; 166-3, ¶ 10.)

Since 2004, IPD/IMPD has offered three promotional processes: in 2004, 2006, and 2008. (Dkt. Nos. 166-1, ¶¶ 14, 15; 166-2, ¶ 10; 166-3, ¶ 6.) In each process, a Development Committee was established to oversee and create the process. (Dkt. Nos. 166-1, ¶¶ 9, 10; 166-2, ¶¶ 9, 10; 166-3, ¶ 6.) For each process, the Development Committees have determined there would be three components: a written examination, an oral interview/assessment exercise, and the candidate's "personnel profile." (Dkt. Nos. 166-1, ¶ 18; 166-2, ¶ 16; 166-3, ¶ 12.) All members of IPD/IMPD were notified of the processes at the same time and in the same manner. (Dkt. Nos. 166-1, ¶ 19; 166-2, ¶ 19; 166-3, ¶ 15.) All candidates who were eligible to participate in the promotional processes were given the same set amount of time to sign-up for that process. (Dkt. Nos. 166-1, ¶ 20; 166-2, ¶ 20; 166-3, ¶ 17.)

After the Development Committees determined the format for the particular promotional processes, an Information Booklet was created for the different merit ranks, which outlined the specifics of the promotional processes. (Dkt. No. 168, Exs. 1-8.) All candidates who chose to be part of the promotional processes were given a copy of the Information Booklet when he/she signed up for the process. (Dkt. Nos. 166-1, ¶ 26; 166-2, ¶ 23; 166-3, ¶ 19.)

ii. 2008 Promotions

In 2008, eight officers were promoted to the rank of captain: seven officers were promoted on March 5, 2008, as a result of IMPD's 2006 promotional process,[3] and one officer was promoted on September 3, 2008, as a result of the 2008 process. (Dkt. No. 168, Exs. 9, 10.) Twelve officers were promoted to the rank of lieutenant: nine on March 5, 2008, and three on April 2, 2008. (Dkt. No. 168, Ex. 11.) Twenty-one officers were promoted to the rank of sergeant: nine on March 5, 2008, and twelve on May 7, 2008. (Dkt. No. 168, Ex. 12.)

Officers Walton, Coleman, Knight, Taylor, Steward, Hanks, Jefferson, Young, Burke, Finnell, Adams, Green, Mills, Rowley, Bell, and Moore were eligible to be promoted in 2008. (Dkt. No. 168, Exs. 9, 11, 12.) Officers Danny Anderson, Burns, Davenport, Harris, Maddrey-Patterson, and Williams were not eligible to be promoted in 2008.[4] (Dkt. No. 168, Exs. 9, 11, 12.) Plaintiff Finnell was promoted on March 5, 2008. (Dkt. No. 168, Ex. 12.)

The list of eligible "captain" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:

---

[3] None of the IMPD Plaintiffs participated in the 2006 promotional process for the rank of captain, and therefore, none of the IMPD Plaintiffs were eligible for the seven captain promotions that were made on March 5, 2008. (Dkt. No. 168, Ex. 10.)

[4] Officers Danny Anderson, Burns, Davenport, Harris, Maddrey-Patterson, and Williams were not eligible to be promoted in 2008 because they did not participate in the 2008 promotional process for the rank of captain or in the 2006 promotional processes for the ranks of lieutenant or sergeant. (Dkt. No. 168, Exs. 9, 11, 12.) The District Court concluded that all claims of disparate treatment for promotions prior to 2008 were barred by the statute of limitations. (Dkt. No. 190, pp. 12-13.) The Officers did not raise this issue on appeal, and therefore, have abandoned these claims.

Name	Race	Total Score	Rank	Promoted
…	White	78.82	#1	Sept. 3, 2008
…	White	78.49	#2	Yes[5]
…	White	75.09	#3	Yes[6]
…	White	74.72	#4	Yes[7]
…	White	74.60	#5	Yes[8]
…	White	73.80	#6	No
…	White	72.89	#7	No
…	White	72.12	#8	No
…	White	71.74	#9	No
…	White	69.92	#10	No
…	White	69.04	#11	No
…	White	68.55	#12	No
…	White	68.48	#13	No
…	White	68.24	#14	No
…	White	67.48	#15	No
John Walton	Black	67.42	#16	No
Brownie Coleman	Black	64.83	#17	No
…	White	64.83	#18	No
…	White	62.67	#19	No
…	Black	62.33	#20	No
…	Black	60.35	#21	No

(Dkt. No. 168, Ex. 9.)

The list of eligible "lieutenant" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:[9]

Name	Race	Total Score	Rank	Promoted
…	White	84.96	#1	March 3, 2008
…	White	84.53	#2	March 3, 2008
…	White	84.08	#3	March 3, 2008
…	White	82.75	#4	March 3, 2008
…	White	81.95	#5	March 3, 2008

[5] Promotion made on October 6, 2010. (Dkt. No. 168, Ex. 9.)
[6] Promotion made on December 29, 2010. (Dkt. No. 168, Ex. 9.)
[7] Promotion made on December 29, 2010. (Dkt. No. 168, Ex. 9.)
[8] Promotion made on December 29, 2010. (Dkt. No. 168, Ex. 9.)
[9] For brevity, only the first fifty eligible candidates out of sixty-nine were included herein. (*See* Dkt. No. 168, Ex. 11.)

…	White	81.31	#6	March 3, 2008
…	White	80.29	#7	March 3, 2008
…	White	79.75	#8	April 2, 2008
…	White	78.99	#9	March 3, 2008
…	White	78.92	#10	April 2, 2008
…	Black	78.77	#11	March 3, 2008
…	White	78.76	#12	April 2, 2008
…	White	78.75	#13	No
Timothy Knight	Black	78.23	#14	No
…	White	78.03	#15	No
Jeffrey Taylor	Black	77.51	#16	No
…	White	77.36	#17	No
…	White	77.16	#18	No
…	Black	76.36	#19	No
…	White	76.35	#20	No
Matthew Steward	Black	76.19	#21	No
…	White	75.59	#22	No
…	White	75.28	#23	No
…	White	75.05	#24	No
…	Black	74.57	#25	No
Curtis Hanks	Black	74.40	#26	No
…	White	74.34	#27	No
Michael Jefferson	Black	73.95	#28	No
…	White	73.83	#29	No
…	White	73.82	#30	No
…	White	73.77	#31	No
…	Black	73.65	#32	No
…	White	73.43	#33	No
…	White	73.40	#34	No
…	White	72.90	#35	No
…	White	72.76	#36	No
…	White	72.68	#37	No
…	White	72.21	#38	No
…	White	72.06	#39	No
Kimberly Young	Black	71.97	#40	No
…	White	71.74	#41	No
…	White	71.67	#42	No
…	White	71.42	#43	No
…	White	71.32	#44	No
…	White	70.98	#45	No
…	White	70.97	#46	No
…	White	70.87	#47	No
…	Black	70.75	#48	No
…	White	70.27	#49	No

Vincent Burke	Black	70.09	#50	No

(Dkt. No. 168, Ex. 11.)

The list of eligible "sergeant" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:[10]

Name	**Race**	**Total Score**	**Rank**	**Promoted**
…	White	88.06	#1	March 5, 2008
…	White	84.19	#2	March 5, 2008
…	White	83.11	#3	March 5, 2008
…	White	81.92	#4	March 5, 2008
…	White	79.25	#5	March 5, 2008
…	White	78.59	#6	March 5, 2008
…	White	77.88	#7	May 7, 2008
…	White	77.80	#8	May 7, 2008
…	White	77.79	#9	May 7, 2008
…	White	77.73	#10	May 7, 2008
…	White	77.54	#11	May 7, 2008
…	White	77.43	#12	May 7, 2008
…	White	77.39	#13	May 7, 2008
…	White	77.24	#14	May 7, 2008
…	White	76.95	#15	March 5, 2008
…	White	76.56	#16	May 7, 2008
…	White	75.90	#17	March 5, 2008
…	White	75.83	#18	May 7, 2008
…	White	75.63	#19	May 7, 2008
…	White	74.99	#20	May 7, 2008
…	White	74.94	#21	No
…	White	74.91	#22	No
…	White	74.90	#23	No
…	White	74.56	#24	No
…	White	73.84	#25	No
…	White	73.77	#26	No
…	White	73.62	#27	No
Anthony Finnell	Black	73.52	#28	March 5, 2008
…	White	73.38	#29	No
…	White	73.30	#30	No
…	White	72.57	#31	No

[10] For brevity, only the first seventy-five eligible candidates out of 121 were included herein. (*See* Dkt. No. 168, Ex. 12.)

…	Black	72.52	#32	No
…	White	72.45	#33	No
…	White	72.26	#34	No
…	White	71.90	#35	No
Kendale Adams	Black	71.83	#36	No
…	White	71.81	#37	No
…	White	71.75	#38	No
…	White	71.65	#39	No
…	White	71.60	#40	No
…	White	71.16	#41	No
John T. Green	Black	71.14	#42	No
…	White	71.05	#43	No
…	White	70.84	#44	No
…	Black	70.58	#45	No
…	White	70.17	#46	No
…	Black	70.05	#47	No
…	White	69.99	#48	No
Ron Mills	Black	69.79	#49	No
…	White	69.77	#50	No
…	White	69.43	#51	No
…	White	69.42	#52	No
Arthur Rowley	Black	69.40	#53	No
…	White	69.05	#54	No
Marta Bell	Black	68.44	#55	No
…	White	68.27	#56	No
…	White	68.08	#57	No
…	Black	67.94	#58	No
…	White	67.74	#59	No
…	White	67.56	#60	No
…	White	67.55	#61	No
…	White	67.52	#62	No
…	White	67.48	#63	No
…	Black	67.44	#64	No
…	White	67.35	#65	No
…	White	67.24	#66	No
…	White	67.13	#67	No
…	White	67.06	#68	No
…	Black	66.73	#69	No
…	White	66.59	#70	No
…	White	66.58	#71	No
…	White	66.44	#72	No
…	White	66.44	#73	No
…	White	66.34	#74	No
Kendall Moore	Black	66.29	#75	No

(Dkt. No. 168, Ex. 12.)

The City selected candidates for promotion based on scoring, determining the higher-ranked candidates were more qualified based on their performance in the promotional process. (Dkt. No. 166-4, 32:14-25, 33:1-6.)

A. Indianapolis Fire Department

i. IFD Promotional Processes

Indianapolis Fire Department ("IFD") firefighters can earn three different merit ranks during their tenures with the department: battalion chief, captain, and lieutenant. (Dkt. Nos. 166-5, ¶¶ 4-6; 166-6, ¶¶ 4-6.) To earn those ranks, a firefighter must sign-up for and participate in a promotional process that is offered by IFD. (Dkt. Nos. 166-5, ¶ 18; 166-6, ¶ 19.)

Since 2004, IFD has offered two promotional processes: in 2004 and 2007. (Dkt. Nos. 166-5, ¶ 9; 166-6, ¶ 7.) In each process, a Development Committee was established to oversee and create the process. (Dkt. Nos. 166-5, ¶¶ 8, 9; 166-6, ¶¶ 7, 9-10.) In both processes since 2004, the Development Committees have determined there would be four components: a written examination, an oral interview, a practical exercise, and the candidate's "personnel profile." (Dkt. Nos. 166-5, ¶ 11; 166-6, ¶ 11.) All members of IFD were notified of the processes at the same time and in the same manner. (Dkt. Nos. 166-5, ¶ 20; 166-6, ¶ 21.) All candidates who were eligible to participate in the promotional processes were given a set amount of time to sign-up for that process. (Dkt. Nos. 166-5, ¶¶ 21-23, 166-6, ¶ 22.)

After the Development Committees determined the format for the particular promotional processes, an Information Booklet was created for the different merit ranks, which outlined the specifics of the promotional processes. (Dkt. No. 168, Exs. 16-21.) All candidates who chose to be a part of the promotional processes in 2007 and 2004 were given a copy of the Information Booklet when he/she signed up for the process. (Dkt. Nos. 166-5, ¶ 19; 166-6, ¶ 20.)

ii. 2008 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. (Dkt. No. 168, Ex. 25.) All of the candidates for each rank were promoted between April 26, 2008, and April 28, 2008, and all the IFD Officers—Ron Anderson, Tracy, Passon, Garza, White, Simmons, Grissom, and Womock—were eligible to be promoted in 2008. (*Id.*)

The list of "battalion chief" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:[11]

Name	Race	Total Score	Rank	Promoted
…	White	84.068	#1	April 28, 2008
…	White	81.994	#2	April 28, 2008
…	White	81.818	#3	April 26, 2008
…	White	81.686	#4	April 28, 2008

[11] For brevity, only the first nineteen eligible candidates out of thirty-one were included herein. (*See* Dkt. No. 168, Ex. 25, pp. 1-2.)

…	White	78.459	#5	April 27, 2008
…	Black	78.421	#6	April 28, 2008
…	White	78.221	#7	April 27, 2008
…	Black	77.854	#8	April 28, 2008
…	White	77.311	#9	April 26, 2008
…	White	76.787	#10	April 28, 2008
…	White	76.300	#11	Yes[12]
…	White	76.023	#12	Yes[13]
…	White	75.926	#13	Yes[14]
…	White	75.827	#14	No
…	Black	75.247	#15	No
…	White	74.720	#16	No
…	White	74.542	#17	No
…	White	74.299	#18	No
Ronnie Anderson	Black	74.204	#19	No

(Dkt. No. 168, Ex. 25, pp. 1-2.)

The list of "captain" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:

Name	**Race**	**Total Score**	**Rank**	**Promoted**
…	White	86.299	#1	April 26, 2008
…	White	84.988	#2	April 28, 2008
…	White	83.720	#3	April 27, 2008
…	White	82.168	#4	April 28, 2008
…	White	81.772	#5	April 26, 2008
…	Black	81.686	#6	April 27, 2008
…	Black	81.430	#7	April 28, 2008
…	White	81.423	#8	April 27, 2008
…	White	80.839	#9	April 26, 2008
…	White	79.457	#10	Yes[15]
…	White	78.853	#11	Yes[16]
…	White	78.691	#12	Yes[17]
…	White	78.503	#13	Yes[18]

[12] Promotion made on March 8, 2009. (*See* Dkt. No. 168, Ex. 25.)
[13] Promotion made on March 9, 2009. (*See* Dkt. No. 168, Ex. 25.)
[14] Promotion made on August 2, 2009. (*See* Dkt. No. 168, Ex. 25.)
[15] Promotion made on March 8, 2009. (*See* Dkt. No. 168, Ex. 25.)
[16] Promotion made on March 7, 2009. (*See* Dkt. No. 168, Ex. 25.)
[17] Promotion made on March 9, 2009. (*See* Dkt. No. 168, Ex. 25.)

…	White	78.129	#14	Yes[19]
…	Black	78.070	#15	Yes[20]
…	White	77.908	#16	No
…	White	77.164	#17	No
…	White	77.068	#18	No
…	White	76.953	#19	No
…	White	76.112	#20	No
…	White	75.670	#21	No
…	White	75.641	#22	No
…	White	75.639	#23	No
…	White	75.449	#24	No
Larry Tracy	Black	75.116	#25	No
Dei Passon	Black	75.015	#26	No
…	Black	74.899	#27	No
…	Black	74.846	#28	No
…	White	74.767	#29	No
…	White	74.052	#30	No
Mario Garza	Hispanic	73.903	#31	No
…	White	73.762	#32	No
…	White	73.250	#33	No
…	Black	73.063	#34	No
…	White	71.261	#35	No
…	White	70.924	#36	No
…	White	70.823	#37	No
…	White	70.819	#38	No
…	White	70.626	#39	No
…	Black	70.552	#40	No
…	White	70.403	#41	No
…	White	70.302	#42	No
…	White	70.068	#43	No
…	White	70.014	#44	No
…	White	69.846	#45	No
…	White	69.295	#46	No
…	White	69.201	#47	No
…	White	68.567	#48	No
…	White	68.394	#49	No
…	Black	68.250	#50	No
Brian White	Black	66.999	#51	No
…	Black	66.935	#52	No
…	White	66.614	#53	No

[18] Promotion made on March 8, 2009. (*See* Dkt. No. 168, Ex. 25.)
[19] Promotion made on March 9, 2009. (*See* Dkt. No. 168, Ex. 25.)
[20] Promotion made on March 7, 2009. (*See* Dkt. No. 168, Ex. 25.)

…	White	66.603	#54	No
…	White	64.051	#55	No
…	White	63.992	#56	No
…	Black	63.914	#57	No
…	White	63.617	#58	No
…	White	63.374	#59	No
…	Black	62.853	#60	No
…	White	62.565	#61	No
…	Black	62.281	#62	No
…	White	62.150	#63	No
…	White	61.873	#64	No
…	White	60.879	#65	No
Eric Simmons[21]	Black	58.589	#66	No

(Dkt. No. 168, Ex. 25, pp. 3-5.)

The list of "lieutenant" candidates who were promoted (and eligible to be promoted) in 2008 was as follows:[22]

Name	**Race**	**Total Score**	**Rank**	**Promoted**
…	White	89.686	#1	April 26, 2008
…	White	89.049	#2	April 27, 2008
…	Black	87.921	#3	April 28, 2008
…	White	87.285	#4	April 28, 2008
…	White	87.158	#5	April 28, 2008
…	White	86.781	#6	April 26, 2008
…	White	86.603	#7	April 26, 2008
…	White	86.588	#8	April 27, 2008
…	White	86.420	#9	April 27, 2008
…	White	86.252	#10	April 27, 2008
…	Black	85.826	#11	April 26, 2008
…	White	85.720	#12	April 26, 2008
…	Black	85.567	#13	March 7, 2009
…	White	85.281	#14	April 26, 2008
…	White	85.096	#15	April 27, 2008
…	White	84.379	#16	April 27, 2008
…	White	84.310	#17	April 28, 2008
…	White	84.243	#18	April 26, 2008
…	Black	84.014	#19	April 28, 2008

[21] Officer Simmons finished last on the eligibility list. (Dkt. No. 168, Ex. 25, p. 5.)
[22] For brevity, only the first sixty-one eligible candidates out of ninety-four were included herein. (*See* Dkt. No. 168, Ex. 25.)

…	White	83.894	#20	April 26, 2008
…	Black	83.491	#21	April 27, 2008
…	White	83.328	#22	April 27, 2008
…	White	83.249	#23	April 28, 2008
…	White	83.247	#24	April 28, 2008
…	White	83.184	#25	April 27, 2008
…	White	83.176	#26	March 9, 2009
…	Black	83.043	#27	April 27, 2008
…	White	83.021	#28	Yes[23]
…	White	82.958	#29	No
…	White	82.921	#30	No
…	White	82.904	#31	No
…	White	81.903	#32	No
…	White	81.723	#33	No
…	White	81.485	#34	No
…	Black	81.434	#35	No
…	White	81.387	#36	No
…	Black	81.364	#37	No
…	White	81.350	#38	No
…	Black	81.172	#39	No
…	White	81.153	#40	No
…	White	81.129	#41	No
Chris Womock	Black	80.743	#42	No
…	White	80.655	#43	No
…	White	80.639	#44	No
…	White	80.367	#45	No
…	White	80.122	#46	No
…	White	80.119	#47	No
…	White	80.023	#48	No
…	Black	79.604	#49	No
…	White	79.101	#50	No
…	White	79.070	#51	No
…	Black	79.050	#52	No
…	White	78.993	#53	No
…	Black	78.886	#54	No
…	Black	78.656	#55	No
…	White	78.629	#56	No
…	White	78.519	#57	No
…	White	78.480	#58	No
…	White	78.456	#59	No
…	White	78.236	#60	No
Eric Grissom	Black	78.174	#61	No

[23] Promotion made on March 8, 2009. (*See* Dkt. No. 168, Ex. 25.)

(Dkt. No. 168, Ex. 25, pp. 5-9.)

The City selected candidates for promotion based on scoring, determining the higher-ranked candidates were more qualified based on their performance in the promotional process. (Dkt. No. 170, ¶¶ 9, 10.)

V. Summary of the Argument

First, the District Court properly granted the Government's Motion for Partial Judgment on the Pleadings, thereby dismissing the Officers' Title VII disparate impact claims. Many of the Officers filed untimely EEOC charges, and therefore, all claims allegedly set forth therein by those Officers were procedurally barred. The continuing violation doctrine does not save the Officers' untimely EEOC charges because binding Supreme Court precedent has held that the continuing violation doctrine does not apply to adverse employment discrimination cases. Additionally, the District Court correctly determined that none of the Officers' EEOC charges or their first Amended Complaint alleged a facially neutral employment practice, and thus, were deficient as a matter of law.

Second, the District Court properly denied the Officers' Motion for Leave to Amend their Amended Complaint. The Officers did not establish excusable neglect or good cause to file a third pleading seven months after the case management deadline. The Officers conceded that their proposed second amended complaint offered essentially the same factual assertions as their first two pleadings, and even though the Officers were put on notice of the

deficiencies in their Amended Complaint five months before the deadline, they did not seek leave prior to the case management deadline or seek to stay the deadline. Additionally, the Officers' proposed third pleading was futile, as it did not—nor could it—cure the procedural and legal deficiencies in the Officers' prior pleadings.

Finally, the District Court properly granted the City's Motion for Summary Judgment, denying the Officers' claims of disparate treatment. The Officers did not establish a *prima facie* case of intentional discrimination, as the record proves the City promoted other African-American and Caucasian officers who were more qualified than the Officers in this case, thereby proving the Officers were not similarly situated. Further, the City has limited resources to promote qualified police officers and firefighters, it had a legitimate, nondiscriminatory reason to promote qualified candidates in the order of their rankings, and the City's decision to promote candidates based on these final rankings after the promotional process was complete was not pretextual.

VI. Argument

A. The District Court properly granted the Government's Motion for Partial Judgment on the Pleadings.

a. Standard of Review

It is well settled that this Court's review of a district court's decision to dismiss a complaint pursuant to Rule 12(c) is *de novo*. *Hayes v. City of Chicago*, 670 F.3d 810, 813 (7th Cir. 2012); *Buchanan-Moore v. Cnty. Of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). This Court is required to

"[t]ak[e] all well-pled allegations as true and draw[] all reasonable inferences in [plaintiff's] favor." *Hayes*, 670 F.3d at 813. The Court must "affirm a Rule 12(c) dismissal 'only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief.'" *Id.* (quoting *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 704 (7th Cir. 2004)). The Court should not, however, "ignore facts set forth in the complaint that undermine the plaintiff's claim or give weight to unsupported conclusions of law." *Buchanan-Moore*, 570 F.3d at 827.

b. The District Court correctly dismissed the Officers' disparate impact claims.

The Officers further contend the District Court erred when it dismissed their Title VII disparate impact claims for failure to state claim. (App. Brief, pp. 29-36.) The Officers, however, are wrong. The District Court correctly held that the continuing violation doctrine does not apply to adverse employment discrimination cases, and thus, did not save the Officers' untimely claims. The District Court also correctly determined that dismissal was proper because none of the Officers' EEOC charges or their first Amended Complaint alleged a facially neutral employment practice, and therefore, were deficient as a matter of law. (Dkt. No. 135, pp. 15-19.) Accordingly, this Court should affirm the District Court's granting of the City's Motion for Partial Judgment on the Pleadings.

i. The continuing violation doctrine does not apply to adverse employment action claims.

The Officers first argue that this Court should reverse the District Court's dismissal of their disparate impact claims because the continuing violation doctrine excuses the Officers' untimely EEOC charges. (App. Brief, pp. 30-33.) The U.S. Supreme Court, however, has held that the continuing violation theory will not save an otherwise untimely claim. In *Nat'l R.R. Passenger Corp. v. Morgan,* the Supreme Court held that a discrete discriminatory act occurs on the day it happens. 536 U.S. 101 (2002). The Court said:

> discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180-or 300-day time period after the discrete discriminatory act occurred ….
>
> …
>
> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

Morgan, 536 U.S. at 113 (emphasis added).

In this case, the lower court correctly applied the Supreme Court's analysis in *Morgan*, stating that the Court specifically rejected the Officers' 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." (Dkt. No. 135, p. 12.) The District Court correctly recognized that "[t]he substance of each of these plaintiffs' charges is

discrimination based on a failure to promote," which the *Morgan* Court categorized "as a discrete incident of discrimination to which the continuing violation doctrine does not apply." (Dkt. No. 135, p. 12); *Morgan*, 536 U.S. at 113.

In response, the Officers contend that *Morgan* is distinguishable because it involved "a single claimant's single incident of being denied promotion." (App. Brief, p. 32.) The Officers argue that their EEOC Charges "are directed at a promotion process, … not simply a single, discrete incident of a failure to promote." (*Id.*) Yet, the Officers' analysis is false and their reliance on *Palmer v. Board of Education*, 46 F.3d 682 (7th Cir. 1995), is unpersuasive. The Officers concede that the continuing violation doctrine applies only in cases involving hostile work environment and pattern-and-practice claims. (App. Brief, p. 31.) Yet, in the three years that litigation has been pending, the Officers have never pled or argued this as a pattern-and-practice case. Instead, this case is about the Government's failure to promote the Officers after he/she made the voluntary choice to sign up for and participate in a competitive promotional process, where only a limited number of applicants can be promoted. This is not a case where daily racial discrimination is alleged, as in *Palmer*, where schoolchildren were forced, with no option, to attend a school "under a racially discriminatory policy." *Palmer*, 46 F.3d at 683. This case is about alleged adverse employment discrimination, which places it squarely within the confines of the Supreme Court's findings in *Morgan*. Therefore, dismissal of the Officers' Amended Complaint was proper.

ii. No EEOC charge adequately alleged sufficient claims to exhaust disparate impact claims.

Nonetheless, even if the Officers had timely filed their EEOC charges or if the District Court had held that the continuing violation doctrine applied in this case, dismissal of the Officers' Amended Complaint was still appropriate because none of the Officers' EEOC charges adequately satisfied the Title VII requirements for asserting a disparate impact claim—an issue the Officers did not address on appeal. *See Welch v. Eli Lilly & Co.*, 2009 WL 2461119, *2-5 (S.D. Ind. 2009)(The "starting point of [its] analysis . . . whether Welch and/or Tyson sufficiently preserved disparate impact claims in their EEOC charges of discrimination, as the validity of the plaintiffs' disparate impact claims hinges on this finding")).

Disparate impact claims are only cognizable under Title VII. *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991). Disparate impact claims are therefore subject to Title VII's strict exhaustion requirement. *See Morgan*, 536 U.S. 101 (requiring strict adherence to charge filing requirement); *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994)(generally, "a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge.") It is well established that "[i]n order to be cognizable, Title VII claims set forth in a complaint must be: (1) reasonably related to the allegations of the EEOC charge, and (2) growing out of the allegations of the EEOC charge." *Cheek*, 31 F.3d at 500. "When an EEOC

charge alleges a particular theory of discrimination, allegations of a different type of discrimination in a subsequent complaint are not reasonably related to them unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge." *Id.* at 503.

The federal courts have instructed that theories of disparate impact are completely different from disparate treatment theories. *See Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2005), *cert denied*, 123 S.Ct. 299 (2006)(finding that a disparate impact investigation would not reasonably be expected to grow out of a disparate treatment complaint where the charge identified no neutral employment policy, and noting that a neutral employment policy is the quintessential "cornerstone" of any disparate impact investigation). If a plaintiff fails to adequately allege disparate impact claims in their EEOC charge, dismissal of their claim is proper. *Welch*, 2009 WL 2461119 at *2-5 ("Davis's charge does not allege a specific neutral employment policy that disproportionately affected African American employees, an *essential* element of a disparate impact claim"); *Pittman v. General Nutrition Corp.*, 515 F.2d 721, 732-33 (S.D. Tex. 2007)(dismissing disparate impact claim for failure to exhaust requisite administrative remedies where plaintiff did not identify a neutral policy, and administrative complaint alleged only disparate treatment); *Woodman v. WWOR-TV*, 293 F. Supp. 381, 390 (S.D.N.Y. 2003)(holding that administrative remedies are not exhausted where plaintiff's charge failed "to identify a specific, facially neutral employment practice"), *aff'd* 411 F.3d 69 (2d Cir. 2005).

Here, the District Court correctly determined that none of the Officers' EEOC charges identified a specific, neutral employment practice, which is a prerequisite to preserving a claim for disparate impact. Instead, each charge only alleged claims for disparate treatment, as they assert that the testing and promotional process intentionally discriminated against each Officer based on their race—African-American. Indeed, the charges do not identify a neutral employment policy, which is the quintessential "cornerstone" of any disparate impact investigation. *Pacheco*, 448 F.3d at 792. And, "[s]imply gesturing towards the hiring process as a whole will not satisfy the requirement that the plaintiff identify a 'specific employment practice' that is the cause of the statistical disparities." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001).

The District Court correctly held that the Officers did not preserve disparate impact claims in their EEOC charges because they did not identify a neutral employment policy, thereby failing to exhaust their administrative remedies. (Dkt. No. 135, pp. 15-19.) Therefore, even if this Court decides the District Court erred when it refused to apply the continuing violation doctrine—and it did not—the Officers failed to exhaust their administrative remedies. This Court should affirm the District Court's Order.

iii. The Amended Complaint did not plausibly state Title VII disparate impact claims.

Finally, this Court should affirm the District Court's dismissal of the Officers' disparate impact claims because the Amended Complaint, just like the EEOC charges, does not identify a facially neutral employment policy.

It is well established that disparate impact claims do not require proof of a discriminatory motive. *See Int'l Broth. Of Teamsters v. United States*, 431 U.S. 324, 334 n.15 (1977). But, disparate impact claims require an allegation that "[a]n employer has adopted a particular employment practice that, although neutral on its face, disproportionately and negatively impacts members of one of Title VII's protected classes." *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002) (emphasis added). In asserting a disparate claim, broad generalizations are insufficient, as "it is not enough to simply allege that there is a disparate impact on workers or point to a generalized policy that leads to such an impact." *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). Instead, an employee must "isolate[e] and identif[y] the specific employment practices that are allegedly responsible for any [disparate impact]." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989), superseded by statute on other grounds, Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1074, *as recognized in Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003), and *Fisher v. Transco Services-Milwaukee*, Inc. 979 F.2d 1239, 1245 (7th Cir. 1992). Absent this standard, "employers [could be held] liable for 'the myriad of innocent causes that may lead to statistical imbalances...' ." *Smith*,

544 U.S. at 241 (citing *Wards Cove*, 490 U.S. at 656); *see also Irvine v. American Nat. Bank and Trust Co. of Chicago*, 1991 WL 134182 (plaintiff who alleged only that defendant systemically compensated females at a lower rate than men had "wholly failed to identify" a neutral policy to support a disparate impact claim).

Analogous to their EEOC charges, the Officers' Amended Complaint did not plausibly state a claim for relief for disparate impact. The Officers ambiguously alleged "[t]hat the Defendants have and continue to discriminate against the Police Officers [and the Firefighters], that said conduct was and is intentional, and has been denied promotional opportunities to qualified minority officers [and qualified minority firefighters]." (Dkt. No. 45, ¶¶ 59, 79, 94, 109.) The Officers further alleged that "African-American officers were deprived of promotional opportunities by being subjected to tests that are racially biased against those of African-American descent" (*id.* ¶¶ 28, 29, 30, 31, 32, 36, 37, 42, 43), and "being subjected to culturally biased tests" (*id.* ¶¶ 29, 30, 31, 32, 36, 37, 42, 43.) This, as the District Court found, is insufficient to state a disparate impact claim under Title VII.

In their Brief, the Officers do not dispute that their Amended Complaint lacked an allegation challenging a facially neutral employment policy, arguing instead that their pleading, as written, should have been found to state a claim for disparate impact because it met the plausibility standard in Rule 8(a)(2). (App. Brief, pp. 34-36.) However, the Officers' reliance on *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010) is misplaced. That hypothetical, which

stems from this Court's analysis of *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), provides an example of how a claim of intentional discrimination should be pled to satisfy Rule 8's requirements. *Swanson*, 614 F.3d at 404-05. In this case, however, the Government did not raise a Rule 12(b)(6) defense with respect to the Officers' claims of disparate treatment. Instead, the Government argued, and the District Court agreed, that the Officers were required to plead a facially neutral employment practice to state a claim for disparate impact under Title VII. This they did not do.

A review of the Officers' Amended Complaint proves that their claims amount to nothing more than broad, sweeping generalizations, which are insufficient. *See Fulcher v. City of Wichita*, 445 F. Supp. 2d 1271, 1276 (D. Kan. 2006). Such broad generalizations that the Government practices a system of "subjective promotional decisions…disproportionately made in favor of Caucasians" (Dkt. No. 45, ¶ 29), and "improperly administer[s], tests wherein police officers [and Firefighters] are then ranked and promoted based upon a preset placement formula" (*id.* ¶¶ 52, 87), do not sufficiently identify any specific neutral employment practice. The Officers' Amended Complaint failed to plausibly state a claim for relief under a theory of disparate impact, and this Court should affirm the District Court's finding.

c. The Officers' did not develop cogent arguments on appeal.

In their Brief, the Officers raise the following "issues" on appeal: (1) the 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"; (2) the court "required the Plaintiff-Appellants to plead a *prima facie* case in their complaint"; (3) the court should have considered the Government's level of "circumstances, experience, and sophistication" when it dismissed the Officers' disparate impact claims; (4) the court should have "estopped" the Government from raising a Rule 12(b)(6) defense to their disparate impact claims; and (5) the court should have converted the City's Motion for Partial Judgment on the Pleadings into a Motion for Summary Judgment.[24] (App. Brief, pp. 23-29.) These arguments, however, must fail because the Officers did not cite to any pertinent legal authority or provide any cogent argument or analysis to support them.

"'It is well-settled that 'it is not this court's responsibility to research and construct the parties' arguments. Where, as here, a party fails to develop the factual basis of a claim on appeal and, instead, merely draws and relies upon bare conclusions, the argument is deemed waived.'" *Scott v. Astrue*, 2009 WL

[24] The District Court properly did not convert the Government's Motion for Partial Judgment on the Pleadings to a Motion for Summary Judgment. *See* Fed.R.Civ.P. 10(c). When ruling on a Rule 12(c) motion, the Court considers only the pleadings, "which consist of the complaint, the answer, and any written instruments attached as exhibits." *Hous. Auth. Risk Retention Group, Inc. v. Chi. Hous. Auth.*, 378 F.3d 596, 600 (7th Cir. 2004)(citing *N. Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998)). Rule 10(c) has found its use in civil rights suits, especially when exhibits are dispositive of the issues, without converting the motion into a Rule 56 motion. *Tierney v. Vahle*, 304 F.3d 734,738-39 (7th Cir. 2002)(In a suit alleging discrimination under 42 U.S.C. section 1983: "Although this is not a contract case, the letter by Judge Vahle attached to the complaint is potentially (in fact actually, as we shall see) dispositive of the claim of retaliation against him and so he could have submitted it for the court's consideration, even if the plaintiffs had not

211122, *1 (S.D. Ind. 2009) (citing *Muhich v. C.I.R.*, 238 F.3d 860, 864 (7th Cir. 2001)). This Circuit has repeatedly stressed that failure to fully develop a legal argument will result in waiver:

> Curtis's appeal with respect to Schwartz is waived for failure to adequately develop his argument. His treatment of the matter in his opening brief is cursory, and he fails in both his opening and reply briefs to cite to any legal authority setting forth the appropriate legal standard for resolving his claim. The failure to develop an argument constitutes a waiver.

Weinstein v. Schwartz, 422 F.3d 476, 477 n.1 (7th Cir. 2005)(internal citations omitted); *accord Issacs v. Colgate-Palmolive Co.*, 2006 U.S. Dist. 96053, *67 (S.D. Ind. 2006), *aff'd in part*, *rev'd in part*, 485 F.3d 383 (7th Cir. 2007) ("perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived"); *see Kramer v. Banc of Am. Sec.*, LLC, 355 F.3d 961, 964 n. 1 (7th Cir. 2004)("We have repeatedly made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).").

In this case, outside of their citations to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Officers did not present one citation to support any of these arguments. (App. Brief, pp. 23-29.) Moreover, they did not specify which legal claims in the Government's Motion for Partial Judgment on the Pleadings they contend these arguments apply. (*Id.*) It is not this Court's responsibility to construct the

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attached it to their complaint, without the court's being obliged to convert his motion to dismiss to a motion for summary judgment").

Officers' arguments, nor should this Court, or counsel, be required to scour the District Court's twenty-six page opinion to determine which "summary judgment and trial cases" the Officers' contend the lower court did not critically question. (App. Brief, pp. 23-25; Dkt. No. 135.) As a result, this Court should find that the Officers have waived their arguments raised in Sections IX(B) through IX(F) of their brief. (App. Brief, pp. 23-29.)

B. The District Court properly denied the Officers' Motion for Leave to file a Second Amended Complaint.

a. Standard of Review

This Court reviews a district court's "denial of a motion for leave to amend for abuse of discretion." *Johnson v. Cypress Hill*, 641 F.3d 867, 871 (7th Cir. 2011). "Whether to grant leave to amend a pleading is a matter purely within the sound discretion of the district court," and "[a] district court's denial of a motion for leave to amend a complaint 'will be reversed only if no reasonable person could agree with its decision.'" *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684, 694 (7th Cir. 2008)(quoting *Cleveland v. Porca Co.*, 38 F.3d 289, 297 (7th Cir. 1994)); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 665 (7th Cir. 1992). Indeed, the decision should only be overturned if the plaintiff "can show that the court acted without justification." *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1020-21 (7th Cir. 1992).

b. The District Court did not act without justification when it denied the Officers' Motion for Leave.

The District Court properly denied the Officers' Motion for Leave to File a Second Amended Complaint for three reasons: (1) they failed to establish "excusable neglect" under Rule 6; (2) they failed to show "good cause" under Rule 16(b)(4); and (3) their proposed Second Amended Complaint was futile. This Court should therefore affirm the lower court's denial of the Officers' Motion for Leave to Amend their Amended Complaint.

i. The Officers did not show excusable neglect or good cause supporting leave to file a third complaint.

A case management plan issued pursuant to Rule 16 is an order of the Court and may only be modified for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). The CMP Order itself, upon approval by the Court, "constitutes an order of the Court…[and] [f]ailure to comply with an Order of the Court may result in sanctions for contempt, or as provided under Rule 16(f)…." (Dkt. No. 53, p. 10.) When a party fails to comply with a deadline imposed by a CMP Order, a party seeking to act after the deadline "run[s] the otherwise avoidable risk that they will be unable to establish excusable neglect," pursuant to Rule 6, in addition to good cause pursuant to Rule 16(f). *Roach v. Pedigo Holdings, Inc.*, 2005 WL 2253590, *1 (S.D. Ind. 2005); *see also Scott v. City of Indianapolis*, 2009 WL 4907021, *1 (S.D. Ind. 2009).

In this case, the Officers' Motion for Leave to Amend the Amended Complaint did not establish excusable neglect. According to Federal Rule of

Civil Procedure 6(b)(1), "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time…(B) on motion made after the time has expired if the party failed to act because of excusable neglect." Therefore, a party who seeks an extension of a court-imposed deadline after that deadline has expired must establish excusable neglect for failing to comply with the deadline. *See Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 464 (7th Cir. 2005). Indeed, the Officers' motion was a *de facto* motion for additional time under Rule 6(b)(2). *See Shotts v. Bombardier*, 2006 WL 1663837 98, *4 n.1 (S.D. Ind. 2006).

The Officers' Motion, however, did not establish excusable neglect for failing to file an amended complaint prior to the court's CMP deadline of March 3, 2010. On the contrary, as in *Roach*, the Officers' Motion neither addressed the excusable neglect standard nor did it otherwise establish excusable neglect. *Roach*, 2005 WL 2253590 at *1. The Officers primary proffered reason for seeking to amend their complaint after the CMP deadline was that "justice requires this case be heard on the merits and not dismissed on mere technicalities." (Dkt. No. 143, p. 4.) Yet, their brief in no way explained why the Motion to Amend constituted excusable neglect, and in fact, the Officers conceded that their proposed Second Amended Complaint offered essentially the same factual assertions as their original complaint and the first amended complaint. (Dkt. No. 143, ¶¶ 9, 10.) The Officers were therefore aware of the same facts in January 2009 and August 2009 when they filed their first two

complaints. The Officers, nonetheless, chose not to cure the deficiencies in their First Amended Complaint before the March 3, 2010 deadline.

Furthermore, the Officers' Motion for Leave to Amend did not establish good cause to amend the complaint after the CMP Order deadline. A Rule 16(b)(1) scheduling order (CMP Order) may only be modified for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). "To amend a pleading after the expiration of the trial court's Scheduling Order deadline to amend pleadings, the moving party must show 'good cause.'" *Trustmark Ins. Co. v. General & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). The primary consideration in applying the good cause standard is the diligence of the moving party. *Id.* In *Trustmark*, a plaintiff waited nine months after a CMP Order deadline to add an equitable estoppel claim; however, the district court found, and this Court affirmed, that the plaintiff "was, or should have been, aware of the facts underlying its equitable estoppel claim as early as 1999."

In response, the Officers point blame at the District Court, arguing that the lower court's delayed ruling on the dispositive motion caused them to miss the case management deadline. (App. Brief, p. 18)("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.) Yet, the Officers did not present any case law to show that this constitutes excusable neglect, and the record proves the Officers were on notice of the factual and legal deficiencies in

their Amended Complaint and could have cured their deficiencies prior to the case management deadline. *See Spitz*, 976 F.2d at 1021 (Midwest had fair notice of its pleading deficiencies from the defendants' motion to dismiss, but it chose to ignore that warning"). The Officers' Motion did not establish excusable neglect or good cause, and therefore, the District Court properly denied the Officers' Motion.

ii. *The Officers proposed second amended pleading was futile.*

Rule 15(a)(2) of the Federal Rules of Civil Procedure states that, "… 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." Although this rule appears to demand a liberal interpretation, "[t]he terms of the rule do not mandate that leave be granted in every case." *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2002). "If the underlying facts or circumstances relied upon by a plaintiff [are] a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962)(emphasis added).

If, however, "the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss," leave should not be granted. *Crestview Village Apts. v. United States Dep't Of Housing & Urban Dev.,* 383 F.3d 552, 558 (7th Cir. 2004)(quoting *Perkins v. Silverstein,* 939 F.2d 463, 471-72 (7th Cir. 1991)). The Supreme Court has

emphasized that "leave to amend need not be given if there is an apparent reason not to do so, such as '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, [or] futility of amendment.'" *Foman,* 371 U.S. at 182.

In this case, the District Court properly denied the Officers' Motion for Leave. The lawsuit had been pending for nearly two years when the Officers filed their second Motion for Leave. They had been given leave to amend their complaint once, which did not cure the deficiencies set forth in their original complaint. *Contra Bausch v. Stryker Corp.*, 630 F.3d 546 (7th Cir. 2010)(where the plaintiff was not allowed to file an amended complaint after the court granted the defendants' motion to dismiss because "Rule 15 ordinarily requires that leave to amend be granted at least once when there is a potentially curable problem with the complaint or other pleading"). As a result, the Government was forced to file a lengthy dispositive motion, which—for a second time—put the Officers on notice of their factual and legal deficiencies. *See Spitz*, 976 F.2d at 1021. The Officers had five months after the Government filed its dispositive motion before the March 3, 2010 deadline to file all motions for leave, but they did not. The Officers also could have filed a motion asking the court to stay the March 3 deadline until it ruled on the Motion for Partial Judgment on the Pleadings. But again, they did not.

Additionally, the Officers' proposed Second Amended Complaint was properly denied because it included claims that were futile and could not be remedied by a third amended pleading—a fact the Officers did not address on appeal. (App. Brief, pp. 16-23.) Indeed, the Officers sought to revive a number of claims that had been litigated by the parties and were dismissed by the District Court either due to procedural defects or legal inadequacies, and therefore, could not be cured with the filing of a new complaint.

For example, when the District Court dismissed the Officer's Title VII disparate impact claim, they did so for two (2) reasons: (1) they failed state a claim in their pleading, and (2) they failed to exhaust their administrative remedies in their EEOC Charges. (Dkt. No. 135, pp. 10-19.) The court was very clear:

> 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. **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**.

(Dkt. No. 135, p. 19)(citation omitted)(emphasis added). The Officers' Title VII disparate impact claims were not dismissed solely due to "technical pleading errors." The Officers' Title VII disparate impact claims were also dismissed because **none** of the Officers identified a neutral employment policy in their individual EEOC Charges, and therefore, **none** of the Officers preserved a disparate impact claim under Title VII. The Officers were therefore

procedurally barred from recovering under Title VII and nothing they included in an amended pleading would fix that error.

Similarly, the Officers' Section 1983 disparate impact claims, Section 1981 claims and claims for monetary damages under the Indiana Constitution were dismissed because the District Court concluded the Officers had no legal right to recover under those theories. (Dkt. No. 135, pp. 9-10, 20-22.) Therefore, because many of the Officers' claims were not legally viable, the District Court correctly concluded, on an alternate ground, that filing a second amended complaint to include additional facts would not cure the deficiencies from the prior pleading. Therefore, the record proves the District Court did not abuse its discretion when it denied the Officers' Motion for Leave.

C. *The District Court properly granted the City's Motion for Summary Judgment.*[25]

a. Standard of Review

Review of a district court's denial of summary judgment under Title VII is *de novo*. *Dass v. Chicago Bd. of Educ.*, 675 F.3d 1060, 1068 (7th Cir. 2012). In conducting this review, the Court should "construe all facts and reasonable inferences in favor of the non-moving party." *Goodman v. National Sec. Agency, Inc.*, 621 F.3d 651, 653 (7th Cir. 2010). The Court should not evaluate the

[25] The Officers have only appealed the Court's finding on the legal theory of disparate treatment as it applies to the 2008 promotions. (App. Brief, pp. 36-42.) As a result, the City will not address the other legal theories that were addressed in the City's Motion for Summary Judgment, nor will the City address the statute of limitations argument for promotions that were made prior to 2008, as the Officers have abandoned those claims on appeal.

weight of the evidence, judge the credibility of witnesses or determine the ultimate truth of the matter. *Jewett v. Anders*, 521 F.3d 818, 821 (7th Cir. 2008). Rather, it should determine whether there exists a genuine issue of triable fact. *Id.* "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal citations omitted).

b. *Summary judgment was proper on the claims of disparate treatment under 42 U.S.C. 1983, Title VII, and Indiana Constitution Art. I, § 23 for 2008 promotional decisions in IMPD and IFD.*[26]

Summary judgment was proper on the Officers' claims of intentional race discrimination under the Equal Protection Clause of the 14th Amendment, Title VII, and the Indiana Constitution.[27] The Officers failed to designate any evidence to substantiate their claims of intentional discrimination, and the

[26] In its Motion for Summary Judgment, the City also argued that the disparate treatment claims made by the Officers for promotional decisions before January 30, 2007, were barred by the statute of limitations. The IMPD/IFD Officers did not raise that issue on appeal, and therefore, it will not be addressed herein.

[27] Under both Section 1983 and Title VII, allegations of racial discrimination are analyzed under the same framework. *Poole v. Spagnolo*, 2000 WL 1720217, *10-*11 (N.D. Ill. 2000); *Rioux v. City of Atlanta*, 520 F.3d 1269, 1275 n. 5 (11th Cir. 2008). Therefore, since all of the thirty Officers alleged claims of disparate treatment under Section 1983, whereas only twenty-one of the Officers have disparate treatment claims under Title VII, the City analyzed all such claims herein. (*See* Dkt. No. 135, pp. 25-26.) What is more, the Officers' claims for equal protection under Article I, Section 23 of the Indiana Constitution are nearly identical to the analysis under the 14th Amendment to the U.S. Constitution. *See e.g. Pitts v. Unarco Industries, Inc.*, 712 F.2d 276, 280 (7th Cir. 1983). For the sake of brevity, the City collectively analyzed the Officers' Title VII, Section 1983 disparate treatment, and Art. I, Section 23 claims.

record proves the City promoted African-American officers and firefighters who were more qualified than the Officers in this case. Therefore, this Court should affirm the District Court's denial of the Officers' claims of disparate treatment.

Disparate treatment "occurs when a plaintiff is intentionally treated less favorably than others simply because of his race, color, religion, sex, or national origin." *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 513 (7th Cir. 1996). "It requires the plaintiff to prove that the defendants acted with actual discriminatory intent." *Id.*; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988). To prove "discriminatory intent or motive," a plaintiff must designate "enough evidence, whether direct or circumstantial, of discriminatory motivation to create a triable issue or establish a *prima facie* case under the McDonnell Douglas formula." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 940 (7th Cir. 1997)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)), *cert. denied*, 521 U.S. 1104 (1997).

To establish a *prima facie* case of race discrimination for failure to promote, a plaintiff has to establish, by a preponderance of the evidence, that: (1) she is a member of a protected class; (2) she is qualified for the position; (3) she was rejected for the position sought; and (4) the position was granted to a person outside the protected class who is similarly or less qualified than the plaintiff. *Jordan v. City of Gary*, 396 F.3d 825, 833 (7th Cir. 2005). "Once the plaintiff has established his *prima facie* case, a presumption of discrimination is created, and the burden of production shifts to the defendants to present evidence of a legitimate, nondiscriminatory reason for their unfavorable

treatment of the plaintiff." *Vitug*, 88 F.3d at 515. The burden of persuasion, however, always remains with the plaintiff. *Id.*; *Pugh v. City Of Attica*, 259 F.3d 619, 626 (7th Cir. 2001). "If the defendants satisfy their burden and articulate a nondiscriminatory reason for their actions, the burden of production reverts back to the plaintiff and merge with his ultimate burden of persuading the factfinder that the defendants' proffered reason is pretextual and that he was actually the victim of intentional discriminatory conduct." *Vitug*, 88 F.3d at 515.

As the District Court found, the Officers did not establish their case for disparate treatment. (Dkt. No. 190, pp. 13-18.) The City met its burden of providing a legitimate, nondiscriminatory reason for its promotional decisions, and the Officers failed to present any evidence to establish that the City's reliance on the candidates' scores in making its promotional decisions was merely a pretext for discrimination. The court further dismissed the Officers' attempt to rely "almost exclusively on non-expert statistical evidence," stating that "the Seventh Circuit has rejected such efforts to use statistics as the primary means of establishing discrimination in disparate treatment situations." (Dkt. No. 190, p. 17.) Accordingly, this Court should affirm the District Court's opinion.

i. Officer Finnell suffered no adverse employment action.

Officer Finnell challenged the City's promotion decisions in March 2008 as discriminatory, despite the fact that the City selected him for promotion.

(Dkt. No. 168, Ex. 12.) Since he suffered no adverse action, summary judgment against Officer Finnell was proper. He could not prove that he suffered a material adverse employment action because of the 2008 promotions. *See Chaudhry v. Nucor Steel-Indiana*, 546 F.3d 832, 838 (7th Cir. 2008)(stating that "[a] cognizable adverse employment action is a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'.") As a result, the lower court correctly dismissed his claim.

ii. IMPD Officers were not similarly situated to candidates selected for promotion.

In 2008, the City made promotions to the rank of sergeant on March 5 and May 5, to the rank of lieutenant on March 5 and April 2, and one promotion to the rank of captain on September 8.[28] The City made these promotional decisions without regard to race, and in fact, Officer Finnell and another African-American officer were promoted to sergeant and lieutenant, respectively, on March 5, 2008. (Dkt. No. 168, Exs. 11, 12.) The City's decision to promote other officers, both Causation and African-American, was made because these promoted officers were not similarly situated to the

[28] None of the IMPD Officers participated in the 2006 promotional process for the rank of captain. (Dkt. No. 168, Ex. 10.) Therefore, none of the IMPD Officers were eligible for the seven captain promotions that were made on March 5, 2008, and none of the Officers can argue they suffered an adverse employment decision based on the March 5, 2008 promotions that were made from the 2006 captain's eligibility list.

Officers, and the promoted candidates were more qualified for the respective positions, based on the results of the promotional processes.

1. September 8, 2008, Promotion to Captain[29]

Based on the 2008 promotional process, one promotion was made to the rank of captain on September 3, 2008:

…	White	78.82	#1	Sept. 3, 2008

(Dkt. No. 168, Ex. 9.) Only Officers Walton and Coleman participated in the 2008 IMPD promotional process for the merit rank of captain. (*Id.*) Officer Walton scored 67.42 and ranked #16, whereas Officer Coleman scored 64.83 and ranked #17, and both the Officers scored more than ten points lower than the one candidate who was promoted. (*Id.*) The City promoted the first officer on the list because he was the most qualified candidate based on his score. (Dkt. No. 166-4, 32:14-25, 33:1-6.) The City had no legitimate, non-discriminatory reason to skip fourteen candidates who were ranked higher than Walton and Coleman to select those particular Officers. For those reasons, the District Court properly dismissed Officers Walton and Coleman's disparate treatment claims.

[29] Five officers total were promoted as a result of the 2008 IMPD captain's examination. (Dkt. No. 168, Ex. 9.) However, the additional four promotions that were made were done nearly two years after the Officers filed this lawsuit, and at no time did the Officers seek to amend their pleadings to add disparate treatment claims

2. March 5 and April 2, 2008 Promotions to Lieutenant

On March 5, 2008 and April 2, 2008, the City promoted the following twelve candidates to the rank of lieutenant, which included one African-American:

…	White	84.96	#1	March 5, 2008
…	White	84.53	#2	March 5, 2008
…	White	84.08	#3	March 5, 2008
…	White	82.75	#4	March 5, 2008
…	White	81.95	#5	March 5, 2008
…	White	81.31	#6	March 5, 2008
…	White	80.29	#7	March 5, 2008
…	White	79.75	#8	April 2, 2008
…	White	78.99	#9	March 5, 2008
…	White	78.92	#10	April 2, 2008
…	Black	78.77	#11	March 5, 2008
…	White	78.76	#12	April 2, 2008

(Dkt. No. 168, Ex. 11.) Officers Knight, Taylor, Steward, Hanks, Jefferson, Young, and Burke did not score as high as the candidates who were promoted in 2008. These Officers scored and ranked as follows:

Timothy Knight	Black	78.23	#14
Jeffrey Taylor	Black	77.51	#16
Matthew Steward	Black	76.19	#21
Curtis Hanks	Black	74.40	#26
Michael Jefferson	Black	73.95	#28
Kimberly Young	Black	71.97	#40
Vincent Burke	Black	70.09	#50

(*Id.*) The candidates the City promoted were more qualified than these Officers, based on the final scores and ranks, and these decisions were made without regard to race. (Dkt. No. 166-4, 32:14-25, 33:1-6.) These promotional

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based on the promotions that were made *after* their lawsuit was filed. *See Morgan*,

processes are competitive and are the City's objective way to determine how to promote its police officers—many of whom are qualified for promotions and are in many ways "similarly situated." As the former Police Chief stated, "[w]hen there are no other indicators that a candidate will perform better or worse than another . . . I feel like it's very difficult to do anything other than use that list in rank order." (*Id.*) Accordingly, summary judgment on these claims was proper.

3. March 5 and May 5, 2008 Promotions to Sergeant

On March 5, 2008 and May 7, 2008, the City promoted the following individuals to sergeant, including Officer Finnell, an African-American:

…	White	88.06	#1	March 5, 2008
…	White	84.19	#2	March 5, 2008
…	White	83.11	#3	March 5, 2008
…	White	81.92	#4	March 5, 2008
…	White	79.25	#5	March 5, 2008
…	White	78.59	#6	March 5, 2008
…	White	77.88	#7	May 7, 2008
…	White	77.80	#8	May 7, 2008
…	White	77.79	#9	May 7, 2008
…	White	77.73	#10	May 7, 2008
…	White	77.54	#11	May 7, 2008
…	White	77.43	#12	May 7, 2008
…	White	77.39	#13	May 7, 2008
…	White	77.24	#14	May 7, 2008
…	White	76.95	#15	March 5, 2008
…	White	76.56	#16	May 7, 2008
…	White	75.90	#17	March 5, 2008
…	White	75.83	#18	May 7, 2008
…	White	75.63	#19	May 7, 2008
…	White	74.99	#20	May 7, 2008
Anthony Finnell	Black	73.52	#28	March 5, 2008

536 U.S. at 110.

(Dkt. No. 168, Ex. 12.) Officer Adams, Green, Mills, Rowley, Bell, and Moore were not similarly situated to the candidates selected to promotion, for the City did not see them as more qualified than higher-ranking candidates. These Officers scored and ranked as follows:

Kendale Adams	Black	71.83	#36
John T. Green	Black	71.14	#42
Ron Mills	Black	69.79	#49
Arthur Rowley	Black	69.40	#53
Marta Bell	Black	68.44	#55
Kendall Moore	Black	66.29	#75

(*Id.*)

The City did not intentionally discriminate against the Officers based on race. The candidates selected for promotion were more qualified than the Officers, based on the final scores received at the conclusion of the promotional process. The Officers maintain the City should have skipped over the seven higher-ranked, African-American candidates, including Officer Finnell, to select them instead. The City, however, chose to promote the more qualified candidates based on the promotional process scores, and the District Court correctly granted summary judgment on these claims.

iii. IFD Officers were not similarly situated to candidates selected for promotion as the promoted firefighters were more qualified.

Similar to IMPD's promotions, the City made IFD promotions in 2008 to the ranks of lieutenant, captain, and battalion chief on April 26, April 27, and April 28. (Dkt. No. 168, Ex. 25.) The City did not promote the IFD Officers

because they were not similarly situated to the other more qualified candidates, both Causation and African-American, who were ultimately promoted, based on the results of the promotional processes.

1. April 26, 2008 to April 28, 2008 Promotions to Battalion Chief

From April 26, 2008 to April 28, 2008, the City promoted the following ten firefighters to the rank of battalion chief, including two African-Americans:

Name	Race	Total Score	Rank	Promoted
…	White	84.068	#1	April 28, 2008
…	White	81.994	#2	April 28, 2008
…	White	81.818	#3	April 26, 2008
…	White	81.686	#4	April 28, 2008
…	White	78.459	#5	April 27, 2008
…	Black	78.421	#6	April 28, 2008
…	White	78.221	#7	April 27, 2008
…	Black	77.854	#8	April 28, 2008
…	White	77.311	#9	April 26, 2008
…	White	76.787	#10	April 28, 2008

(*Id.*)

Only Officer Ron Anderson participated in this process and was eligible to be promoted to the rank of battalion chief. (*Id.*) Officer Anderson, however, scored 74.204 and ranked #19 at the conclusion of the process. (*Id.*) His score was lower than the other applicants who were promoted when his alleged claims of disparate treatment occurred, including three African-American candidates. The City selected more qualified candidates without regard to race, and it had no legitimate, non-discriminatory reason to skip other candidates, including African-American candidates, who were ranked higher than Officer

Anderson to select him instead. Accordingly, Officer Ron Anderson's claims were properly dismissed.

2. April 26, 2008 to April 28, 2008 Promotions to Captain

From April 26, 2008 to April 28, 2008, the City promoted the following individuals to the rank of captain, including two African-Americans:

Name	**Race**	**Total Score**	**Rank**	**Promoted**
…	White	86.299	#1	April 26, 2008
…	White	84.988	#2	April 28, 2008
…	White	83.720	#3	April 27, 2008
…	White	82.168	#4	April 28, 2008
…	White	81.772	#5	April 26, 2008
…	Black	81.686	#6	April 27, 2008
…	Black	81.430	#7	April 28, 2008
…	White	81.423	#8	April 27, 2008
…	White	80.839	#9	April 26, 2008

(*Id.*)

Based on the results of the 2007 promotional process, Officers Tracy, Passon, Garza, White, and Simmons were not as qualified for the promotions as the nine officers who were promoted in 2008. (*Id.*) These Officers scored and ranked as follows:

Larry Tracy	Black	75.116	#25
Dei Passon	Black	75.015	#26
Mario Garza	Hispanic	73.903	#31
Brian White	Black	66.999	#51
Eric Simmons	Black	58.589	#66

(*Id.*)

All of these Officers scored much lower than the promoted candidates, and in the case of Officer Simmons, who ranked last on the eligibility list, the City would have been forced to skip fifty-five more qualified candidates, including nine African-American candidates, to promote him to the rank of captain. (*Id.*) The City chose to promote more highly-qualified candidates based on their performance in the promotional process, and the City did not have legitimate, non-discriminatory reasons to skip other qualified candidates, both Caucasian and African-American, who scored higher than these Officers.

3. April 26, 2008 to April 28, 2008 Promotions to Lieutenant

From April 26, 2008 to April 28, 2008, the City promoted the following individuals to the rank of lieutenant, including six African-American candidates:

Name	**Race**	**Total Score**	**Rank**	**Promoted**
…	White	89.686	#1	April 26, 2008
…	White	89.049	#2	April 27, 2008
…	Black	87.921	#3	April 28, 2008
…	White	87.285	#4	April 28, 2008
…	White	87.158	#5	April 28, 2008
…	White	86.781	#6	April 26, 2008
…	White	86.603	#7	April 26, 2008
…	White	86.588	#8	April 27, 2008
…	White	86.420	#9	April 27, 2008
…	White	86.252	#10	April 27, 2008
…	Black	85.826	#11	April 26, 2008
…	White	85.720	#12	April 26, 2008
…	Black	85.567	#13	March 7, 2009
…	White	85.281	#14	April 26, 2008
…	White	85.096	#15	April 27, 2008
…	White	84.379	#16	April 27, 2008

…	White	84.310	#17	April 28, 2008
…	White	84.243	#18	April 26, 2008
…	Black	84.014	#19	April 28, 2008
…	White	83.894	#20	April 26, 2008
…	Black	83.491	#21	April 27, 2008
…	White	83.328	#22	April 27, 2008
…	White	83.249	#23	April 28, 2008
…	White	83.247	#24	April 28, 2008
…	White	83.184	#25	April 27, 2008
…	White	83.176	#26	March 9, 2009
…	Black	83.043	#27	April 27, 2008
…	White	83.021	#28	March 8, 2009

(*Id.*)

Officers Womock and Grissom participated in the 2007 promotional process for the merit rank of lieutenant. (*Id.*) Officer Womock scored 80.743 and was ranked #42, while Officer Grissom scored 78.174 and was ranked #61. (*Id.*) The City would have been forced to skip thirteen more qualified candidates, including three other African-American firefighters to promote Officer Womock and thirty-two other firefighters, including eight total African-American firefighters to promote Officer Grissom. (*Id.*) The City did not have a legitimate, non-discriminatory reason to make those leaps and promote these Officers.

iv. The City legitimately chose to promote higher scoring IMPD/IFD candidates, which was not discrimination based on race.

Based on the above facts and corresponding evidence, the record proves that none of the Officers scored as high as the applicants who were promoted in the different processes, outside of Officer Finnell who was, in fact, promoted.

The City acknowledges that in some instances the difference in the point values between the applicants is minimal, and it is both unfortunate and frustrating—for both the Officers and the City—that not all of the promotional applicants can be promoted after each of the promotional processes have been completed. But, neither agency can staff all of the promotional applicants at the merit rank positions they are seeking, and both agencies have budgetary issues that they must consider prior to making any promotions. Each promotion costs between $6,500 and $8,200, which must be approved by the City-County Council/Merit Board before the promotion can be given. (Dkt. No. 166-3, 31.) Plus, the agency has to consider whether there is other available manpower within the agency to replace the officer/fireman who has been promoted, which then creates a "snowball" effect, unless the agency is sufficiently staffed at that time. (Dkt. No. 166-4, 76:23-25, 77:1-4, 90:14-25, 91:1-25; Dkt. No. 170, ¶¶ 10, 11.) For these reasons, it is necessary for IMPD and IFD to limit the number of promotions that occur after each process.

The City did not have a discriminatory motive when it issued the 2008 promotions. As the record proves, the City had legitimate, nondiscriminatory reasons for not promoting the Officers: it promoted from the list in order of the candidates' ranking. In short, those that were not promoted did not score as high as the applicants who were promoted. As the District Court correctly found, this is a legitimate, nondiscriminatory reason for the promotions. Accordingly, this Court should affirm the District Court's granting of the City's

Motion for Summary Judgment on all the Officers' claims of disparate treatment.

c. The Officers were not entitled to a surreply.

On appeal, the Officers first contend that the District Court erred when it did not "address and adopt" the Officers' "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." (App. Brief, p. 36.) Specifically, the Officers contend that *United States, et. al. v. City of New York, et. al.*, 683 F.Supp.2d 225 (E.D.N.Y. 2010) was "relevan[t] to the summary judgment proceedings" and that "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." (App. Brief, p. 38.) The Officers arguments, however, are unsupported and unpersuasive. They cite no legal authority to prove the District Court erred by not expressly denying their Motion for Leave to File a Surreply, or that the District Court erred by not expressly outlining why it rejected their analysis of *City of New York*. Accordingly, this Court should affirm the District Court's entry of summary judgment.

In this case, the District Court correctly declined to consider the Officers' Motion for Leave to File a Surreply because it violated Local Rule 56.1(d). Local Rule 56.1(d) states that "[i]f, in reply, the moving party relies upon evidence not previously cited or objects to the admissibility of the non-moving party's

evidence, the non-moving party may file a surreply brief limited to such new evidence and objections, no later than 7 days after service of the reply brief." S.D.Ind.L.R. 56.1(d) (emphasis added). The City's Reply Brief did not introduce or rely on any new evidence not previously cited by one of the parties, nor did the City's Reply Brief object to the admissibility of the Officers' evidence. (*See* Dkt. No. 185.) The Officers' omission to address either of the proper issues for a surreply demonstrated a complete disregard for the plain language of Local Rule 56.1(d) and was merely an attempt to have the last word in summary judgment, which is impermissible under the Local Rules. *See Bane v. Chappell*, 2010 WL 989898 (S.D. Ind. 2010) (Surreply stricken when it "merely reiterate[d] arguments made in previous briefs, and fail[ed] to address any new evidence or objections."); *Israel v. Glenmark Constr. Co.*, 2006 U.S. Dist. LEXIS 92213, *1 n. 3 (S.D. Ind. 2006) (Untimely surreply stricken because "it repeat[ed] evidence cited and/or discussed in the original moving or responsive papers, or attempt[ed] to refute [the moving party's] arguments, which is impermissible under Local Rule[] [56.1].").

Nonetheless, even if the District Court had granted them leave to file their surreply, the Officers' reliance on *City of New York* was unpersuasive, as the disparate treatment claim in that case was one of "pattern and practice," which the Officers in this case have never pled or argued. *See City of New York, et. al.*, 683 F.Supp.2d at 246. Even so, the Officers failed to establish "by a preponderance of the evidence that the [the City] took the challenged action 'because of' its adverse effects on the protected class, and that such intentional

discrimination was the defendant's 'standard operating procedure.'" *Id.* (citing *Watson*, 487 U.S. at 985-86, and *Int'l Bhd. of Teamsters*, 431 U.S. at 336). Accordingly, this Court should reject the Officers' contentions that summary judgment was inappropriate because the District Court did not "address and adopt" the Officers' arguments in their unaccepted surreply.

VII. Conclusion

The District Court correctly granted the City's Motion for Partial Judgment on the Pleadings, correctly denied the Officers' Motion for Leave to Amend their Amended Complaint, and correctly granted the City's Motion for Summary Judgment. For the reasons stated herein, Defendant-Appellee respectfully requests that this Court affirm the judgments of the District Court.

Respectfully submitted,

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VIII. Certificate of Compliance in Accordance with Fed. R. App. 32(a)(7)(C).

The foregoing Brief of Defendant-Appellee complies with the type volume limitations required under Federal Rule of Appellate Procedure 32(a)(7)(B)(i) in that there are not more than 14,000 words or 1,300 lines of text using monospaced type in the brief, and that there are 13,987 words typed in Microsoft Word word-processing this 5th day of July, 2012.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing was filed electronically on July 5, 2012. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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