UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHERIE EASTERLING, individually and on behalf of all others similarly situated	CLASS ACTION COMPLAINT CIVIL ACTION NO. 08 CV 826 (JCH)
PLAINTIFF,	
v.	
STATE OF CONNECTICUT DEPARTMENT OF CORRECTION.	
DEFENDANT.	September 29, 2008

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND INITIAL COMPLAINT AND RELATE BACK THE CLAIM

Respectfully submitted on behalf of the
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UNITED STATES DISTRICT COURT
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CHERIE EASTERLING, individually
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Plaintiffs,

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STATE OF CONNECTICUT
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Defendant.

CLASS ACTION COMPLAINT
CIVIL ACTION NO. 08 CV 826 (JCH)

September 29, 2008

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND INITIAL COMPLAINT AND RELATE BACK THE CLAIM

Plaintiff submits this memorandum of law in support of her motion to amend her initial complaint to add the Department of Administrative Services and relate back her claim, on behalf of herself and similarly situated individuals, pursuant to Rule 15(a) and 15(c) of the Federal Rules of Civil Procedure. Although Plaintiff does not believe that the Department of Administrative Services is an indispensable party, Plaintiff makes this motion in an abundance of caution in the event that the Court rules that the department must be added.

PROCEDURAL AND FACTUAL BACKGROUND

In order to secure employment as a Correction Officer ("C.O.") with the State of Connecticut Department of Correction ("D.O.C."), applicants are required to pass a written exam, a physical fitness test, a criminal background investigation, and an interview. Compl. ¶ 2.

The candidate must first pass a written test. After passing the written exam, he or she progresses to the physical fitness test ("P.F.T."). The P.F.T. consists of four parts; failing any one part leads to failing the entire test. Prior to 2007, the P.F.T. included: a sit and reach test; a one-minute sit-up test; a one-minute push up test; and a timed 1.5 mile run test. Compl. ¶ 21.

Ms. Easterling and other similarly situated women applied for the position of C.O. with the State of Connecticut's Department of Correction in 2004. Compl. ¶ 27. Plaintiff took and passed the written portion of the examination and then took and failed the P.F.T. in October 2004. She was notified of her failure on or about October 28, 2004. Compl. ¶ 28-29.

In order to pass the P.F.T., the D.O.C. required applicants to meet a minimum sex-by-age standard, whereby an applicant's pass/fail status was assessed according to the applicant's sex and age. On average, female applicants for the C.O. position failed the P.F.T. at a rate that was higher than their male counterparts. Since 1998, the D.O.C. has administered the P.F.T. with the 1.5-mile run a total of nine times. In each of the nine tests, female applicants have failed the P.F.T. at a rate that is materially higher than their male counterparts. The observed gender-based disparities are statistically significant at greater than 2 standard deviations. Compl. ¶ 23. This observed disparity in pass/fail rates by gender is statistically significant both in the aggregate and for each test administered by the D.O.C. Compl. ¶ 3. The D.O.C. was aware of this adverse impact as early as September 2004, prior to the administration of the October 2004 exam. The D.O.C. chose to administer the exam and utilize its results for hiring C.O.s, despite its adverse impact on women. Since learning of the test's adverse impact on women, the D.O.C. utilized this P.F.T. on three more occasions, in October 2004, June 2006, and October 2006. Every administration of the test since 2001 has resulted in a disparate impact on women. Compl. ¶ 4, 5. In 2007, the D.O.C. modified the physical fitness component of its selection process. Instead of

a timed 1.5-mile test, the D.O.C. substituted a 300-meter run test. Upon information and belief, the new 300-meter run test does not create an adverse impact on female applicants for the C.O. position. Compl. ¶ 5.

There is no empirical data demonstrating that the P.F.T. is predictive of or significantly correlated with important elements of job performance. The individual fitness activities tested by the P.F.T. have not been proven to be an underlying factor for performing essential or critical physical functions of the job of C.O. (that is, the P.F.T. does not have demonstrated construct validity). Compl. ¶ 24. The P.F.T. has not been shown to be predictive of who can and cannot perform the essential or critical physical functions of the job of C.O. (that is, the P.F.T. does not have demonstrated criterion validity.) Compl. ¶ 25. And finally, the P.F.T. has not been scientifically validated as it neither has construct validity, criterion validity nor has been shown to be an accurate and reliable measure of the fitness area tested. Compl. ¶ 26.

Plaintiff, Cherie Easterling, dual-filed a charge with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunity Commission ("EEOC") on behalf of herself and similarly situated women against the State of Connecticut Department of Correction ("D.O.C.") on April 25, 2005. The Plaintiff, in good faith, pursued her complaint at the CHRO and participated in an investigation and mediation with the D.O.C. Representatives from the Department of Administrative Services ("D.A.S.") were present at the fact-finding, mediation, and settlement conference. Affidavit of Attorney Gary Phelan, attached hereto as Exhibit A. A reasonable cause determination was issued by the CHRO and the case was certified for a public hearing. Plaintiff subsequently participated in a settlement conference with the D.O.C. and D.A.S. representatives, exchanged responsive documents with the Defendant, and attended a pre-hearing conference on January 17, 2008.

During the pre-hearing conference, Referee David S. Knishkowy addressed a number of pending issues, including the likelihood of settlement with the D.O.C. and any potential limitations on his ability to award remedies in both a class-action and disparate impact case. The Plaintiff reiterated her position that any settlement discussions must be conducted on a class-wide basis, which the Defendant had consistently refused to do. The D.O.C. was only willing to discuss settlement on an individual basis with Ms. Easterling and affirmatively represented to the Plaintiff that it had the authority to do so. *See* Email from Chapple to Phelan, attached hereto as Exhibit B. At this hearing, Referee Knishkowy stated that the CHRO had no mechanism for adjudicating a class-action claim. Plaintiff requested and received a release of jurisdiction from the CHRO and a notice of right to sue from the EEOC. Compl. at ¶ 8-10.

On May 30, 2008, Plaintiff filed her initial class action Complaint against the State of Connecticut Department of Correction. The parties filed their Joint Report of Parties' Planning on August 6, 2008. Under the Scheduling Order Regarding Case Management Plan entered on August 29, 2008, any motion to amend the complaint or join parties must be filed by the Plaintiff no later than October 15, 2008.

Plaintiff now seeks to amend her class action Complaint. Plaintiff's proposed Amended Complaint (("Am. Comp.") attached as Exhibit C) adds the State of Connecticut Department of Administrative Services as a Defendant.

Pursuant to Local Rules, Plaintiff asked Defendant if it would consent to the filing of this amended complain. Defendant did not consent.

ARGUMENT

I. PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE GRANTED

Plaintiff is entitled to amend the pleading once as a matter of course at any time before a responsive pleading is served. However, in an abundance of caution, Plaintiff has briefed this issue for the court.

A. Leave To Amend Should Be Given Freely When Justice So Requires

The Plaintiff and putative class move to amend the complaint to add the D.A.S. within the time provided under the case management plan ordered by the court and within 120 days of filing the initial complaint. Because there is no undue delay, no bad faith, or dilatory motive on the Plaintiff's part, Plaintiff's motion to amend the original complaint should be granted.

The decision to grant or deny a motion to amend is within the sound discretion of the trial court. Foman v. Davis, 371 U.S. 178, 182 (1962). Fed. R. Civ. P. 15(a) states that "leave [to amend] shall be freely given when justice so requires." As the Supreme Court has held, "this mandate is to be heeded."

> In the absence of any apparent or declared reason -- 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, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Foman, 371 at 182. *See also*, Independence Ins. Serv. Corp. v. Hartford Fin. Servs. Group. No. 3-04-cv-1512 (JCH) 2005 U.S. Dist. LEXIS 7785, *12 (May 3, 2005) quoting Prescription Plan Service Corp. v. Franco, 552 F.2d 493, 498 (2d Cir. 1997); Moore's Federal Practice § 15.14[3] (Matthew Bender 3d ed. 2004) ("essentially, a plaintiff may correct the complaint to show that jurisdiction does in fact exist"). Unpublished decisions attached hereto as Exhibit I.

1. No "Apparent Reason" That Would Preclude Leave

The length of time between the original filing and the instant motion to amend the complaint does not amount to "undue delay." In Independence Insurance Service Corporation

("IISC"), for example, IISC filed its Motion to Amend approximately three months after the filing of its Complaint, and three weeks after defendant's Motion to Dismiss. This court found that "that total span of time does not constitute undue delay." Independence Ins. Svc. Corp. at *15. Similarly, Easterling, on behalf of herself and the putative class filed her complaint on May 31, 2008. The Defendant filed its motion to dismiss on August 11, 2008 and has not yet filed an answer to the complaint. Therefore, the Plaintiff's motion to amend should be freely given because there is no "apparent reason" to preclude the leave. The delay has been minimal, Defendant has not yet filed a responsive pleading, and the Plaintiff has not failed to cure deficiencies by previously allowed amendments.

2. Granting the Motion to Amend Will Not Prejudice The Defendant

The Supreme Court has emphasized that amendments should normally be permitted and has stated "refusal to grant leave without justification is 'inconsistent with the spirit of the Federal Rules.'" Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234 (2d Cir. 1995) (quoting Foman, 371 U.S. at 182). Accordingly, "[i]f no prejudice is found, then leave normally will be granted." Wright & Miller, Fed. Prac. & Proc. Civ. 2d §1484 (1990 & 2000 Supp.). "Prejudice may be found, for example, when the amendment is sought after discovery has been closed..." Finlay v. Simonovich, No. 97 Civ. 1455, 1997 WL 746460, *1 (S.D.N.Y. Dec. 2, 1997) (citations omitted) (alterations in original).

In determining what constitutes "prejudice," this court has considered three factors: (1) whether the amendment would require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (2) whether the amendment would significantly delay the resolution of the dispute; or (3) whether the amendment would prevent the plaintiff from bringing a timely action in another jurisdiction (in the context of an affirmative defense). Indep

Serv Corp. at *13-14 citing Block v. First Blood Associates, 988 F.2d 344, 350 (2d Cir. 1993). One of the most important considerations in determining whether an amendment would be prejudicial is the degree to which it would delay the final disposition of the action. Id. citing H.L. Hayden Co. v. Siemens Medical Systems 112 F.R.D. 417, 419 (S.D.N.Y. 1986) "[A] proposed amendment [is] especially prejudicial...[when] discovery had already been completed and [non-movant] had already filed a motion for summary judgment." Krumme v. Westport Stevens, Inc. 143 F.3d 71, 88 (2d Cir. 1998).

Here, as described *supra*, there is no prejudice or potential for delay. The Plaintiff only recently filed her complaint and the Defendant has not yet answered. Other than filing a motion to dismiss and jointly filing a planning conference report, Defendant has done little else. At this time, only limited discovery has been completed and the Defendant will not be obligated to expend any additional resources to conduct discovery and prepare for trial as a result of the addition of the D.A.S. Therefore, granting the motion to add the D.A.S. will in no way delay the resolution of the dispute.

II. PLAINTIFF'S MOTION TO RELATE BACK AMENDMENT SHOULD BE GRANTED

Fed. Civ. P. 15(c)(3) allows an amendment that changes the party or the naming of the party to relate back to the filing of an earlier complaint where (A) the amended pleading relates to the same transaction or occurrence; (B) where the new party has timely notice of the institution of the action; and (C) where the new party knew or should have known it would have been named but for a mistake of identity of the proper party. Fed. R. Civ. P. 15(c)(2), Fed. R. Civ. P. 15(c)(3)(A); Fed. R. Civ. P. 15 (c)(3)(B); *see also*, Soto v. Brooklyn Correctional Facility, 80 F.3d 34, 35 (2d Cir. 1996).

A. The Plaintiff's Claim against the D.A.S. Arises out Of the Same Conduct Originally Pleaded

The Plaintiff claims that the State of Connecticut D.O.C. utilized a P.F.T. that discriminatorily eliminated female Correction Officer applicants at a statistically significant higher rate than male applicants. The test used by the employer, the D.O.C., was purportedly "developed by the State of Connecticut Department of Administrative Services with input from the Department of Correction." Defendant's Memorandum of Law in Support of Motion to Dismiss, p. 3, attached hereto as Ex. D. The conduct originally pleaded was that the employer, the D.O.C., used a discriminatory P.F.T. during the class liability period. The Plaintiff's claim against the D.A.S. arises out of the same use of the same P.F.T. during the same liability period. The Plaintiff's claims against the D.O.C. and the D.A.S. are identical: the D.O.C. and the D.A.S. utilized a P.F.T. that eliminated female correction officer applicants at a statistically significant higher rate than male correction officer applicants and the claim against both arises out of the same occurrence.

B. The D.A.S. Received Timely Notice Of The Action And Will Not Be Prejudiced In Maintaining A Defense On the Merits

The Plaintiff may add the D.A.S. to the pleadings and her Title VII claim will relate back if the D.A.S. "received such notice of the action that it will not be prejudiced in defending on the merits." Fed. R. Civ. P. (c)(1)(C)(i) The D.A.S. has had ample notice of the action. The D.A.S., as a state agency, is represented by the same counsel upon whom the complaint was served pursuant to Conn. Gen. Stat. §52-64 thus providing the D.A.S.'s counsel with notice of the claim. Moreover, the D.A.S. has participated in the defense of the claim since the claim's initiation at the CHRO. This is not a case where a Plaintiff is attempting to relate back claims against a wholly unrelated entity. Therefore, the D.A.S. has received actual and constructive notice of the action and will not be prejudiced in maintaining a defense on the merits.

C. <u>To the Extent that the D.A.S. Should Have Been Named As A Party, Failure To Name The D.A.S. Was A Mistake</u>

In order for the Plaintiff's amended complaint to relate back to the date of the original complaint, she must show that she failed to name the D.A.S. due to a "mistake concerning the identity of the proper party." Fed. R. Civ. P. 15(c)(3)(B). The "mistake" criterion amendment to Rule 15 was "expressly intended to preserve legitimate suits despite such mistakes of law at the pleading stage." Soto, 80 F. 3d at 36 (citing Fed. R. Civ. P. 15 advisory committee notes for 1966 amendment).

Instances where Plaintiffs have been precluded from amending a complaint to relate back to the original filing date are distinguishable from the case at bar. Those cases reflect occasions where either the Plaintiff had been directed by the court to add a defendant but failed to do so or the Plaintiff was not required to sue a particular defendant and chose not to do so for strategic reasons, despite knowledge of the defendant's role in the action. *See*, for example, Barrow v. Wethersfield Police Department, 66 F.3d 466 (2d Cir. 1995) modified, 74 F.3d 1366 (2d Cir. 1995); Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994).

Unlike the Plaintiff in Barrow, however, it was not for a lack of knowledge of the identity or existence of the D.A.S. that the Plaintiff did not include that agency as a party in the charge and complaint. To the extent that the D.A.S. should have been named as a party, it was a mistake not to do so. Plaintiff here were aware of the D.A.S. and indeed identified the D.A.S. in the CHRO charge, as noted by the Defendant in its motion to dismiss the complaint. Attached hereto as Exhibit D, p. 15 (the plaintiff's complaint to the CHRO demonstrates awareness of the D.A.S.) Moreover, during the pendency of the claim at the CHRO, representatives of the D.A.S. were present for the fact-finding, mediation, and settlement conference. *See* affidavits of Attorneys Phelan and Marnin, attached hereto as Exhibits A and F. Plaintiff's "mistake" was

made in reliance on the D.O.C.'s affirmative representations that it is the employer and that, as the employer, it had the authority to modify the exam and/or direct the D.A.S. to administer and modify the exam. At minimum, the D.O.C. represented to Plaintiff's counsel that the D.O.C. and D.A.S. would "jointly administer the physical fitness test." Ex. B.

Nor is there any evidence that Plaintiff's failure to include the D.A.S. could reflect a strategic decision to include the D.O.C. and omit the D.A.S. The Plaintiff jeopardizes nothing and loses nothing by including the D.A.S. This court has original jurisdiction pursuant to 28 U.S.C. § 1331, and venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the D.O.C., the D.A.S., and the Plaintiff all reside in Connecticut. There is no strategic reason that Plaintiff failed to include the D.A.S. as a defendant. It was purely a mistake, to the extent that the D.A.S. should have been named.

III. EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT PRECLUDE THE ADDITION OF THE D.A.S.

Contrary to Defendant's assertion, "'filing a timely charge of discrimination with the EEOC 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.'" Carrion v. Coca-Cola Bottling Co., No. 3:05-cv-1720 (JCH), 2006 U.S. Dist. LEXIS 91571 at *8 (D. Conn. Dec. 1, 2006) (citing Downey v. Runyon, 160 F.3d 139, 145 (2d Cir. 1998); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, (1982)) *See also*, Surrell v. California Water Service Co. 518 F.3d 1097, 1104 (9th Cir. 2008) (failure to obtain a right-to-sue letter does not preclude federal jurisdiction). Although exhaustion is ordinarily "an essential element" of a Title VII claim, claims not raised at an administrative agency may be brought if they are "reasonably related" to the claim filed with the agency. Williams v. New York City Housing Auth., 458 F.3d 67, 70 (2d Cir. 2006) citing Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1401

(2d Cir. 1993). *See also*, 42 U.S.C. § 2000e-5(e); Zipes, 455 U.S. at 392 (A prerequisite to bringing a Title VII action in federal is filing a charge of discrimination with an administrative agency within 300 days of the alleged unlawful act.).

The parties do not dispute the timely filing of the claim against the D.O.C. However, because the D.A.S. was not named as a party at the administrative agency filing, Defendant has asserted that this court cannot assert jurisdiction over the D.A.S. However, this is incorrect. Because the claims are "reasonably related" and the parties share an "identity of interests," the court should permit the addition of the D.A.S. and the relating back of the claims.

A. The Purpose of Filing With An Administrative Agency Has Already Been Fulfilled

The function of the administrative filing requirement is to convey prompt notice to the employer, thus encouraging conciliation where feasible. It also allows the administrative agency to investigate, mediate, and take remedial action. Finally, it provides the employer with a chance to voluntarily rectify the alleged violation, thus avoiding costly and time-consuming federal litigation. Cameron v. St. Francis Hosp. & Med. Ctr., 56 F. Supp. 2d 235, 239 (D. Conn. 1999) (internal quotations omitted). The D.A.S. representatives' participation during the pendency of the Plaintiff's action at the CHRO reflects that the purpose of administrative filing was fulfilled. The D.A.S. received notice of the claim, the CHRO investigated and attempted to mediate, and the D.O.C. had the opportunity, in conjunction with the D.A.S., to voluntarily resolve the claim. Therefore, the purpose of filing with an administrative agency has already been fulfilled and should not preclude adding the D.A.S. as a party.

B. The D.O.C. And The D.A.S. Share Identity Of Interests

Courts have taken a "flexible stance in interpreting Title VII's procedural procedures so as not to frustrate Title VII's remedial goals," Johnson v. Palma, 931 F.2d 203, 209 (2d Cir.

1991) (internal quotation omitted), and recognized an exception to the general rule that a defendant must be named in the administrative agency complaint. "This exception, termed the 'identity of interest' exception, permits a Title VII action to proceed against an unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge." Id.

The classic definition of the identity of interest exception is articulated in Hernandez Jimenez v. Calero Toledo:

> The identity of interests concept, a judicial gloss on Rule 15(c)(1), provides that the institution of the action serves as constructive notice of the action to the parties added after the limitations period expired, when the original and added parties are so closely related in business of other activities that it is fair to presume the added parties learned of the institution of the actions shortly after it was commenced . . .

604 F.2d 99, 102-03 (1st Cir. 1979) In the Second Circuit, "courts have generally held that Rule 15(c) is satisfied where the original party and added party have a close identity of interests. Identity of interests has also served as touchstone for determining whether the new party knew or should have known that 'but for' a mistake in identity, he would have been sued in the first instance." Sounds Express Int'l Ltd. v. American Themes and Tapes, Inc., 101 F.R.D. 694, 697 (S.D.N.Y. 1984).

The Second Circuit has adopted a four-part test to determine whether an "identity of interest" exists, thereby excusing a Title VII plaintiff's failure to name a defendant in the administrative agency complaint. The four factors are: 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the [administrative] complaint; 2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the administrative

proceedings; 3) whether its absence from the administrative proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. Vital v. Interfaith Med. Ctr., 168 F.3d 615, 619 (2d Cir. 1999) (quoting Johnson, 931 F.2d at 209-210, 931 F.2d at 209-210). *See also* Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 905 (7th Cir.1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1710, 72 L. Ed. 2d 134 (1982) ("Where an unnamed party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance, the charge is sufficient to confer jurisdiction over that party."); Goyette v. DCA Advertising Inc., 830 F. Supp. 737, 747-48 (S.D.N.Y. 1993) (holding an identity of interest existed between a parent company not named in the administrative complaint and its subsidiary).

This identity-of-interest exception may apply even where, as here, Plaintiff were represented by counsel in the administrative proceedings. Williams v. Quebecor World Infiniti Graphics, Inc., No. 3:03-CV-2200 (PCD), 2007 U.S. Dist. LEXIS 21194, *6-7 (D. Conn. Mar. 22, 2007) citing Wood v. Pittsford Cent. Sch. Dist., No. 03-CV-6541T, 2005 U.S. Dist. LEXIS 18063 at *4 (W.D.N.Y. Jan. 10, 2005) (noting that the Second Circuit has declined to explicitly limit the identity of interest analysis to situations in which the plaintiff appeared *pro se* in the administrative proceedings); Olvera-Morales v. Sterling Onions, Inc., 322 F. Supp. 2d 211 (N.D.N.Y. 2004); Manzi v. DiCarlo, 62 F. Supp. 2d 780 (E.D.N.Y. 1999).

1. Factor 1: Was the Identity of the D.A.S. Ascertainable?

The District Court in Jin Zhao v. State Univ. of N.Y. analyzed the four factor identity of interest test in a case with facts similar to the case at bar. 472 F. Supp. 2d 289, 306

(E.D.N.Y. 2007) In Zhao, a Research Foundation acted as the employer but delegated its hiring and other employment decisions to the state university representative. The court in Zhao found that although the Research Foundation could have been named in the administrative agency complaint, the roles of the Research Foundation and the state university, as it related to employees, were substantially intertwined. The court noted that is was not surprising that an employee might not understand, in filing an administrative complaint, that both the Research Foundation and state university should be named. Id. Here, the D.A.S. could have been named in the CHRO complaint, however the roles of the D.O.C. and the D.A.S., as acknowledged by the D.O.C., were substantially intertwined. *See* Defendant's Memo of Law in Support of Motion to Dismiss, p. 3 (D.O.C. provides input into development of P.F.T.); Ex. B; *see also*, Defendant's August 15, 2005 rebuttal ("the Physical Fitness Test administered for Correction Officers is sanctioned by the Department of Administrative Services") and Defendant's July 17, 2005 Schedule A responses and admit/deny responses to complaint (identifying portions of the D.A.S. website in its responses), attached herein as Exhibits G and H. The intertwined roles, coupled with the D.O.C.'s representations to Plaintiff, led to the mistake of not including the D.A.S. Therefore, the Plaintiff can satisfy the first prong of the test because the identity was ascertainable.

2. Factor 2: Similarity of Interests of the D.O.C. and the D.A.S. for Purposes of Conciliation and Compliance

The Plaintiff can also satisfy the second prong of the identity of interests test. Again, like the relationship between the Research Foundation and SUNY, the relationship between the D.O.C. and the D.A.S. creates nearly "identical interests with respect to conciliation and compliance." Id., citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1242 (2d Cir. 1995). Specifically, although the D.A.S. is a separate state agency from the D.O.C., the D.A.S.'s,

statutory purpose is to manage the selection process for the D.O.C. (in conjunction with the D.O.C.) and other state agencies. Under such circumstances, the intertwined relationship between D.O.C. and the D.A.S. and accompanying identity of interests with respect to conciliation and compliance result in this factor weighing heavily in the Plaintiff' favor.

Moreover, in addition to statutory responsibility, the D.A.S. actually accompanied the D.O.C. through the administrative agency. Importantly, D.A.S. representatives were present for the fact-finding, mediation, and the settlement conference at the CHRO. Clearly, the D.O.C. and the D.A.S. recognized the similarity of their interests for the purposes of conciliation and compliance.

3. Prong 3: D.A.S. Was Not "Absent" From The Administrative Proceedings And Therefore There Was No Actual Prejudice To The D.A.S.

As noted *supra*, the D.A.S. was actually present for the administrative proceedings. The agency's presence at the proceedings reflects actual notice of the claim. In addition, the D.A.S.'s counsel (attorneys from the Office of the Attorney General) were present at these meetings. Therefore, there was no actual prejudice to the D.A.S. and the D.A.S. cannot demonstrate any prejudice resulting from not being specifically named in that charge. Thus, Plaintiff can satisfy the third prong of the identity of interests test.

4. Prong 4: The D.A.S.'s Presence At The Administrative Proceedings Communicated To The Plaintiff That Its Relationship With the Plaintiff Was To Be Through The D.O.C.

Despite spending more than two years at the CHRO, neither the D.O.C. nor the D.A.S. ever communicated to the Plaintiff that the D.O.C. was not the proper party or the sole party. To the contrary, the D.O.C. affirmatively represented to the Plaintiff that it had the capacity and authority to modify the P.F.T. and/or to direct the D.A.S. to modify the exam. Ex. B. The

D.A.S., although present for proceedings, did not challenge the D.O.C.'s authority in this action. Their silence strongly communicated to the Plaintiff that any necessary relationship between the D.A.S. and the Plaintiff was to be through the D.O.C. The Plaintiff can therefore satisfy the fourth prong of the identity of interests test.

In applying these factors to the facts of this case, it is evident that the identity of interest exception should apply. In addition to satisfying all four factors of the identity of interest test, both the D.O.C. and the D.A.S. are represented by the same counsel: the Attorney General's Office. Further, the claims against the D.O.C. are "reasonably related" to the claims against the D.O.C. In fact, they are the same. Therefore, because the filing of a timely charge of discrimination with an administrative agency is not a jurisdictional prerequisite to suit in federal court, but a requirement that is subject to waiver, estoppel, and equitable tolling, the Plaintiff should be permitted to relate back her claim despite failing to exhaust her administrative remedies against the D.A.S.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion to amend the complaint and relate back the amendments, and, accordingly, should allow the filing of Plaintiff's First Amended Class Action Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **September 29, 2008** a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System

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