UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EUGENE JOHNSON, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

GARY LOCKE, Secretary, United States Department of Commerce,

Defendant.

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DECISION AND ORDER

10 Civ. 3105 (FM)

FRANK MAAS, United States Magistrate Judge.

In this putative class action, plaintiffs Eugene Johnson, Evelyn Houser, Sandra Anderson, Anthony Gonzalez, Ignacio Riesco, Precious Daniels, and Felicia Rickett-Samuels (collectively, "Plaintiffs") allege that the process by which the United States Census Bureau ("Census Bureau") screens applicants for temporary jobs for the decennial census is racially discriminatory and therefore violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Specifically, the Plaintiffs challenge (a) the Census Bureau's policy requiring all applicants with criminal records to provide "official court documentation" of their prior arrests and convictions within 30 days after their receipt of a demand letter, and (b) the criteria the Census Bureau uses to determine whether an applicant who complies with such a demand is suitable for employment. The Plaintiffs contend that the Census Bureau's screening practices are neither job-related nor consistent with business necessity, and disproportionately preclude

African-Americans, Latinos, and Native Americans from obtaining employment with the Census Bureau because these groups have higher arrest and conviction rates than whites.

The Census Bureau has moved to dismiss the Plaintiffs' First Amended Complaint (ECF No. 32 ("FAC")), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)"), on the ground that the Plaintiffs have failed to exhaust their administrative remedies with respect to both their individual and their class-wide claims. (ECF No. 35).

For the reasons set forth below, the Census Bureau's motion to dismiss is granted in part and denied in part.

I. Factual and Procedural Background

Unless otherwise noted, the following facts are judicially noticed or taken from the FAC and presumed to be true.

A. Census Bureau

The Census Bureau is an agency of the United States Department of Commerce. (http://www.census.gov/aboutus/who.html) (last visited Mar. 14, 2011). Every ten years, in accordance with Article I, Section 2 of the United States Constitution, the Census Bureau conducts a Population and Housing Census, commonly known as the decennial census. (See http://www.census.gov/aboutus) (last visited Mar. 14, 2011); http://www.census.gov/dmd/www/dropin7.htm (last visited Mar. 14, 2011)). The data gathered during the decennial census is used to apportion seats in the United States House

of Representatives, to inform the drawing of voting districts, and to allocate substantial amounts of federal funding. (FAC ¶ 8).

B. Census Bureau Criminal Background Screening Process

Every applicant for a temporary decennial census position is required to undergo a criminal background check. (Id. ¶ 10). At the outset of the process, the Census Bureau runs each applicant's name and other personal identifiers (such as date of birth and social security number) through the Name Index of the Criminal Justice Services Division of the Federal Bureau of Investigation, which contains more than 70 million arrest records. (Id. ¶¶ 11, 13; Decl. of Kathryn H. Anderson, dated July 15, 2010 (ECF No. 31), Ex. A ("Houser File") at 264). If an applicant's arrest record appears in the FBI index, the Census Bureau sends the applicant a form letter requiring the applicant to provide "official court documentation on any and all arrest(s) and/or conviction(s)" within 30 days should the applicant not dispute the "identity of the arrest record" ("30-day letter"). (FAC ¶¶ 11, 15). The form letter further advises an applicant who wishes to challenge the "identity" of the arrest record that he or she "may" submit a set of fingerprints. (Id. ¶ 15).

During the 2010 Census, nearly all applicants with arrest records received 30-day letters, regardless of the disposition of their cases, how long ago the arrests had occurred, the nature of their offenses, or whether the positions they sought involved interaction with the public. (Id. ¶¶ 11, 15, 16, 19). Only seven percent of applicants who received a 30-day letter responded. (Id. ¶¶ 4, 20). The Plaintiffs estimate that the 30-day

letter policy thus prevented 93 percent of the applicants with arrest records, approximately 700,000 people, from securing employment in connection with the 2010 Census. (Id. ¶ 2).

An applicant who complies with the requirements of the 30-day letter proceeds to the "adjudication" stage of the screening process. (Id. ¶¶ 11, 23). At this stage, the Census Bureau applies certain criteria to determine whether the applicant is suitable for employment. (Id. ¶ 11). Pursuant to these criteria, however, the Census Bureau automatically excludes applicants with prior arrests for nearly all felonies and most misdemeanors. (Id. ¶¶ 6, 24). To the extent that the criteria allow any discretion, Census Bureau employees are instructed to "[d]efer anything [they] feel strongly about" or as to which they cannot "make an unbiased decision." (Id. ¶ 26). The Plaintiffs allege that this decision-making at the adjudication stage is consequently "ad hoc . . . , unguided by professional principles or social science, and based largely on gut instinct." (Id. ¶¶ 6, 26).

In 2009 and 2010, the adjudication stage often took months to complete, leaving even those applicants eventually deemed "eligible for hire" without a job because all of the temporary positions had been filled before the applicants were cleared. (Id. ¶ 29).

C. Parties

Plaintiff Evelyn Houser ("Houser") is a 69-year-old African-American woman who lives in Philadelphia, Pennsylvania. (Id. ¶ 53). In 1981, Houser was arrested

on charges of theft and forgery stemming from her attempt to cash a lost check. (Id. ¶ 57). Despite this arrest, the Census Bureau hired Houser in 1990 for a position as a census taker.[1] (Id. ¶ 54). She later transitioned to another job at the Census Bureau that involved interviewing applicants and performing background checks. (Id.). Notwithstanding her prior experience at the Census Bureau, Houser's application for a temporary position in connection with the 2010 Census was rejected after she mistakenly responded to a 30-day letter by sending the Census Bureau her fingerprints rather than the "official court documentation" concerning her prior arrest. (Id. ¶ 55).

Plaintiff Felicia Rickett-Samuels ("Rickett-Samuels") is an African-American woman who lives in Stamford, Connecticut. (Id. ¶ 69). At the time she applied for a position with the Census Bureau, Rickett-Samuels had three prior felony convictions (for attempted assault in 1989, attempted sale of a controlled substance in 1993, and possession of marijuana in 1998). (Id. ¶¶ 71-72). She nevertheless clearly has reformed; indeed, she has worked as a paralegal for a Manhattan law firm for the past nine years. (Id. ¶ 69). After receiving her 30-day letter in March 2009, Rickett-Samuels sent the Census Bureau a copy of a Certificate of Good Conduct issued by the New York State Division of Parole, which listed her three convictions.[2] (Id. ¶ 72). Approximately

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[1] Census takers, also called "enumerators" conduct the door-to-door counts during the decennial census. (Id. ¶ 10).

[2] "A certificate of good conduct is a document, issued by the [New York State] Parole Board, which removes employment and licensure restrictions imposed on individuals who have been convicted of two or more felonies, and may restore the right of the individual to hold (continued...)

one week after she submitted the certificate, the Census Bureau notified Rickett-Samuels that her application had been denied. (Id. ¶ 73).

Plaintiff Eugene Johnson ("Johnson") is a 48-year-old African-American resident of New York City. (Id. ¶ 47). In 1996, Johnson was convicted on misdemeanor assault charges for which the court ordered him to perform community service and make restitution. (Id. ¶ 50). On or about January 13, 2010, he applied for a position as a census taker at the Census Bureau office in Manhattan. (Id. ¶ 47). The Census Bureau then sent Johnson a 30-day letter on January 25, 2010. (Id. ¶ 51). After Johnson timely submitted an official copy of his disposition slip from the New York City Criminal Court, the Census Bureau informed him in June 2010 that he was being placed on its "eligibility list." (Id. ¶¶ 51-52). Johnson also learned at that time, however, that most temporary census jobs had been filled. (Id. ¶ 52). He never obtained a Census Bureau position. (Id.).

Plaintiff Precious Daniels ("Daniels") is an African-American woman who is a lifelong resident of Detroit, Michigan, where she works as a phlebotomist. (Id. ¶¶ 79-80, 82). In November 2009, Daniels was charged with disorderly conduct after participating in a peaceful protest against a health insurer. (Id. ¶ 84). The charge later was dropped. (Id.). When Daniels applied for a job in January 2010, the Census Bureau

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[2](...continued)
public office." (http://criminaljustice.state.ny.us/ojis/documents/record-review-faqs.pdf) (last visited Mar. 11, 2011). A Certificate of Good Conduct also creates a presumption of rehabilitation. (FAC ¶ 71).

directed that she provide official documentation regarding her criminal history. (Id. ¶ 85). She later was informed that the local court had no such records. (Id. ¶ 86). Consequently, because she was unable to provide any documentation to the Census Bureau, she was not hired. (Id.).

Plaintiff Anthony Gonzalez ("Gonzalez") is a 51-year-old Latino resident of Riverview, Florida. (Id. ¶¶ 74, 76). Gonzalez amassed four felony convictions during the 1980s on burglary and weapons possession charges. (Id. ¶ 76). After turning his life around, Gonzalez worked for the New York State Department of Correctional Services ("DOCS") for sixteen years as a substance abuse counselor before retiring in 2009. (Id. ¶ 74). Based on his experience with DOCS, Gonzalez knew that he would be unable to obtain official documentation of his prior convictions within 30 days after he received the Census Bureau's 30-day letter in March 2010. (Id. ¶ 77). Gonzalez therefore submitted in its stead a printout of his criminal history from the Inmate Lookup page of the DOCS website, along with a letter from the DOCS Commissioner thanking him for his "outstanding service." (Id.). Gonzalez never heard back from the Census Bureau. (Id. ¶ 78).

Plaintiff Ignacio Riesco ("Riesco") is a Latino resident of Massachusetts. (Id. ¶ 87). Riesco's only encounter with the criminal justice system was in 2006 when he was arrested on a theft charge which later was dismissed when authorities determined that someone else was responsible. (Id. ¶ 88). After receiving a 30-day letter, Riesco submitted documentation in April 2010 verifying that the charges against him had been

dropped, but was told that it would take up to five weeks for his file to "clear." (Id. ¶ 89). Although the Census Bureau assured Riesco that it was still hiring, he never received any confirmation that he has been deemed suitable for employment. (See id.).

Plaintiff Sandra Anderson ("Anderson") is a Native American who lives in Albuquerque, New Mexico. (Id. ¶ 59). In 2006, she was arrested on a misdemeanor charge of driving while intoxicated. (Id. ¶ 65). She subsequently entered a plea of guilty and was ordered to pay a fine, participate in a counseling program, install an ignition interlock device in her car, and perform 24 hours of community service. (Id. ¶ 66). In response to a 30-day letter, Anderson provided the Census Bureau with the official court documentation concerning her criminal case. (Id. ¶ 67). Nevertheless, in February 2010, the Census Bureau rejected her application because of her criminal record. (Id.).

Defendant Gary Locke ("Secretary Locke") is the Secretary of the United States Department of Commerce. (Id. ¶ 91). As such, he has full authority over the Census Bureau. (Id.).

D. Complaints of Discrimination

As early as October 2008, applicants who had been rejected for temporary positions with the 2010 Census based on their criminal records began filing formal and informal complaints with the Census Bureau's Equal Employment Opportunity Office ("EEOO"). (Id. ¶¶ 36, 43; Decl. of Samuel R. Miller, Esq., dated Oct. 8, 2010 (ECF No. 44) ("Miller Decl."), ¶¶ 3, 18, & Ex. 1). By July 10, 2009, the number of complaints alleging widespread racial discrimination had grown so large that the Acting Chair of the

Equal Employment Opportunity Commission ("EEOC") wrote a letter to both Secretary Locke and the Acting Director of the Census Bureau, in which he cautioned that the Census Bureau's screening policies "may run afoul of Title VII." (FAC ¶¶ 38, 40; Miller Decl. Ex. 28 ("EEOC Letter") at 498). The EEOC letter explained that "the Census Bureau should not disqualify [an applicant] based on an arrest record" because "an arrest in itself is not evidence that the person engaged in the conduct alleged." (EEOC Letter at 499). The EEOC Letter also indicated that "the Census Bureau should not exclude people from employment for [having been convicted of] offenses that do not predict an unacceptable risk." (Id. at 500).

Houser and Rickett-Samuels were two of the rejected applicants who filed formal complaints of discrimination with the Census Bureau EEOO. (FAC ¶ 36; Supp. Decl. of Kathryn H. Anderson, dated Sept. 10, 2010 (ECF No. 36), Ex. 1 at 1125-34). Houser initially filed an informal complaint with the EEOO on August 10, 2009, after she received a letter from the Census Bureau, dated May 21, 2009, which stated that she was ineligible for employment because she had failed to send documentation regarding her criminal record in a timely manner. (FAC ¶¶ 36, 56). Her informal complaint alleged that the Census Bureau was "discriminating against [her] based on [her] race, because of the disparate impact of its policies about criminal records on African-Americans." (Houser File at 121). Houser subsequently filed a formal EEOO complaint on August 28, 2009. (FAC ¶ 36). In that document, Houser contended that the policy pursuant to which she had been rejected "has a racially disparate impact and violates Title VII." (Houser

File at 113-20). Despite that allegation, however, Houser's formal complaint did not expressly seek relief on behalf of a class. (See id.).

On September 29, 2009, the EEOO dismissed Houser's complaint for failure to comply with 29 C.F.R. § 1614.105(a)(1), which requires a complainant to initiate contact with the EEOO within 45 days "of the date of the alleged discriminatory event." (Id. at 205-07). Based on the assumption that Houser would have received the May 21 letter denying her application on May 24, 2009, three days after it was sent, the EEOO concluded that her informal complaint was more than one month late. (Id.). The EEOO further concluded that she was not entitled to an extension of time to file her complaint. (Id.).

Houser appealed the EEOO decision to the Office of Federal Operations ("OFO") of the EEOC. (Id. at 226-36; FAC ¶ 36). On January 28, 2010, the OFO reversed the EEOO's decision and remanded the case based on its determination that the Census Bureau had failed to establish that Houser had either actual or constructive notice of the 45-day filing requirement. (Houser File at 278). The OFO decision also stated that Houser had 90 days to institute a civil action in federal court. (Id. at 280). Finally, in the decision, the OFO advised the Census Bureau that any request that the OFO reconsider its decision had to be filed within 30 days after its receipt of the decision. (Id.). Despite that notice, the Census Bureau never sought reconsideration of the OFO decision. (ECF No. 45 ("Pls.' Mem.") at 10).

Rickett-Samuels initiated contact with the EEOO on February 25, 2010, after she too was rejected by the Census Bureau. (Miller Decl. Ex. 4). Thereafter, on March 30, 2010, Rickett-Samuels filed an formal complaint of discrimination. (Id.). On May 21, 2010, the Census Bureau placed that complaint into abeyance pending the outcome of this action. (See Miller Decl. ¶ 6; June 28, 2010 Tr. at 30).

E. Federal Court Action

On April 13, 2010, Houser and Johnson timely commenced this action within 90 days of the OFO decision reversing the EEOO's dismissal of Houser's complaint. (ECF No. 1). The initial federal complaint filed by Houser and Johnson alleged that the Census Bureau's screening process violated Title VII because it "has a significant adverse impact upon African Americans, Latinos, and Native Americans, and . . . is neither job related nor a business necessity." (Id. ¶ 1). Houser and Johnson brought claims against the Census Bureau both individually and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of a putative class. (Id. at 1). The complaint defined that class to include:

> All African American, Latino, and Native American persons who applied for temporary employment with the United States Census Bureau . . . who were sent a 30-day notice to produce official court documentation or fingerprints, for whom there was no record of conviction, or who were otherwise suitable for employment . . . , and who were not hired or were terminated by the Census Bureau, between the commencement of temporary hiring for the 2010 decennial census and the date of judgment in this action.

(Id. ¶ 9).

Subsequently, on August 5, 2010, the Plaintiffs filed the FAC, which added the individual claims of the five additional named plaintiffs. (ECF No. 32). No further individual plaintiffs are likely to come before the Court because, as in Rickett-Samuels' case, the Census Bureau has held in abeyance any complaints filed after the commencement of this lawsuit which allege that its screening policies have a racially-disparate impact on African-Americans, Hispanics, and Native Americans, including any class action EEOO complaints. (See, e.g., Miller Decl. Ex. 6).

F. Present Motion

On September 10, 2010, the Census Bureau moved to dismiss the FAC pursuant to Rule 12(b)(6) on the theory that the Plaintiffs failed to exhaust their administrative remedies with respect to both their individual and their class-wide claims. (See ECF No. 35). The Plaintiffs filed their opposition papers on October 8, 2010, (ECF Nos. 44-45), after which the Census Bureau filed reply papers on October 22, 2010. (ECF Nos. 41-42). The motion therefore is fully submitted.[3]

II. Applicable Law

A. Standard of Review

Since the exhaustion of administrative remedies "is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement," Francis v. City of N.Y., 235 F.3d 763, 768 (2d Cir. 2000) (quotation marks omitted), Rule

[3] The motion is before me pursuant to the parties' previous consent to my exercise of jurisdiction over this case for all purposes pursuant to 28 U.S.C. § 636(c). (See ECF No. 20).

12(b)(6) is the appropriate vehicle to evaluate the sufficiency of a plaintiff's efforts to exhaust such remedies. See Holowecki v. Fed. Express Corp., 440 F.3d 558, 565 (2d Cir. 2006) (reviewing motion to dismiss a complaint for failure to exhaust administrative remedies under Rule 12(b)(6)); Fernandez v. Chertoff, 471 F.3d 45, 51-52 (2d Cir. 2005) (same).

Under Rule 12(b)(6), a court must dismiss a complaint that fails to state a claim upon which relief can be granted. In deciding a motion under Rule 12(b)(6), the Court must accept as true all factual allegations made in the complaint and draw all reasonable inferences in favor of the plaintiff. Leatherman v. Tarrant Cnty Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Newman & Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 662 (2d Cir. 1996). "To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). While a complaint need not contain detailed factual allegations, it must include "more than an unadorned, the-defendant-unlawfully- harmed-me accusation" or "naked assertion[s] devoid of further "factual enhancement." Id. Determining whether the allegations of a complaint nudge a plaintiff's claims across the line from "conceivable to plausible" requires a court to "draw on its judicial experience and common sense." Id. at 1950-51. Moreover, the Court is "not bound to accept as true" legal conclusions couched as factual allegations. Twombly, 550 U.S. at 555.

In deciding a Rule 12(b)(6) motion, "the Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken." Associated Fin. Corp. v. Kleckner, No. 09 Civ. 3895 (JGK), 2010 WL 3024746, at *1 (S.D.N.Y. Aug. 3, 2010) (citing Chambers v. Time Warner, Inc., 292 F.3d 147, 153 (2d Cir. 2002)). In Title VII cases, it is proper for the court to consider a plaintiff's relevant filings with the EEOC, even if they are not attached to the complaint. Holowecki, 440 F.3d at 565.

B. Exhaustion of Administrative Remedies

To pursue a Title VII claim in federal court, a plaintiff ordinarily must first exhaust his administrative remedies. See Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683, 684-85 (2d Cir. 2001). In a Title VII suit against a federal agency, the first step in the exhaustion process is to initiate contact with an agency EEO counselor within 45 days of the date of the matter alleged to be discriminatory. See 29 C.F.R. §§ 1614.105(a)(1), 1614.204(b). Because "[t]his timeliness requirement is not jurisdictional . . . the filing deadline is subject to waiver, estoppel, and equitable tolling." Bruce v. U.S. DOJ, 314 F.3d 71, 74 (2d Cir. 2002). "An agency waives a timeliness objection by making an express finding that the complaint was timely or failing to appeal an EEOC determination of timeliness." Id. (citing Briones v. Runyon, 101 F.3d 287, 290 (2d Cir. 1996)).

The additional steps required to exhaust a Title VII claim against a federal agency vary depending on whether the plaintiff is pursuing an individual or a class claim. After initiating contact with an agency EEO counselor, a Title VII plaintiff bringing an individual discrimination claim ordinarily must simply file a timely complaint with, and obtain a right-to-sue letter from, the agency EEOO. See 29 C.F.R. §§ 1614.106, 1614.407; Alenski v. Potter, No. 03 Civ. 2179 (SJF) (MLO), 2005 WL 1309043, at *7 (E.D.N.Y. May 18, 2005). To exhaust a claim asserted on behalf of a class, however, a Title VII plaintiff typically must do more. See Gulley v. Orr, 905 F.2d 1383, 1384 (10th Cir. 1990) (exhaustion procedures for class action claims against a federal agency are "markedly different than the administrative mechanism for addressing individual discrimination claims"). Specifically, pursuant to regulations first promulgated in 1977 ("Class Regulations"), an individual pursuing a class claim must file a class action complaint with the agency that contains allegations concerning numerosity, commonality, typicality, and adequacy of representation. Compare 29 C.F.R. § 1614.204(a)(2) with Fed. R. Civ. P. 23(a).[4]

Within 30 days after a class complaint is filed, the agency must forward the complaint to the EEOC, which may dismiss the complaint, or any portion thereof, on a number of grounds, including failure to meet the requirements of a class action complaint or lack of timeliness. 29 C.F.R. § 1614.204(d)(2). If the EEOC administrative judge

[4] "There is no regulatory scheme governing the exhaustion of class complaints in private-sector cases." Woodward v. Salazar, 731 F. Supp. 2d 1178, 1189 n.9 (D.N.M. 2010) (emphasis added).

accepts the complaint, the agency must notify class members of this development. Id. § 1614.204(e). Although the EEOC, rather than the agency, investigates the complaint, the Class Regulations provide an opportunity for reconciliation or a hearing if the dispute cannot be amicably resolved. Id. §§ 1614.204(g)-(h). At the end of the process, a class action representative who remains dissatisfied with the outcome of the administrative proceedings has 90 days to file a federal lawsuit. Id. § 1614.407.

C. Single Filing Rule

Notwithstanding these detailed requirements to exhaust a plaintiff's administrative remedies, courts have held that "Title VII's administrative prerequisites must be interpreted liberally to effectuate its purpose of eradicating employment discrimination." Cronas v. Willis Group Holdings Ltd., No. 06 Civ. 15295 (GEL), 2007 WL 2739769, at *2 (S.D.N.Y. Sept. 17, 2007) (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397 (1982); Love v. Pullman Co., 404 U.S. 522, 526-27 (1972)). Accordingly, "[f]airness, and not excessive technicality, must guide the consideration of Title VII actions." Id.

In an effort to "mitigate what might otherwise be the harsh consequences of the exhaustion requirement" in employment cases, the Second Circuit has adopted what is known as the "single filing" or "piggybacking" rule. As Judge Kaufman explained in Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986), under that rule, when "two plaintiffs allege that they were similarly situated and received the same discriminatory treatment, the purposes of the exhaustion requirement are adequately served if one

plaintiff has filed an EEOC complaint." Id. at 1101 (quoting De Medina v. Reinhardt, 686 F.2d 997, 1013 (D.C. Cir. 1982)); see also id. at 1100 ("other non-filing plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same time frame") (brackets and internal quotation marks omitted); Holowecki, 440 F.3d at 564 (same). If the non-filing and filing plaintiffs both complain of conduct in a work unit of "modest size," the "mere similarity of the[ir] grievances within the same general time frame suffices to permit the 'single filing rule'" to be applied. Tolliver v. Xerox Corp., 918 F.2d 1052, 1058 (2d Cir. 1990). The rationale for this relatively low threshold is that "[i]f it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful[?]" Id. (quoting Oatis v. Crown Zellerbach, 398 F.2d 496, 498 (5th Cir. 1968)).

In cases involving a substantially larger number of plaintiffs, or a class, the Second Circuit has added an additional requirement intended to ensure that both the employer and the EEOC are aware of what is at stake at the conciliation stage. Thus, to take advantage of the rule in such circumstances, a non-filing plaintiff must show that the filing plaintiff's complaint or charge provides "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." Id. (emphasis added).

A statement that a grievance affects persons other than the plaintiff may also suffice to enable non-filing plaintiffs to piggyback on the claim of a similarly-situated filing plaintiff. Such a statement is not sufficient, however, to comply with the

Class Regulations. See Gulley, 905 F.2d at 1385 ("[T]he weight of authority addressing this issue has held that exhaustion of individual administrative remedies is insufficient to commence a class action in federal court; rather, one of the named plaintiffs must have exhausted class administrative remedies."). Accordingly, to rely on a complaint against a federal agency, class members must show that their representative or agent filed a timely class action complaint which, among other things:

> (i) identifies the policy or practice adversely affecting the class; (ii) identifies the specific action or matter affecting the class agent; (iii) alleges the class is so numerous that a consolidated complaint filed on behalf of all members would be impractical; (iv) alleges that there are questions of fact common to the class members; [and] (v) alleges that the claims of the class' agent are typical of the claims of the class' members.

Woodward, 731 F. Supp. 2d at 1187 (citing 29 C.F.R. § 1614.204(a)(2)).

III. Application of Law to Facts

A. Waiver of Timeliness Objection to Houser's Individual Complaint

The Census Bureau contends that none of the seven named plaintiffs initiated contact with the EEOO in a timely manner, despite having notice of the 45-day filing deadline, and that their claims therefore are subject to dismissal because they failed to exhaust their administrative remedies properly with respect to both their individual and class claims. (ECF No. 37 ("Def.'s Mem.") at 9-15). In response, the Plaintiffs concede that the plaintiffs other than Houser did not initiate timely contact with the EEOO. (See Pls.' Mem. at 9-15). They argue, however, that the Census Bureau has waived any

timeliness objection as to Houser's complaint by failing to move for reconsideration of the OFO decision. (Id.).

The Plaintiffs' waiver argument rests primarily on Briones. In that case, as here, a federal agency dismissed a discrimination claim because the plaintiff failed to contact the agency's EEOO within the required time period.[5] 101 F.3d at 288-89. The plaintiff then appealed the agency's decision to the OFO, which remanded the case after determining that the plaintiff's complaint was timely. Id. at 289. On remand, the agency chose not to seek reconsideration of the OFO decision, but nevertheless again dismissed the case, finding that the plaintiff had not been the victim of unlawful discrimination. Id. The plaintiff then commenced an action in federal court. Id.

On appeal, the Second Circuit held that the agency had waived any objection to the untimeliness of the plaintiff's complaint in the subsequent federal court action. Adopting the Ninth Circuit's reasoning in Girard v. Rubin, 62 F.3d 1244, 1247 (9th Cir. 1995), the Second Circuit determined that "a governmental agency defendant may not have 'a second bite at the apple' by arguing lack of timely filing in federal court after failing to challenge an EEOC determination that the complaint was timely filed." Briones, 101 F.3d at 291 (quoting Girard, 62 F.3d at 1247). As the court reasoned, although the federal government may, at times, be "protean," it "cannot in its EEOC form

[5] In Briones, the complaint had to be filed within 30 days. 101 F.3d at 290. Thereafter, the EEOC amended its regulations to increase the time limit to 45 days. Id. n.1.

say that the employee may go forward, while in its [agency] form it says he may not." Id. (quoting Girard, 62 F.3d at 1248).

The Census Bureau attempts to distinguish Briones on that basis that the agency in that case not only failed to challenge the OFO decision, but also took the additional step of issuing a second decision stating that there was no discrimination. (Def.'s Mem. at 17-18; ECF No. 41 ("Reply Mem.") at 8). However, as the Plaintiffs correctly observe, this is a "distinction without a difference." (Pls.' Mem. at 11). Indeed, nowhere in Briones did the Court of Appeals suggest that a final agency decision on the merits is a critical element of a waiver claim. Moreover, when it subsequently had another opportunity to address this issue in Bruce, the Second Circuit held that "[a]n agency waives a timeliness objection by making an express finding that the complaint was timely or failing to appeal an EEOC determination of timeliness." 314 F.3d at 74 (emphasis added). Once again, the language of the decision provides no indication that a waiver can occur only when an agency proceeds to issue a final decision on the merits. Nor is there any reason to believe that this was the Second Circuit's intent since it would, in the words of Briones, impermissibly give the Census Bureau a "second bite at the apple." 101 F.3d at 291.

It follows that, notwithstanding the Census Bureau's attempt to engraft an additional requirement onto the waiver case law, the Census Bureau has waived any objection to the timeliness of Houser's complaint by failing to seek reconsideration of the

OFO's decision. Therefore, at least insofar as Houser's individual claim of discrimination is concerned, the Census Bureau's motion to dismiss must be denied.

B. Inapplicability of Single Filing Rule to Rickett-Samuels' Individual Claims

As noted earlier, Rickett-Samuels filed a formal complaint with the Census Bureau EEOO in March 2010. (Miller Decl. Ex. 4). Although the Census Bureau subsequently placed that complaint into abeyance pending the outcome of this action, the individual claims that she has raised in her complaint cannot piggyback on those asserted by Houser because Rickett-Samuels filed a complaint. See Holowecki, 440 F.3d at 564 ("An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge."); see also Snell, 782 F.2d at 1100 (single filing rule "provides that where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action") (emphasis added). Accordingly, Rickett-Samuels' individual claims must be dismissed.[6]

C. Individual Claims of the Five Other Named Plaintiffs

The remaining named plaintiffs are Johnson, Daniels, Gonzalez, Riesco, and Anderson. It is undisputed that each of these plaintiffs failed to exhaust their administrative remedies. (See Pls.' Mem. at 25-27). Consequently, for their individual

[6] While the Census Bureau placed administrative proceedings concerning Rickett-Samuels on hold, it likely would have dismissed her complaint had it not done so. Indeed, it is undisputed that Rickett-Samuels first initiated contact with the EEOO in February 2010, nearly one year after the Census Bureau rejected her application, (FAC ¶¶ 72-73; Miller Decl. Ex. 4). Her subsequently-filed formal complaint is therefore untimely, unless, like Houser, she lacked actual or constructive notice of the 45-day limitations period. See 29 C.F.R. § 1614.105(a)(1).

claims to be properly before this Court, they must be able to piggyback them onto Houser's complaint. (Id.). It its motion papers, the Census Bureau argues that they may not do so because their claims do not "arise out of similar discriminatory treatment." (Def.'s Mem. at 29 (quoting Holowecki v. Federal Express Corp., 644 F. Supp. 2d 338, 350 (S.D.N.Y. 2009))). According to the Census Bureau, "Houser's case is fundamentally different from all . . . her fellow plaintiffs' cases" because her case "is premised on the burden of complying with the 30-day letter," whereas none of the other plaintiffs was "rejected from employment due to failure to comply with the Census Bureau's 30-day letter process." (Id.).

Not surprisingly, the Plaintiffs disagree, contending that Houser's complaint is capable of supporting the other plaintiffs' claims because "all of their claims arose from the disparate impact of the Census Bureau's criminal screening policies and [because] any reasonable investigation of . . . Houser's charge would have revealed the claims of these [five] individuals." (Pls.' Mem. at 26).

The Plaintiffs who seek to piggyback live in five different states and can scarcely be characterized as having applied for employment in a work unit of "modest size." See Tolliver, 918 F.2d at 1058. Nevertheless, they each allege that the procedures that the Census Bureau has employed during the 2010 Census to screen prospective employees to ensure that individuals with disqualifying criminal records were not hired are discriminatory. While there certainly are differences in the ways in which the Census

Bureau responded to their applications, they therefore seek to redress substantially similar conduct.

The critical question is whether Houser's individual complaint is adequate to support each of these plaintiffs' individual claims. In her formal complaint of discrimination, Houser has alleged that "[t]he policy under which [she] was rejected has a racially discriminatory impact and violates Title VII." (Houser File at 113). She has noted further that the EEOC previously found that "a policy or practice of excluding persons from employment on the basis of their conviction records has an adverse impact on African-Americans." (Id. at 114). Finally, she has cited a second EEOC pronouncement which, in her view, justified a "presumption" that the Census Bureau's "policy of denying employment based on criminal convictions" has an "adverse impact on African-Americans and Hispanics" as a consequence of their higher "national and regional conviction rate[s]."[7] (Id.).

This broad language establishes that Houser's claims are substantially similar to those of the four African-American and Latino plaintiffs other than Rickett-Samuels who seek to piggyback on her claims. Moreover, Houser's formal complaint clearly provides "some indication" that her grievance affects "a group of individuals

[7] In this second policy statement, the EEOC declared that "[i]t is the Commission's position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." (http://www.eeoc.gov/policy/docs/convict2.html) (last visited Mar. 14, 2011).

defined broadly enough to include those who seek to piggyback on the charge." Tolliver, 918 F.2d at 1058. Thus, in her informal complaint, which is an attachment to her formal complaint, Houser claims that "the Census Bureau is discriminating against me based on race, because of the disparate impact of its policies about criminal records on African-Americans." (Houser File at 121). By alleging that the Census Bureau's screening policies have a racially-disparate impact on African-Americans, Houser's complaint unquestionably alerted the Census Bureau that "more than an isolated act of discrimination" was being alleged. Although Houser also acknowledged in her complaint that "some criminal record cases may require business necessity decisions that are debatable," (id. at 115), this statement does not detract from the scope of the discrimination alleged in her complaint. Admitting that the exclusion of particular individuals on the basis of their criminal records may be warranted in certain cases does not mean that other members of the same protected class are not afflicted by the discriminatory policy. Thus, the individual claims of Johnson and Daniels, who are African-American, may piggyback onto Houser's complaint.

Whether Houser's complaint suffices to permit Gonzalez and Riesco, who are Hispanic, to piggyback their way into federal court is a closer question. Nevertheless, by alleging that there is a "presumption" that the Census Bureau's hiring protocol has had "an adverse impact on both African-Americans and Hispanics, based on national and regional conviction rate statistics," (id.) (emphasis added), Houser certainly provided "some indication" that the use of convictions to screen job applicants also

disproportionately affected Hispanic applicants. The claims of Gonzalez and Riesco therefore can piggyback onto Houser's complaint.

The same cannot be said for Anderson. Houser's complaint makes no mention of Native Americans having a high rate of criminal convictions nationwide. In fact, Native Americans are nowhere discussed. Thus, it simply cannot be said that Houser's complaint would have put either the EEOC or the Census Bureau on notice that it would be wise to explore conciliation with this protected group. Furthermore, while the "EEOC itself has interpreted the filing requirements to be satisfied so long as the matter complained of was within the scope of a previously filed charge, regardless of who filed it," Cronas, 2007 WL 2739769, at *5 (quoting Tolliver, 918 F.2d at 1057) (internal quotation marks and ellipsis omitted; emphasis in original), the Plaintiffs have not identified any other fully exhausted complaint upon which a Native American plaintiff, such as Anderson, could piggyback. (See Miller Decl. Exs. 7, 10, 12, 13, 14).

In sum, the individual claims of Johnson, Daniels, Gonzalez, and Riesco may proceed, but Anderson may not piggyback on Houser's complaint.

D. Class Claims

The Census Bureau also argues that the class claims against it must be dismissed because none of the Plaintiffs properly complied with the Class Regulations. (Def.'s Mem. at 19-23; Reply Mem. at 2 (citing, inter alia, Gulley, 905 F.2d at 1385, McKnight v. Gates, 282 F. App'x 394 (6th Cir. 2008), and Downes v. Adams, No. 81 Civ. 61, 1982 WL 31035 (E.D.N.Y. May 12, 1982))). According to the Census Bureau,

only a plaintiff who files a complaint pursuant to the Class Regulations can establish a basis for non-filing putative class members to pursue their claims in federal court. (Def.'s Mem. at 21).

The Plaintiffs respond that function, rather than form, should control in Title VII cases. They place particular emphasis on the Supreme Court's decision in Zipes, in which the Court held that Title VII's requirement that a plaintiff file suit within 180 days of the allegedly discriminatory act is "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 398. In so holding, the Court was able to "honor the remedial purpose of [Title VII] as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." Id.

As the Eleventh Circuit subsequently explained in Griffin v. Carlin, 755 F.2d 1516, 1530 (11th Cir. 1985), prior to 1977, there was no clear means by which a plaintiff could assert class claims under Title VII against a federal agency. At that time, Title VII claims involving a federal agency had to be presented to the Civil Service Commission ("CSC").[8] See Gulley, 905 F.2d at 1385 n.2. The CSC also had promulgated regulations that permitted it to review agency personnel policies at the request of a third party. Griffin, 755 F.2d at 1530. The difficulty was that "[i]f one filed an individual complaint with the agency and tried to raise class claims in court, the

[8] The authority to enforce equal employment opportunity in the federal government subsequently was transferred to the EEOC. Gulley, 905 F.2d at 1385 n.2.

government would argue that there had been no exhaustion because the class claims were not raised in the agency." Id. On the other hand, if one filed a "third party" complaint seeking review of a federal employer's personnel policies, "the government would argue that such a complaint was not an appropriate basis for a civil action." Id. Notwithstanding these arguments, courts generally permitted individual plaintiffs to prosecute class action suits "provided that the class claim could reasonably be expected to grow out of the issues presented in the individual claim and all administrative remedies for the individual claim had been exhausted." Lewis v. Smith, 731 F.2d 1535, 1540 (11th Cir. 1984).

In 1975, in an effort to clarify the applicable law, the United States District Court for the District of Columbia ordered the CSC to modify its regulations to "accept, process and resolve complaints of class and systemic discrimination which are advanced through individual complaints of discrimination." Barrett v. U.S. Civil Serv., 69 F.R.D. 544, 552 (D.D.C. 1975). Two years later, in 1977, the CSC promulgated the Class Regulations, which are specifically designed to allow individual complainants to exhaust class-wide claims.

Even a cursory review of Houser's complaint establishes that she did not comply with the Class Regulations since there is no mention of the required considerations, such as numerosity and typicality. See 29 C.F.R. 1614.204(a)(2). The Plaintiffs argue that the Court should nevertheless allow this suit to proceed with respect to their class claims. In doing so, the Plaintiffs in effect urge a continuation of the pre-

1977 regime despite the promulgation of the Class Regulations. The Plaintiffs also argue that this result is warranted because the EEOC Letter put the Census Bureau on notice that there were scores of complaints about its hiring practices. (Pls.' Mem. at 18).

Finally, the Plaintiffs note that "some of the class-wide charges [against the Census Bureau] have followed" the Class Regulations. (Id. at 19). However, the complaints to which they refer, (see Miller Decl. Exs. 7, 9, 11, 13, 14), were not filed by any of the Plaintiffs in this action. Moreover, only one of those complaints, (id. Ex. 7), was filed before the Plaintiffs initiated this action on April 13, 2010.

Tellingly, there is only one case decided after the Class Regulations came into effect which has held that a plaintiff who exhausts only an individual Title VII claim may maintain a class action in federal court without complying with the Class Regulations. See Fitzwater v. Veterans Admin., 90 F.R.D. 435, 438 (S.D. Ohio 1981). In reaching that conclusion, the district judge in Fitzwater relied on the Sixth Circuit decision in James v. Rumsfeld, 580 F.2d 224, 228 (6th Cir. 1978). In the latter case, however, the plaintiff had followed the old CSC regulations, which were not revoked until the pendency of the appeal. Id. at 227-28. Although the Sixth Circuit described compliance with the new Class Regulations as the "preferred administrative procedure" for exhausting a class complaint, id. at 228, thereby suggesting that other avenues were available, the court expressly declined to resolve whether exhaustion of individual administrative remedies was sufficient to exhaust class administrative remedies. Id. n.5.

The Sixth Circuit recently answered the question left open in James in McKnight, 282 F. App'x at 397-99.[9] There, in his administrative complaint, the plaintiff charged the Department of Defense with "target[ing] and discriminating against a select group of people by their age, spe[cifically] including myself." Id. at 398. Although this language arguably suggested that the plaintiff was suing on behalf of a class, the Sixth Circuit flatly rejected the notion that this was sufficient to exhaust the plaintiff's class administrative remedies, noting the plaintiff's failure to include "the specific information required by [the Class Regulations]." Id.

The Sixth Circuit is not alone in its view that a plaintiff must comply with the Class Regulations to bring a class action against a federal agency in federal court. Indeed, except for Fitzwater, every court that has considered the question has concluded that a plaintiff must comply with the Class Regulations to exhaust a class-based claim under Title VII against a federal agency. See Murphy v. West, No. 98-2308, 1999 WL 64284, at *3 (4th Cir. Feb. 11, 1999); Belhomme v. Widnall, 127 F.3d 1214, 1217 (10th Cir. 1997); McKenzie v. Principi, No. Civ. A. 01-0221, 2001 WL 1005931, at *1 (E.D. La. Aug. 29, 2001); Downes, 1982 WL 31035. Although the Second Circuit has not expressly addressed this issue, it has held in the context of an individual Title VII claim that the filing of a formal charge is necessary to comply with Title VII's exhaustion requirement. See Reich v. Dow Badische Co., 575 F.2d 363, 368 (2d Cir. 1978) (oral

[9] Although McKnight is an unreported decision, Rule 28(f) of the Sixth Circuit Rules permits its citation. See 6 Cir. R. 28(f).

notice to agency is insufficient to meet ADEA filing requirements). In light of this holding, there is no reason to believe that the Second Circuit would diverge from the clear weight of authority and permit a plaintiff to pursue a class claim without complying with the Class Regulations, on the theory that this furthers the broad remedial purposes of federal anti-discrimination statutes.[10]

As noted earlier, there are certain formal complaints that have been filed by persons other than the Plaintiffs which comply with the Class Regulations. However, the only such complaint filed before this suit was commenced was filed on April 9, 2010. (Miller Decl. Ex. 7). Since this was only four days before the initial complaint in this action was filed, (see ECF No. 1), it is obvious that even the claims asserted by that plaintiff could not have been exhausted prior to the filing of this case. The Plaintiffs' class action claims therefore cannot piggyback on the exhausted class action claims of any non-Plaintiffs who followed the Class Regulations.

In sum, the overwhelming majority of courts to address the issue have concluded that adherence to the procedures set forth in the Class Regulations is the only means by which an individual may exhaust class administrative remedies. Since the

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[10] Indeed, the district courts in this Circuit that have considered the issue have concluded to the contrary. See Allen v. Xerox Corp., Civ. B-89-383, 1990 WL 375610, at *5 (D. Conn. June 28, 1990) ("If plaintiff's argument is accepted, an individual ADEA plaintiff need only allege that the EEOC and defendant had effectively been placed on notice of his claim, rather than that a formal charge had been filed. . . . Such a practice runs contrary to the clear congressional determination that only a formal filing sufficiently apprises the agency and any defendants of a plaintiff's claim."); Comfort v. Rensselaer Polytech. Inst., 575 F. Supp. 258, 260 (N.D.N.Y. 1983) (plaintiff who merely sent EEOC copy of proposed future complaint failed to exhaust administrative remedies).

Plaintiffs have not identified any complaint that both complies with the Class Regulations and was fully exhausted prior to commencement of this action, their class claims must be dismissed.[11]

IV. Conclusion

For the reasons set forth above, the Census Bureau's motion to dismiss the FAC pursuant to Rule 12(b)(6), (ECF No. 35), is granted with respect to the individual claims of plaintiffs Rickett-Samuels and Anderson as well as the Plaintiffs' class claims, but denied with respect to the individual claims of the remaining Plaintiffs.

SO ORDERED.

Dated: New York, New York
March 14, 2011

FRANK MAAS
United States Magistrate Judge

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[11] As a practical matter, this disposition will not preclude the Plaintiffs from pursuing their class claims since at least some of the administrative complaints containing class claims that the Census Bureau has held in abeyance pending the outcome of this lawsuit will presumably now be permitted to proceed.