



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Office of Federal Operations  
P.O. Box 19848  
Washington, D.C. 20036

SSA, OCREC  
2007 MAY 15 PM 5:00

Paulette C. Taylor,  
Debra L. Harley, *et al.*  
Complainants,

v.

Jo Anne B. Barnhart,  
Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 07A50060

Hearing Nos. 120-A3-0304X & 120-A3-0305X

Agency Nos. SSA-03-0224 & SSA-03-0208

DECISION

JURISDICTION

Following its final action dated April 4, 2005, the agency filed the instant appeal. On appeal, the agency requests the Commission affirm its final action rejecting the decision of an Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) certifying the above-captioned matter as a class complaint. Pursuant to 29 C.F.R. § 1614.204(d)(7), we accept the appeal.

BACKGROUND

During the relevant period, complainants Paulette C. Taylor and Debra L. Harley were employed as GS-12 Analysts at a Baltimore, Maryland facility of the agency. Acting as putative class agents, on December 9, 2002, complainants initiated contact with an EEO Counselor, and, on February 27, 2003, filed a formal complaint alleging that the agency discriminated against a class of persons on the bases of race (African-American), sex (female), and reprisal for prior EEO activity in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* The complainants alleged that the agency discriminated against the above-indicated class of persons when

it failed to select them for promotions, duty assignments, training, or awards.<sup>1</sup> To support their contentions, the complainants conducted an investigation and obtained surveys from African-American females who were employed at the agency's Maryland facility and felt that the agency discriminated against them in the terms and conditions of their employment. In addition, the complainants obtained affidavits from African-American females who were employed at the agency's Maryland facility and who either did not receive a temporary or a permanent promotion or alleged that they were discouraged from applying for such. Complainants explained that the agency pre-selected or "groomed" individuals outside of their protected classes for promotion. In addition, the complainants asserted that they had to wait a significant number of years in a grade before receiving a promotion to the next grade, although they were listed on a position's best qualified list and/or the individual selected was less qualified. They noted they had both held grade twelve positions with the agency for more than ten years without being promoted. Complainants provided affidavits and surveys from other African-American females employed at the facility to corroborate their assertions.

The agency forwarded the class complaint to an EEOC AJ for procedural acceptance or dismissal and a determination on class certification. The AJ accepted the complaint and issued a decision certifying the class in part and rejecting it in part. Specifically, the AJ certified the class as:

all African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of General Counsel and the Office of the Inspector General, in general schedule grades seven through thirteen (GS-7 through GS-13), after December 9, 2000, who have not been promoted.

The AJ rejected the class complaint as to training and awards. Specifically, the AJ found that the class agents failed to show that the denial of training and awards is typical and common to the class, as very few of the affidavits submitted by complainants in support of their claim mentioned a denial of training or awards. On April 4, 2005, the agency issued a final action stating that it would not implement the AJ's decision, and filed the instant appeal.

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<sup>1</sup> The record reveals that both complainants had individual EEO complaints pending when they initiated EEO contact on the instant matter. For instance, the record shows that Ms. Taylor had a complaint involving promotions, docketed by the agency as SSA-02-0001, that was scheduled for a hearing and, on December 12, 2002, was postponed pending class counseling. In addition, the record reveals that Ms. Harley had a complaint involving a promotion and other matters, docketed as SSA-01-0435, that was pending for hearing and, on December 16, 2002, was dismissed without prejudice pending the filing of a class complaint. The initial interview for the class complaint was held on January 2, 2003.

On appeal, the agency stated that the complainants failed to identify a specific agency policy or practice that resulted in discrimination and the AJ allowed complainants to submit additional evidence beyond the discovery period. Further, the agency stated that the AJ did not apply proper Commission precedent regarding class certification in that the AJ allowed everyone within the alleged protected class as a class member rather than considering disqualifying factors which would reduce the number. The agency also asserted that the allegations in the class claim are those of the class agents rather than the class as a whole, that commonality does not exist because promotion decisions were decentralized and were made by various managers, that supervisors should not be included in the class because a different promotion plan is used for them, that the statistical data used was deficient and supported a showing that black females were promoted, and that the class should not include future employees. In addition, the agency stated that the complainants' EEO contact was untimely because neither class agent presented a promotion for which they were not selected within 45 days prior to the date they initiated EEO contact.

In opposition, complainants requested that we redefine the class as follows:

all African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of General Counsel and the Office of the Inspector General, in general schedule grades seven through thirteen (GS-7 through GS-13), who were denied a promotion, or were discouraged from seeking a promotion, whether temporary or permanent, at any time after December 9, 2000.

The complainants stated that the agency's promotion selection process is discriminatory because it allows a high level of subjectivity in selection decisions and the availability of promotional opportunities is conveyed by word-of-mouth by supervisors and African-Americans are excluded from much of the supervisory word-of-mouth communication. The complainants explained that the class consists of persons in grades seven through thirteen because that grouping includes a class of employees with similar levels of responsibility and similar prospects for advancement. Further, the complainants stated that they specified the beginning date of December 9, 2000, because it was two years prior to the date the class agents initiated informal counseling and Title VII allows back-pay to commence two years prior to the date of the first complaint. Complainants stated that both supervisory and non-supervisory employees in the specified grades are affected by the agency's discriminatory practices and that remedial relief would apply throughout the class. Complainants acknowledged that some supervisory employees may effectuate some of the non-selections at issue, but that the supervisors do not effectuate their own non-selections so a conflict does not exist.

To support their claim of class-wide discrimination in promotions, the complainants provided statistical data and an analysis by an industrial/organizational psychologist (P1). In his declaration, P1 stated that he conducted an "adverse impact" analysis of employee promotions by race and sex, covering the years of 2001-2003, with "particular attention to the promotion rates for black women." P1 said he defined "adverse impact" as "a substantially different rate of selection that works to the

disadvantage of members of a race, sex, or ethnic group.” He said that in conducting his analysis he focused on differences in selection rates between black employees and white employees (noting that the majority of the agency’s employees were either black or white) and men versus women. P1 also said he used two tests of statistical significance—the “80% Rule of Thumb” (the selection rate of one group had to be less than 80% of the selection rate of a higher scoring group) and the Fisher’s Exact Test. Finally, P1 used several assumptions in conducting his analysis. First, he considered all employees at the next lower grade to be eligible for promotion to the next grade (i.e. all employees in grade 11 were eligible for grade 12). Second, he used 2003 employment data in looking at those employees in the next lower grade, even when analyzing promotions for 2001 and 2002, because that was the only year’s data that had been provided by the agency. Based on his analysis as described above, P1 made the following conclusions about the Baltimore facility’s promotion rates for the combined three-year period (2001-2003): (1) there was an adverse impact against blacks for promotion to grades 11, 12 and 13; and 2) there was an adverse impact against black women for promotion to grades 11, 12, 13 and 14.

Finally, the complainants provided documentation showing that they are represented by a law firm that was established more than fifteen years ago and that, during its existence, has represented primarily Title VII discrimination actions. In addition, the complainants indicated that they have also retained the services of a second law firm that has significant experience with civil rights class actions.

#### ANALYSIS AND FINDINGS

A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent of the class are typical of the claims of the class; and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2). The burden is on the party seeking to certify a class to meet all four requirements. *Mastren v. U.S. Postal Service*, EEOC Request No. 05930253 (October 27, 1993). Failure of a party to meet any one of the four requirements is sufficient reason for dismissal. See 29 C.F.R. § 1614.204(d)(2); *id.*

In addressing whether a class complaint warrants certification, it is important to first resolve the requirements of commonality and typicality in order to “determine the appropriate parameters and the size of the membership of the resulting class.” *Fusilier v. Dep’t of the Treasury*, EEOC Appeal No. 01A14312 (February 22, 2002) (citing *Moten v. Federal Energy Regulatory Commission*, EEOC Request No. 05960233 (April 8, 1997)). Commonality requires that the complainant identify questions of fact common to the class. *Mastren v. U.S. Postal Service*. “Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of local autonomy or centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members’ treatment will involve common questions of fact.” *Id.* “Evidence used by courts to determine whether individual and class

claims meet commonality include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions alleged." *Hines, et al. v. Dep't of the Air Force*, EEOC Request No. 05940917 (January 29, 1996). As a practical matter, "commonality and typicality tend to merge." *Hudson v. Dep't of Veterans Affairs*, EEOC Appeal No. 01A12170 (March 27, 2003). Typicality exists where the class agent demonstrates some "nexus" with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. U.S. Postal Service*, EEOC Appeal No. 01A03195 (March 22, 2001).

We are persuaded that the complaint meets the requirements of commonality and typicality. Complainants alleged that a practice of failing to promote African-American females because of their race and sex exists throughout the agency's Maryland facility. Specifically, they stated that the selection process is subjective and that promotional vacancies are conveyed by word-of-mouth in circles in which the protected classes at issue do not travel. In addition, the complainants stated that individuals outside of their protected classes were given additional knowledge and skills to "groom" them for promotions. Complainants alleged that persons outside of their protected classes received promotions more quickly than they did. The complainants provided the results of the statistical analysis conducted by their expert witness who concluded that the Baltimore facility's promotion rates for the combined three year period (2001-2003) had an "adverse impact" against blacks for grades 11, 12 and 13, and an "adverse impact" against black women for grades 11, 12, 13 and 14.

Further, complainants provided affidavits and surveys from African-American females employed at the Maryland facility who were denied a promotion or allegedly discouraged from applying for promotion, and corroborated the class agents' assertions regarding the manner in which others were promoted. Further, the class agents' claims and injuries were sufficiently broad to be typical of the wider interests of the class and the putative class members share common factual and legal questions surrounding whether the agency discriminated against them in implementing a practice that resulted in the non-selection of African-American females. Summarily, complainants presented enough evidence to raise an across-the-board claim of class-wide discrimination in the agency's promotion practices.

Next, EEOC regulation 29 C.F.R. § 1614.204(a)(2)(i) requires that a class be so numerous that joinder of the complaint is impractical. While there is no minimum number required to form a class, and an exact number need not be established prior to certification, courts have traditionally been reluctant to certify classes with less than thirty members. *Mastren v. U. S. Postal Service*, EEOC Request No. 05930253 (October 27, 1993).

When determining whether numerosity exists, other considerations include geographic dispersion, ease with which the class may be identified, the nature of the action, and the size of each claim alleged. See *Wood v. Dep't of Energy*, EEOC Request No. 05950985 (October 5, 1998). The complainants contend that they instituted the class complaint on behalf of between 1,000 and 13,000

putative class members. Complainants provided statistical data indicating that, in 2003, 3,035 employees at the Baltimore facility were African-American females in grades seven through thirteen. Even if we assume that each of the 3,035 may not be a class member, it is reasonable to assume that a significant number may be and that number would be sufficient to establish the impracticality of joinder. While we acknowledge that it could be difficult for the agency to identify accurately the putative class members who were discouraged from applying for promotion, it should be relatively easy to identify the African-American females at that facility who applied for and were not selected for promotions back to December 2000.

Finally, in recommending certification of the class, the EEOC AJ order the class counsel to affiliate with another law firm with greater experience in Title VII class litigation. On appeal, the complainants provided documentation showing that they have secured additional counsel who they represent is experienced with Title VII actions and class actions.

As the class agents' claims are common and typical of the prospective class and there is no apparent conflict of interest with its other members, with the aid of the established competent counsel, they may adequately represent the class.

Finally, pursuant to 29 C.F.R. § 1614.204(b), "complainant[s] may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint." The record reveals that both class agents had active individual complaints involving promotions, including complaints that were at the hearing stage in December 2002, and they sought class counseling on December 9, 2002. We find that the complainants initiated counseling in a timely manner.

#### CONCLUSION

The Commission finds that the agency improperly rejected the AJ's decision certifying the class. Thus, we reverse the agency's final action and remand the matter for further processing in accordance with the Order below.

#### ORDER

1. The Commission hereby provisionally certifies a class composed of:

all African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of General Counsel and the Office of the Inspector General, in general schedule grades seven through thirteen (GS-7 through GS-13) who have not been promoted during the period of time beginning on

December 9, 2000, and continuing to the date a final determination is rendered on the class complaint claim.

2. The Commission remands the class complaint to the EEOC's Baltimore Field Office for assignment to an administrative judge and further processing pursuant to 29 C.F.R. § 1614.204(f) *et seq.*
3. The certification shall remain provisional until the administrative judge examines and approves the adequacy of class counsel with the addition of the affiliated law firm.
4. The Commission orders the agency to notify potential class members of the provisional class certification as required by 29 C.F.R. § 1614.204(e) within fifteen (15) calendar days of the date this decision becomes final.
5. The Commission orders the agency to transmit a complete copy of the class complaint record to the Baltimore Field Office within fifteen (15) calendar days of the date this decision becomes final. The record shall include a copy of the notice sent to class members, a description of the means used to notify the class members, a list of all class members who were notified and the means by which they may be contacted inexpensively by the class agent or class representative without an invasion of their personal privacy, *e.g.*, via agency E-mail or by office telephone.
6. After completion of discovery pursuant to 29 C.F.R. § 1614.204(f), one or both parties may move to narrow the coverage of the class complaint and/or to establish additional subclasses. *See Hines, et al. v. Dep't of the Air Force*, EEOC Request No. 05940917 (January 29, 1996) (an administrative judge has the latitude to redefine a class, subdivide it, or recommend dismissal if it is discovered that there is no longer a basis to proceed as a class complaint). If additional subclasses are established, the law firm of the class shall designate appropriate subclass agents who are willing to serve, and move for their approval by the administrative judge prior to the hearing on, or resolution of, the class complaint. The administrative judge's rulings on such motions shall *not* be the subject of an interlocutory appeal.
7. A copy of the agency's letter of notice to class members, a description of the means used to notify the class members, and a list of all class members who were notified must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's

report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

#### STATEMENT OF RIGHTS - ON APPEAL

##### RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).




COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0900)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

MAY - 5 2006

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

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MAY - 5 2006

\_\_\_\_\_  
Date



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Equal Employment Assistant