UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. BOX 77960
WASHINGTON, DC 20013

PAULETTE L. TAYLOR, DEBRA L. HARLEY, et al., Class Agents, v. ANDREW SAUL,[1] COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, Agency.	)	APPEAL No.: 0720140019 EEOC Case Nos. 120-2003-0304X 120-2003-0305X AGENCY Case Nos. SSA-03-0224 SSA-03-0208

AGENCY'S REQUEST FOR RECONSIDERATION

Pursuant to 29 C.F.R. § 1614.405(c) and Chapter 9, Section VII of Management Directive-110 ("MD-110"), SSA, by and through its undersigned counsel, respectfully requests reconsideration of the decision ("Decision") issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission"), Office of Federal Operations ("OFO") on June 26, 2019 in the above captioned matter.[2] As explained in further detail below, the Agency requests

[1] On June 17, 2019, Andrew Saul was sworn in as the Commissioner of the Social Security Administration ("SSA" or "Agency"). Andrew Saul should be substituted for Acting Commissioner Nancy A. Berryhill on behalf of SSA in this matter. *See e.g.,* Fed. R. Civ. P. 25(d).

[2] Consistent with the Certificate of Mailing attached to OFO's decision, this Request is timely filed as the Agency received the Decision on July 1, 2019.

reconsideration because the Decision involved a clearly erroneous interpretation of material fact and law.

Specifically, the EEOC erred when it found an inference of discrimination despite the fact that the class failed to produce any evidence establishing a *prima facie* case for statistically significant disparity in promotions for African-American female class members because of the class' flawed statistics and insufficient anecdotal evidence. Contrary to the Commission's Decision, the Agency did not establish or admit to a gross disparity in promotions for African-American Females to the GS-12 level that raised an inference of discrimination.

Further, the Commission's Decision was clearly erroneous when it found that the Agency failed to rebut the inference of discrimination or otherwise proffer evidence to explain the alleged gross disparity. In fact, contrary to the Commission's Decision, the Agency identified significant evidence rebutting the inference of discrimination, including an additional expert who testified about the plausible non-discriminatory cause of the statistical disparity.

Finally, the Commission erred in affirming the decision of the Administrative Judge ("AJ") that found classwide discrimination without revisiting class certification. Because this case is procedurally distinct from prior Commission precedent, the Commission's Decision upholding certification of the newly created GS-11 class is contrary to law as the new class does not meet the requirements for certification. Accordingly, the Agency respectfully requests that the Commission grant its request for reconsideration and issue a decision in favor of the Agency.

STANDARD OF REVIEW

An agency may request reconsideration within 30 days of receipt of a decision from the Commission. *See* 29 C.F.R. § 405(c). The Commission will grant a request for reconsideration where the Agency demonstrates that (1) the appellate decision involved a clearly erroneous

interpretation of material fact or law; or (2) the decision will have a substantial impact on the policies, practices, or operations of the agency. *Id.* As explained more fully below, the Agency timely submits this Request for Reconsideration as the decision was based on a clearly erroneous interpretation of material fact and law.

LEGAL ARGUMENT

1. The Commission's Decision Upholding Pattern or Practice Disparate Treatment Is Based on a Clearly Erroneous Interpretation of Law and Material Fact.

The Commission erroneously upheld the AJ's findings: of unlawful discrimination with respect to the promotion of GS-11 African American females to the GS-12 level; that the modification of the class was supported by the Agency's expert witness testimony; and, that the Agency's expert concluded that the Agency under-promoted African American females to the GS-12 level from 2001 through 2006 in a statistically significant matter. Decision at p. 7. Not only is this Decision contrary to law, but it is also premised on a clearly erroneous interpretation of material facts.

Specifically, the Commission erred when it upheld the AJ's decision finding discrimination where the class did not satisfy its burden in establishing pattern or practice disparate treatment. The Commission also erred when it concluded that the statistical analysis conducted by the Agency's expert (and the Commission's Reports and Evaluation Division) demonstrated a gross disparity on its own to result in a finding of disparate treatment. The identified statistical disparity was not so significant that it alone should have resulted in a finding of an inference of discrimination, especially when the class failed to satisfy its burden and neither the AJ nor the Commission found the class' anecdotal evidence convincing, including the very witness who was proffered by the class to support discrimination at the GS-11 level. Finally, the Commission incorrectly stated the Agency did not rebut the inference of

discrimination or otherwise proffer any evidence to explain the gross disparity. To the contrary, in its Brief in Support of Its Appeal, the Agency detailed significant "facts and circumstances" that rebutted the statistical disparity, including but not limited to the testimony of the Agency's experts.[3] For these reasons, the Commission's decision is based on a clearly erroneous interpretation of material fact and law, requiring reversal of the decision and a finding in favor of the Agency.

A. The Class Did Not Satisfy Its Extraordinarily High Burden For Proving Pattern or Practice Disparate Treatment, Requiring Reversal of the Decision.

To prove a pattern or practice claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*., the class must prove by a preponderance of evidence that "discrimination was the [agency]'s standard operating procedure – the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). Moreover, the class must show "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* Thus, the class must show that the agency discriminated "regularly and purposely." *Id.* at 335. It is not enough for the class to assert "an abstract policy of discrimination." *Gen. Tel. Co. of S.W. v .Falcon*, 457 U.S. 147, 159 n.15 (1982). The class must produce "significant proof" of a general policy of discrimination. *Id.; see also Garcia v. Holder,* EEOC Appeal No. 8966598005, *14 (June 7, 2013) (citing *Teamsters,* 431 U.S. at 336) (emphasis added) (explaining "[b]ecause the class action complaint, due to its very nature alleges a concerted effort on the part of the Agency to discriminate systemically against a certain group of persons, the factual allegations for a *prima facie* case of disparate treatment in class actions *are significantly greater* than those required in an individual complaint.").

[3] Agency's Brief in Support of Its Appeal From Final Decision Entered December 13, 2013 ("Agency's Brief in Support of Its Appeal) at 18-39.

To prove that discrimination is the employer's standard operating procedure, the class must ordinarily present *both* strong statistical and strong anecdotal evidence showing the alleged pattern or practice. *See EEOC v. Joe's Stone Crab, Inc.,* 220 F.3d 1263, 1274 (11th Cir. 2000); *see also Teamsters,* 431 U.S. at 337-39, 357 (explaining strong statistical proof accompanied by roughly 40 individual accounts of discrimination in a class of 244 members "brought the cold numbers convincingly to life" and proved pattern and practice discrimination); *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 878-79 (1984) (explaining the testimony of three class members alleging discrimination was insufficient to establish a general policy of discrimination).

Significantly, the Supreme Court in *Teamsters* cautioned "[s]tatistics . . . come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340; *see also Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-12 (1977) (explaining that evidence of gross statistical disparities does not always conclusively prove pattern or practice discrimination and the usefulness of statistics "depends on all the surrounding facts and circumstances."). Importantly, the ultimate burden of persuasion 'remains at all times with the [class]." *Tex. Dep't of Cmty. Affairs v Burdine*, 450 U.S. 248, 253 (1981); *see* EEOC Compliance Manual §15-II, n.25 (citing *Reeves v. Sanderson Pluming Prods., Inc.,* 530 U.S. 133, 143 (2000)).

After a trial on the merits of a discrimination claim, the only issue is whether the class "establish[ed] by a preponderance of the evidence that racial discrimination was the [agency]'s standard operating procedure – the regular rather than the unusual practice." *Bazemore v. Friday,* 478 U.S. 385, 698 (1986) (quoting *Teamsters,* 431 U.S. at 336); *see also U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983) (after the close of evidence, the district court

should have proceeded to the specific question of whether the defendant intentionally discriminated against the plaintiff).

In the present matter, the class did not satisfy their extremely high burden as required by law, rendering the Commission's Decision clearly erroneous. After a full hearing, the AJ issued her decision and found the class' statistical evidence "deeply flawed, suspect, and unreliable." Order Entering Judgment, issued December 13, 2013 ("Order Entering Judgment") at 53. The AJ found the class' expert's "analysis was so poorly explained that no conclusion could be made from her work that Black females were under-promoted in a statistically significant manner or discriminated against in promotions as a class" and that the class' expert's testimony was "untrustworthy." *Id.* at 53, 56. Significantly, the AJ concluded the class' expert's analysis was "unreliable, not worthy of weight and *incapable of supporting a prima facie showing of statistically significant disparity in promotions for the African-American females described in this class*." *Id.* at 58. The AJ "accorded no weight" to the class' expert's analysis as it was "*insufficient to support the class's case for* statistical disparity under a disparate impact theory of discrimination or *a pattern or practice theory of intentional discrimination*." *Id.* (emphasis added). In the end, the AJ found that "the Class cannot make a *prima facie* case for statistically significant disparity in promotions for Black female class members. Thus, the Class cannot prevail in its case for class-wide discrimination as set forth in its complaint." *Id.* at 60. Likewise, the class did not provide anecdotal evidence that demonstrated pattern or practice discrimination against Black females in promotions." *Id.* at 62. Significantly, the AJ held "[w]ithout the statistical evidence to support their case, the anecdotal evidence is insufficient for the class to prevail on its claim." *Id.*

As set forth in the AJ's Interim Decision and Order Entering Judgment, the Class in the present matter never satisfied its burden by establishing a *prima facie* case. Specifically, the Class was unable to show through statistical or anecdotal evidence that the alleged intentional discrimination was the agency's standard operating procedure. Decision at 52-62. Notwithstanding the above findings, the AJ's creation of a new class coupled with the AJ's strict application of *McDonnell Douglas*[4] entirely overlooked the ultimate question – whether the newly created GS-11 class "demonstrated a pattern or practice of discrimination by a preponderance of evidence." *Bazemore,* 478 U.S. at 398; *see Aikens*, 460 U.S. at 713-16; *Furnco Const. Co. v. Waters,* 438 U.S. 567, 579 (1978) ("a *McDonnel Douglas prima facie* showing is not the equivalent of a factual finding of discrimination, however."). Nonetheless, the AJ improperly shifted the burden to the Agency, misconstrued the Agency's experts' testimony, and improperly found discrimination against a newly created class.

In affirming the AJ's decision, the Commission disregarded the AJ's repeated conclusions that the Class itself presented no statistical or anecdotal evidence to support its case.[5] This resulted in a wholly unsupportable finding of agency-wide discrimination against GS-11 African-American females. Because the Commission's Decision is based on a clearly erroneous interpretation of law and material facts, the Decision should be vacated in favor of the Agency.

B. The Decision Upholding the AJ's Finding Of Intentional Discrimination Was Based On A Clearly Erroneous Interpretation of Law and Material Fact.

Despite the class providing unreliable statistical and anecdotal evidence, the Commission incorrectly affirmed the AJ's decision finding class discrimination for the newly created GS-11

[4] Order Entering Judgment at 63-64.
[5] *Id.* at 53-62.

class. In reaching its decision, the Commission overlooked the absence of a *gross* statistical disparity in finding intentional discrimination based on statistics and instead focuses on the fact that the Agency's expert found a disparity of more than two or three standard deviations with respect to the newly created GS-11 class.

As explained in the Agency's Brief in Support of Its Appeal, the statistical disparity identified by the Agency's expert was not "gross," especially since the statistics did not reflect disparities in agency-wide promotion decisions.[6] Further, the Commission did not evaluate the other facts and circumstances identified in the Agency's Brief in Support of Its Appeal.[7] Contrary to the Commission's statements, the Agency detailed all of the evidence that rebutted the inference of discrimination, including the testimony of an additional expert who explained a potential non-discriminatory cause for the disparity.[8] Given that the class failed to provide reliable statistical or anecdotal evidence and the fact that the Agency elicited testimony from its experts rebutting the slight disparity, the Commission's decision to uphold intentional discrimination as the agency's standard operating procedure was based on a clearly erroneous interpretation of law and material fact, requiring reversal of the decision.

i. The Agency Did Not Establish or Admit to a *Gross* Statistical Disparity.

As noted in the Commission's decision, "[t]he Supreme Court has not endorsed a bright line rule or precise number of 'standard deviations' which would require a finding of discrimination. Instead, courts examine statistics on a case-by-case approach when analyzing the significance of a disparity." Decision at 7 (citing *Ottaviani v. State Univ. of New York at New Paltz,* 875 F.2d 365, 371 (2d Cir. 1989) (declining to hold that two standard deviations as a

[6] Agency's Brief in Support of Its Appeal at 21-25.
[7] *Id.* at 25-39.
[8] *Id.*

matter of law presents a *prima facie* case). Additionally, the Commission recognized that "the courts should look not only at the statistics, but at the surrounding facts and circumstances." *Id.* (citing *Ottaviani,* 875 F.2d at 371; *Teamsters*, 431 U.S. at 340; and *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 995 (1988).

Despite acknowledging that the courts should look at all of the facts and circumstances, the Commission focused solely on the numerical disparity identified by the Agency's expert, Murray S. Simpson, Ph.D., to the exclusion of all other "facts and circumstances" that preclude a finding of an inference of discrimination. This is especially evident when examining the case cited by the Commission to find that the Agency's statistics demonstrated intentional discrimination, especially since none of the decisions support the conclusion that -3.48 standard deviations constituted a "gross" statistical disparity. Decision at 7.

For instance, in its decision in this matter, the Commission cited to *Castaneda v. Partida,* 430 U.S. 482, 496-97 n.17 (1977) for the proposition that disparities of two or three standard deviations are "would undercut the hypothesis that decision were being made randomly with respect to race." Decision at 7. However, the evidence in *Castaneda* is significantly different from the evidence presented in this matter. Specifically, the Court in *Castaneda* found an inference of discrimination where the plaintiffs presented evidence showing a statistical disparity based on 29 standard deviations. *Id.* Additionally, the Court underscored the fact that the defendant/State provided "practically no evidence" and failed to challenge the reliability of plaintiffs' statistical evidence. *Id.* 496-97 n.17, 498. Although the *Castaneda* Court found that the defendant/State failed to rebut the inference of discrimination, it emphasized that it was "not saying that the statistical disparities proved [in that case] could never be explained in another

case; [the Court was] simply saying that the State did not do so in this case." *Id.* at 499 (citing *Turner v. Fouche,* 396 U.S. 346, 361 (1970)).

The remaining precedent cited in the Commission's decision regarding the need for statistical evidence underscores the need for the disparity to be "gross." *See, e.g., Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 168 (2d Cir. 2001) (emphasis added) (explaining that "[s]tatistics are so central to pattern-or-practice cases that they 'alone can make out a *prima face* case of discrimination if the statistics reveal a *gross* disparity in employee treatment."); *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08 (1977) (emphasis added) ("where *gross* statistical disparities can be shown, they alone may in a proper case constitute prima face proof of pattern or practice of discrimination."). Further, the Commission's reliance on *Hazelwood* to support a finding of an inference of discrimination in this matter is misplaced. In *Hazelwood,* the Supreme Court noted in *dicta* that the fluctuation of more than two or three standard deviations would "undercut the hypothesis that decisions were being randomly made with respect to race." *Hazelwood,* 433 U.S. at 312 n.17; *see* EEOC Compliance Manual §15-V.A.3, n.67 (quoting *Hazelwood*). The Supreme Court did not conclude that numbers above three deviations resulted in *per se* finding of discrimination. In fact, despite the statistical disparity of more than five to six standard deviations at issue in *Hazelwood*, the Court insisted on consideration of "all the surrounding facts and circumstances" before finding discriminatory intent. *Id.* at 309 n.14, 312-15 (citing *Teamsters*, 431 U.S. at 340); *see also Sperling v. Hoffman-LaRoche, Inc.,* 924 F.Supp. 1346, 1383 n.22 (D.N.J. 2008) (analyzing *Hazelwood* and noting that "standard deviations of between 2 and 6 . . . are not the 'gross disparities' that would by themselves constitute a prima facie pattern-or-practice case"). In fact, other courts applying Supreme Court precedent have found that statistical disparities comparable

to or in excess of -3.48 standard deviations were insufficient to support either a prima facie case or the ultimate finding of discrimination. *See, e.g., Apsley v. The Boeing Co.,* 691 F.3d 1184, 1195 (10th Cir. 2012) (affirming a finding of no company-wide discrimination despite statistically significant disparities of more than five standard deviations); *Allen v. Prince George's Cty., Md.,* 737 F.2d 1299, 1307 (4th Cir. 1984) (standard deviation in excess of three, while statistically significant, was "far less than the double digit figure found significant" in *Castaneda*).

A truly "gross" disparity – sufficient to prove discrimination standing alone – must be so lopsided that there is no question discriminatory intent can be presumed. *See, e.g., Castaneda,* 430 U.S. at 496 n.17 (finding that the gross disparity of 29 standard deviations alone was sufficient to support a finding of discrimination); *see also Lopez v. Laborers Int'l Union Local 18,* 987 F.2d 1210, 1215 n.13 (5th Cir. 1993) (internal citations omitted) (-10.24 standard deviations constituted "a truly 'gross' disparity."). Similarly, in *Teamsters,* the Supreme Court coined the phrase "the inexorable zero," based on the glaring absence of any African American drivers in a group of approximately 1,800. *Teamsters*, 431 U.S. at 337, 342 n.23; EEOC Compliance Manual §15-V.A.3, n.69 ("If the statistical disparity is gross, it alone can establish a pattern or practice claim, such as when there is an 'inexorable zero.'") (citing *Hazelwood,* 433 U.S. at 308-08; *Teamsters,* 431 U.S. at 341 n.23). These cases do not support the improper finding of discrimination in this matter, where African-American females received 298 of the 1,557 total promotions at issue, a magnitude of only -3.48 standard deviations.[9] A statistical disparity of -3.48 standard deviations is not the type of stark pattern that cannot be explained on grounds other than discrimination. Thus, the Agency's statistical disparity at a magnitude of

[9] *See* Agency Hr'g Ex. 25a, Simpson Rev. Report at 27, Table C4.

-3.48 standard deviations is far from a *gross* disparity for purposes of establishing a *prima facie* case of intentional discrimination, especially when the AJ rejected the class' statistical evidence as unreliable and found the anecdotal evidence insufficient to establish a *prima facie* case on its own.[10] Because the Agency's statistics do not constitute a "gross" statistical disparity sufficient to prove an inference of discrimination, the Commission's Decision is based on a clearly erroneous interpretation of law and material fact.

ii. The Commission Erred When It Failed to Evaluate the Other Facts and Circumstances and Upheld the AJ's Finding of Discrimination in the Newly Created GS-11 Class.

Contrary to the statements in the Commission's Decision, the Agency rebutted the inference of discrimination.[11] As detailed in the Agency's Brief in Support of its Appeal, the Agency detailed numerous facts and circumstances that precluded a finding that the statistical disparity was caused by the alleged discriminatory practice – i.e., that the decision-makers exercised "unfettered subjective discretion" in a consistently discriminatory fashion with respect to the new GS-11 class.[12]

For instance, the Agency detailed why the AJ's reliance on the cohort study issued by its expert, Dr. Simpson, was not dispositive of intentional discrimination.[13] In short, Dr. Simpson's analysis did not take into account applicant flow data: i.e., his promotion pools included African-American females who never applied or qualified for promotion and did not consider factors such as the actual applicants' experience and qualifications.[14] *See Valentino v. U.S.P.S.,* 511 F.Supp. 917, 954 (D.D.C. 1981) (approving defendant's cohort analyses for general statistical

[10] Order Entering Judgment at p. 60, 62.
[11] Decision at 8.
[12] Agency's Brief in Support of Its Appeal at 25-39.
[13] Agency's Brief In Support of Its Appeal at 26-28.
[14] *See* Order Entering Judgment at 34-35 (¶¶ 156, 160, 161); Agency's Hr'g Ex. 25a, Simpson Rev. Report at 2-3, 5-7; Agency's Hr'g Ex. 25a, Reply Report of Murray S. Simpson, Ph.D. at 3 (Feb. 8, 2008).

information); *Wards Cove Packing v. Atonio,* 490 U.S. 642, 657 (1989) (explaining that a class does not prove disparate impact using bottom line numbers of an imbalance in the workplace); *Garcia v. Dep't of Justice,* EEOC Appeal No. 0120122033, *13 (June 7, 2013) (discounting agency expert's analysis because she did not "conduct an applicant flow data").[15] In fact, because Dr. Simpson's analysis did not take into account the necessary applicant flow data as required by law to reach an inference of discrimination, the Agency cannot be found to have admitted to a gross statistical disparity that raised an inference of discrimination. Therefore, the Commission's acceptance of the slight statistical disparity identified in Dr. Simpson's cohort analysis to uphold an inference of discrimination is contrary to law as the Supreme Court has long emphasized that statistics should reflect the actual applicant pool to be probative of intentional discrimination. *See, e.g., Watson,* 487 U.S. at 997 (citing *Hazelwood,* 433 U.S. at 308).

The Commission's decision to uphold the inference of discrimination against the newly created GS-11 class is based on a clearly erroneous interpretation of material fact as there is an inherent conflict between the finding of no discrimination against the originally certified class and the finding that the Agency discriminated against the newly created GS-11 class. Indeed, neither the AJ nor the Commission reconciled how the same agency officials who allegedly discriminated against African-American females at the GS-11 level, were, at the same time promoting African-American females within acceptable ranges of the expected rates at all other levels. *See also Puffer v. Allstate Ins. Co.,* 255 F.R.D. 450, 465 (N.D. Ill. 2009) (no uniform pattern or practice discrimination shown where there is a wide discrepancy in standard deviations between grades).

[15] Courts apply the *Wards-Cove* analysis to pattern-or-practice claims. *See, e.g., EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 301 n.6 (7th Cir. 1991).

Further, the Commission's Decision finding an inference of discrimination is contrary to law because the statistical evidence did not show an agency-wide policy of systematic and intentional discrimination. Rather, it showed that African-American females were promoted within the expected range in the vast majority of positions. *See Teamsters,* 431 U.S. at 335-36; *Garcia,* EEOC Appeal No. 8966598005, *14 (citing *Teamsters,* 431 U.S. at 336); *Apsley*, 691 F.3d at 1195, 1200-01 (affirming finding of no company-wide pattern or practice of discrimination where statistically significant disparities occurred in only 4 out of 29 director groups). Thus, the Commission's failure to take this material fact into account, renders its Decision erroneous.

The Commission's Decision is also based on a clearly erroneous interpretation of material fact when it mistakenly found that the Agency "did not rebut [the] inference of discrimination or otherwise proffer any evidence to explain the gross disparity." Decision at 8. Contrary to the Commission's statement, the Agency produced evidence negating any possible inference of intentional discrimination from the statistics via the testimony and report of James Outtz, Ph.D.[16] In summary,[17] Dr. Outtz testified that the disparity was more likely caused by the underrepresentation of minorities, especially African-American women, in positions with the skill sets commanded by the technology-oriented occupational series primarily responsible for creating the disparity.[18] *See, e.g., Hazelwood,* 433 U.S. at 309 n.13 (explaining it is well established that a lack of sufficient qualified minority candidates in the promotion pool is a legitimate reason to explain a statistical disparity in promotion decisions); *Wards-Cove,* 490 U.S. at 651-52. Because the Commission failed to consider the evidence the Agency used to rebut the

[16] Agency's Brief in Support of Its Appeal at 30-33.
[17] *Id.*
[18] Order Entering Judgment at 38-39 (¶¶ 176-187), 63, 64; Hr'g Tr. Vol XII at 17:4-21:25, 23:14-26:20, 28:1-29:7, 35:22-39:11 (Outzz); Agency Hr'g Ex. 30a, Outzz Report at 12-16; Agency Hr'g Exs. 30b, 30c.

inference of discrimination, the Commission's Decision is based on a clearly erroneous interpretation of law and material fact.

The Agency also noted that the AJ erred in her finding because the class' anecdotal evidence failed to demonstrate intentional discrimination.[19] In fact, the AJ found the class' evidence wholly failed to demonstrate a pattern or practice of discrimination. This was especially true for the testimony from the one GS-11 class member, Karen Better-Bastfield, who "did not support any class wide discrimination of Black females or demonstrate that the selection decisions were without merit and especially harmful to Black females."[20] Thus, the Commission's Decision upholding an inference of discrimination for the newly created GS-11 class is based on a clearly erroneous interpretation of law and material fact.

Finally, the Agency highlighted the fact that its policies and promotion practices did not support a finding of intentional discrimination.[21] As detailed in the Agency's Brief in Support of Its Appeal, the evidence demonstrated that the recommending and selecting officials exercised their decision-making discretion in an appropriate fashion by considering applicants' experience and qualifications in light of the requirements of the relevant positions.[22] Further, the evidence demonstrated the agency's non-discrimination policy, which expressly forbids discrimination on the basis of race and gender.

In affirming the AJ's decision, the Commission issued a Decision that was based on a clearly erroneous interpretation of law and material facts. Although the Agency detailed numerous facts and circumstances that rebutted the claim that discrimination was the Agency's standard operating procedure, the Commission erroneously concluded that the Agency failed to

[19] Agency's Brief in Support of its Appeal at 33-35.
[20] Order Entering Judgment at 60; *see also id.* at 41 (¶193).
[21] Agency's Brief in Support of its Appeal at 35-39.
[22] *Id.*

rebut or otherwise proffer any evidence to explain the statistical disparity. Accordingly, the Commission's decision should be reversed and a decision should be entered in favor of the Agency.

2. OFO's Decision Is Based On a Clearly Erroneous Interpretation of Law As The Newly Certified GS-11 Class Does Not Meet the Criteria for Certification.

Relying on *Wal-mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011), the Agency argued in its appeal that that the newly crafted GS-11 class in the AJ's Interim Decision and Order Entering Judgment does not meet the requirements for class certification.[23] Specifically, the Agency argued that its appeal to OFO was the first opportunity the Agency could challenge the AJ's certification of the newly crafted GS-11 class and that the class' allegation of "excessive discretion" does not raise common questions appropriate for class certification under appropriate legal authority, including U.S. Supreme Court precedent. Surprisingly, OFO did not address or even reference the Agency's argument challenging class certification, and instead, focused its Analysis and Findings concerning the class on whether the newly defined class established pattern or practice disparate treatment discrimination.[24] In continuing to recognize the newly defined GS-11 class without further analysis of the Agency's compelling arguments challenging certification (on procedural grounds different from prior Commission precedent), OFO issued its Decision finding discrimination based on a clearly erroneous interpretation of law. As explained below, the Agency's appeal challenging class certification is properly before the Commission, which is bound by *Dukes*, requiring reversal of the certification of the new GS-11 class and denial of class relief.

[23] Agency's Brief in Support of Its Appeal at 39-54.
[24] The Decision also addressed the class agent's individual claims and class counsel's request for attorneys' fees and costs, which the Agency did not appeal.

A. The Agency's Challenge To the Newly Certified GS-11 Class Is Properly Before the Commission and Ripe for Ruling In the Agency's Favor.

The Commission's requirements for class certification at 29 C.F.R. § 1614.204(a)(2) were based on, and closely track, Rule 23 of the Federal Rules of Civil Procedure. *See* Preamble to Final Rule, 57 Fed. Reg. 12634-01, 12638-69 (Aug. 10, 1992); *see also Jones v. Potter,* EEOC Doc. 0120083637, *2 (Sept. 10, 2010) (explaining the regulation is an adaptation of Rule 23(a) of the Federal Rules of Civil Procedure). Specifically, a class must allege 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 underlying purpose of a class complaint is to economically address claims 'common to [the] class as a whole [that] turn on questions of law applicable in the same manner to each member of the class.'" *Jones,* EEOC Doc. 0120083637, *2 (citing *Falcon,* 457 U.S. 147, 155 (1982) (citations omitted)); *Mitchell v. Dep't of Air Force,* EEOC Doc. 01A42828, *2 (Sept. 1, 2005)). The class agent bears the burden of proof and is obligated to submit sufficient evidence showing that the class meets the criteria required for certification. *Jones,* EEOC Doc. 0120083637, *2. If the class complaint does not meet the criteria for certification, it will be dismissed. MD-110, Ch. 8, Part IV, A.

MD-110 provides that the AJ in a given case "shall issue a decision on whether to certify or dismiss a class complaint," and "[e]ven after a class is certified, . . . remains free to modify the certification order or dismiss the class complaint in light of subsequent developments." MD-110, Ch. 8, Part V, A (citing *Falcon,* 457 U.S. at 160). MD-110 further provides that an AJ's

certification decision is subject to appeal in accordance with 29 C.F.R. § 1614.403. *Id.* In the present matter, the current GS-11 class was finalized in the context of the December 13, 2013 Order Entering Judgment, not as a separate certification decision. MD-110, Ch. 8, Part V; *see also* 29 C.F.R. § 1614.204(d)(7). Because the AJ did not certify and transmit the decision as anticipated in MD-110, the Agency's appeal of the Order Entering Judgment was the first chance the Agency had to initiate the appeal procedure prescribed by MD-110 to challenge the newly created GS-11 class.[25]

In the past, the Commission has evaluated the timing of an agency's motion to decertify in light of *Dukes* and declined to overturn class certification after "a decision on the merits." *See, e.g., Garcia v. Dep't of Justice,* EEOC Appeal No. 0120122033 (June 7, 2013), *req. for recon. denied with modification, Belia S. v. Dep't of Justice,* EEOC Request No. 0520130561, *4 (Aug. 12, 2014) (citing *Hyman v. Dep't of Health & Hum. Servs.,* EEOC Appeal No. 01840707 (Sept. 9, 1986). However, the AJ's (and presumably OFO's) reliance on *Garcia* to decline decertification in this matter was misplaced. *Garcia,* and its related decision in *Belia S.,* are procedurally distinct from this matter as those decisions did not involve the certification of a new class via an Order Entering Judgment, and those cases rely on an older version of Rule 23 of the Federal Rules of Civil Procedure.

In *Garcia,* the Commission considered the timing of a motion to decertify in light of *Dukes*. *See Garcia,* EEOC Appeal No. 0120122033, *1. At first glance, the procedural posture of *Garcia* and its related case, *Belia S.,* appears similar to the present matter as the agency

[25] Although the newly crafted GS-11 class was first referenced in the Interim Decision on Liability rendered in April 2011, that decision was not final, and therefore, not ripe for appeal. *See Morawski v. Potter,* EEOC Doc. 0720080014, *2 n.1 (July 23, 2010) (agency's appeal was timely, as it had no obligation to appeal an interim decision on liability issued two years prior to the final decision, which included findings on damages); *Robinson v. Potter,* EEOC Doc. 07A30021, *2 n.3 (Jan. 23, 2004) ("There is no regulatory basis for an AJ to issue an 'Interim Decision,' and as such, the agency had no obligation to file an appeal from it."). Accordingly, SSA's appeal was procedurally distinct from the agency's September 30, 2011 Motion to Decertify.

challenged the AJ's denial of the agency's motion to decertify the class. *Id.*; *Belia S.,* EEOC Request No. 0520130561, *1. However, in the present matter, the agency *appealed* the AJ's *certification of the newly created GS-11 class* for the first time (and at the first opportunity). Unlike *Garcia* and *Belia S.*, SSA did not have a chance to challenge certification of the newly created GS-11 class, because the Agency first learned of this newly created class after the hearing in the AJ's Interim Decision on Liability and could not appeal the certification of the new class until the AJ issued her Order Entering Judgment on December 13, 2013. In fact, in the AJ's Memorandum and Order denying the Agency's Motion to Decertify, issued on December 13, 2013, the AJ explicitly acknowledged the agency's right to "raise appropriate arguments [regarding] certification of the GS-11 class" during the appeals process. *See* Memorandum and Order on the Agency's Motion to Decertify, issued December 13, 2013 at 2. Because of this significant procedural distinction, *Garcia* and *Belia S.* are inapposite.

Further, the holdings in *Garcia and Belia S.* may not be procedurally sound as they are premised on an outdated rule. In *Garcia,* the Commission declined to entertain a motion to decertify filed after a "decision on the merits," *citing Falcon*, 457 U.S. 147, 160 (1982), for the proposition that "a certification order may be altered or amended *before the decision on the merits*." *Garcia,* EEOC Appeal No. 0120122033, *9. *Falcon*, in turn, cited to then current Federal Rule of Civil Procedure 23(c)(1) – which referenced "the decision on the merits" – for the relevant proposition. But Rule 23 was amended in 2003 to allow for alteration or amendment of the order "*before final judgment*." (Emphasis added). As such, *Garcia* is inconsistent with the current Federal Rule of Civil Procedure 23(c)(1). *See also* FED. R. CIV. P. 23 Advisory Committee Notes, 2003 Amendments (explaining "[t]he provision that permits alteration or

amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than 'the decision on the merits.'").

While the Commission is not strictly bound by the Federal Rules of Civil Procedure, it can and does frequently look to them for guidance. *See Obas v. Holder,* EEOC Appeal No. 0520110179, *2 (April 21, 2011). In this instance, neither the Commission's regulations nor MD-110 clarify at what point an AJ becomes constrained from modifying the certification order. *Cf.* MD-110, Ch. 8, Part IV.A (explaining "[e]ven after a class is certified, the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments.").[26] Accordingly, the Commission should look to the current version of the Federal Rules of Civil Procedure – not to case law premised on an outdated version of the Federal Rules – for guidance on this issue.

In this case, the current version of Rule 23(c)(1) makes clear that the AJ could have modified the class in response to the Agency's Motion to Decertify that it filed prior to the AJ's issuance of the Order Entering Judgment. Because the AJ's "final judgment" was not issued until December 13, 2013, the AJ was free to modify the class certification before that time, especially upon receipt of the Agency's Motion to Decertify which was filed in September 2013. Indeed, the Supreme Court has ordered remand for reconsideration of a certification decision in light of *Dukes*, even after a jury verdict was rendered in favor of a class. *See Chinese Daily News, Inc. v. Wang,* 132 S. Ct. 74 (2011) (mem.), on remand *Wang v. Chinese Daily News, Inc.,* 737 F.3d 538 (9th Cir. 2013).

[26] Clarification of the requirements for maintaining a class certification in Supreme Court precedent is a sufficient "development" that warrants visiting the class certification decision in this matter, especially when the allegations are extremely similar to that precedent.

As explained above, *Garcia* and *Belia S.* are inapplicable to the current proceedings. Therefore, the Agency's appeal of the eleventh-hour certification of the GS-11 class was properly before the Commission. Because OFO's Decision continued to recognize the newly defined GS-11 class without addressing the Agency's compelling arguments appealing certification, OFO issued its Decision finding class wide discrimination based on a clearly erroneous interpretation of law. Accordingly, OFO should grant the Agency's request for reconsideration, reverse certification of the new GS-11 class, and deny relief to the newly created class.

B. The Commission's Decision is Contrary to Law As Recent Supreme Court Precedent Establishes that the Newly Created GS-11 Class Does Not Satisfy the Commonality Prerequisite Set Forth at 29 C.F.R. § 1614.204(a).

As set forth above, Commission regulations require that a class of individuals must allege "questions of fact common to the class" in order to warrant certification. 29 C.F.R. §§ 1614.204(a)(2)(ii), (d)(2). All of the Commission's certification perquisites – including this commonality prerequisite – are counterparts of Rule 23(a) of the Federal Rules of Civil Procedure; accordingly, "the standards for determining whether a class action under Title VII has met the prerequisite[] of commonality . . . specified in rule 23(a) [are] analogous under" the Commission's regulations. *Brockman v. Veterans Admin.,* EEOC Appeal No. 01842660 (July 2, 1986).

The Supreme Court's decision in *Dukes* clarifies the commonality requirement under Rule 23(a), and therefore, under the Commission's regulations. The *Dukes* majority indicated that the commonality language – "questions of fact common to the class" – "is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" 564 U.S.

at 349 (citations omitted). The Court clarified that, in order to satisfy the commonality prerequisite, there must be

> cause to believe that all [the class] claims can productively be litigated at once. Their claims must depend upon a common contention [which] . . . must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id.

In the present matter, the class did not submit sufficient evidence demonstrating that the newly defined class met the class criteria. Indeed, the class did not submit this class for certification at all. Rather, the AJ announced this new class for the first time in her Interim Decision on Liability issued after a hearing in this matter without revisiting the certification criteria in 29 C.F.R. §1614.204(a). With the Supreme Court's clarification of the commonality prerequisite and its application to a purported class of employees asserting Title VII injury very similar to that alleged here, the Supreme Court's decision in *Dukes* makes clear that the new GS-11 class cannot satisfy this commonality prerequisite. Accordingly, the Commission's decision allowing the GS-11 class to remain certified is based on a clearly erroneous interpretation of law.[27] *See* 29 C.F.R. § 1614.204(d)(2) (class complaint may be dismissed because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2)).

[27] OFO's decision to accept the AJ's certification of the new GS-11 class is based on a clearly erroneous interpretation of law and material fact. By accepting the AJ's certification of a new class *after* the hearing concluded and without notice to the parties, the AJ, and therefore, OFO deprived the Agency of the opportunity to develop and present a defense tailored to the new GS-11 class. Further, OFO's decision is clearly erroneous as it allows the newly created GS-11 class to stand even though the AJ did not revisit any of the prerequisites to class certification set forth at 29 C.F.R. § 1614.204(a)(2). *See* Order Entering Judgment at 63-64; Memorandum and Order on Agency's Motion to Decertify at 2. Accepting the newly created GS-11 class without evaluating the class certification requirements contravenes Commission precedent, which explicitly ties an AJ's ability to modify a certification order to the AJ's "continuing duty to ensure that the requirements for class certification are maintained." *See Welch v. Card,* EEOC Appeal No. 05920520, *3 (Sept. 17, 1992) (citing *Bennett v. Small Bus. Admin.,* EEOC Appeal No. 01842782, *4-5 (Dec. 13, 1985)). In crafting the new GS-11 class without revisiting § 1614.204(a)(2)'s requirements, the AJ, and therefore OFO, failed to recognize that the GS-11 class satisfied neither commonality – as discussed in detail herein – nor typicality, which is closely tied to commonality. *See Footland v. Blank,* EEOC Appeal No. 0120071973, *3 (Nov. 14, 2011) (explaining "the commonality and typicality

1. The Commission is Bound by *Wal-Mart v. Dukes*.

As referenced above, the requirements contained in 29 C.F.R. § 1614.204 of the EEOC regulations are based on Rule 23 of the Federal Rules of Civil Procedure, and the criteria for applying those requirements are intended to conform as closely as possible with Rule 23.[28] *See* 42 Fed. Reg. 11807 (Mar. 1, 1977). Such conformity clearly requires application of a Supreme Court decision clarifying, *inter alia,* the commonality requirement of Federal Rule of Civil Procedure 23(a). *See Brockman,* EEOC Appeal No. 01842660, *3 (standards for determining whether a class has satisfied commonality are analogous under Rule 23 and the Commission's regulations); 63 Fed. Reg. 8594-01, 7600 (Feb. 20, 1998) (indicating that the purpose of contemplated changes to 29 C.F.R. § 1614.204 was "to ensure . . . that class cases are resolved under appropriate legal standards *consistent with the principles applied by federal courts*") (emphasis added).

The Commission regularly relies on Supreme Court precedent in the context of decisions on various procedural issues, including class certification, even in the absence of corresponding policy or guidance. *See Armstrong v. Runyon,* EEOC Appeal NO. 01923434, *5 (Mar. 10, 1993)

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prerequisites tend to merge and are very similar.") (citing *Falcon,* 457 U.S. at 157 n.13). In fact, because Class counsel has yet to follow through on their promise to identify a new class agent more than six years after the AJ created the GS-11 class in the Interim Decision, a typicality analysis is not even possible. *See* Class Opp'n to Agency's Second Motion to Decertify filed Oct. 17, 2011 ("2011 Opp'n") at 20. As such, OFO's acceptance of the newly created GS-11 class is based on a clearly erroneous interpretation of law and material fact, requiring reconsideration of its decision.

[28] While the Commission has indicated that it will apply the class certification criteria less stringently than federal courts under Rule 23, its basis therefore is the class representatives' lack of opportunity "to do precertification discovery in the same manner and extent that a Rule 3 plaintiff does." *See Hines v. Sec'y of the Air Force,* EEOC Appeal No. 05940917, *3 (Jan. 29, 1996). At the time that the AJ created the GS-11 class in this matter, the parties had already engaged in extensive discovery, including hundreds of depositions. *See, e.g.,* 2011 Opp'n at 15 (Oct. 15, 2011) ("Dozens of class members testified in discovery . . ."); Class Counsel's Report on Steps Taken Regarding Discovery (July 6, 2007); Class Counsel's Mem. In Supp. Of Pet. For Attorneys' Fees and Costs (Sept. 1, 2011); Class Reply in Supp. Of Pet. For Attorneys' Fees and Costs (June 27, 2013). Accordingly, less stringent class certification criteria were not applicable to the new GS-11 class.

("Because the [Commission's class certification] Regulation is modeled on Rule 23 . . . the Commission considers judicial interpretations of Rule 23 when determining whether an agency's rejection of a class complaint should be affirmed."); *see, e.g., Footland,* EEOC Appeal No. 0120071973, *3 (premising commonality and typicality rulings on Supreme Court precedent); *Flournoy v. O'Keefe,* EEOC Appeal No. 01A24322, *2 (Dec. 18, 2002) (analyzing Supreme Court precedent regarding certification in context of class settlement); *Brockman,* EEOC Appeal No. 01842660, *3-4 (relying on Supreme Court precedent in commonality and typicality analyses).

Moreover, the fact that federal district courts have explicitly applied *Dukes* in rendering class certification decisions in analogous federal sector Title VII cases underscores the propriety of the Commission in applying *Dukes*. *See Valerino v. Holder,* 283 F.R.D. 302, 309-18 (E.D. Va. 2012) (denying class certification under Rule 23(a) based on *Dukes*); *cf. Moore v. Napolitano,* 926 F.Supp.2d 8, 27-31 (D.D.C. 2013) (finding 23(a) prerequisites satisfied based, in part, on consideration of *Dukes*); 42 U.S.C. §2000e-16(c) (providing for aggrieved federal employees' right to bring civil action in federal court subsequent to proceedings before the Commission). Federal courts' adherence to *Dukes* in federal sector cases is consistent with the Presidential mandate under which authority for enforcement of the federal employee discrimination complaint process was transferred to the Commission in 1979 – "to ensure that (1) Federal employees have the *same* rights and remedies as those in the private sector . . ."; [and] "(2) Federal agencies meet the *same* standards as are required of other employers . . . ." 42 Fed. Reg. 19807 (Feb. 23, 1978) (emphasis added).

In order to ensure uniformity in the standards that apply to Title VII class actions across both the public and private sectors, the Commission must evaluate certification in light of *Dukes*.

By allowing the new GS-11 class to remain certified without addressing the application of *Dukes*, the Commission's Decision is based on a clearly erroneous interpretation of law.

2. Recognizing the New GS-11 Class Is Based on a Clearly Erroneous Interpretation of Law Because The Class Did Not Establish the Existence of Biased Testing Procedure or Produce "Significant Proof" that the Agency Operated Under a General Policy of Discrimination, as Required to Establish Commonality Under *Dukes*.

Dukes involved a putative class of 1.5 million current or former female employees. Represented by three named plaintiffs, the class alleged that the company's practice of allowing local managers discretion over pay and promotions – which was exercised disproportionately in favor of men – resulted in an unlawful pattern and practice of discrimination against female employees. 564 U.S. at 344. In considering Wal-Mart's challenge to the certified class, the Supreme Court first focused on the commonality prerequisite of Rule 23(a). *See id.* at 347-359. The Court relied on its earlier explanation in *Falcon,* 457 U.S. at 157-58, as a framework for its discussion of the requirement:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law of fact and that the individual's claim will be typical of the class claims.

564 U.S. at 352-53. The Court went on to highlight two different avenues by which this "conceptual gap" between bare allegations and commonality might be bridged: (1) evidence of a "biased testing procedure" that adversely affected the class; or (2) "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* (citing *Falcon*, 457 U.S. at 159 n.15). The Court ultimately held that the *Dukes* class was unable to "bridge the gap" to commonality via either avenue. *See id.* at 352-358. As explained below, there are striking

similarities between the allegations of the *Dukes* class and the allegations applicable to the newly created GS-11 class. By allowing the newly created GS-11 class to remain certified, the Commission's Decision is based on a clearly erroneous interpretation of law.

a. Allegations of discretionary decision making cannot establish commonality via a "biased testing procedure."

The new GS-11 class cannot not establish commonality via the first avenue identified by the Court for the same reason as the *Dukes* class: an employer's policy of permitting discretionary decision-making does not qualify as a "biased testing procedure" as contemplated by *Falcon*. *See id.* at 2553 ("the whole point of permitting discretionary decision-making is to avoid evaluating employees under a common standard."). Here, the class has consistently maintained that the crux of its concern regarding the Agency's promotion policy was the discretion accorded to individual officers responsible for making promotion decisions at the agency headquarters. The class originally claimed commonality existed because "the SSA personnel system allows subjectivity in decisions."[29] They subsequently clarified that the policy they sought to challenge was the "excessive discretion afforded to selecting officials after the best qualified lists . . . have been formed as it relates to competitive promotions."[30] As in *Dukes*, the class (so necessarily, the new GS-11 class) has challenged only the agency's provision of excessive discretion to the decision-maker. As such, under the authority of *Dukes*, the new GS-11 class cannot not establish commonality via a "biased testing procedure."

[29] *See* Decision to Accept, Reject or Cancel Class Complaint (Feb. 18, 2005).
[30] 2008 Opp'n at 3; *see* 2011 Opp'n at 13 (the challenged "policy granted [decision-makers] unfettered discretion to decide, without justification or documentation, which candidate to select from a pool of best-qualified applicants"); *see also* Closing Argument of Class Agents at 2 (May 22, 2009) (asserting that the agency's "subjective, deeply flawed, and inconstantly applied selection system operated to create a disparate impact on the class").

b. The statistical and anecdotal evidence does not amount to "significant proof" that the agency operated under a "general policy of discrimination."

The new GS-11 class cannot "bridge the gap" via the second avenue – requiring "*significant proof* that an employer operated under *a general policy of discrimination*" in the form of either statistical or anecdotal evidence – for the same reasons as the *Dukes* class. *See id.* at 352-358 (emphasis added).

As discussed above, the only "general policy" identified as potentially problematic was the "excessive discretion afforded to selecting officials" in the agency's promotion process.[31] In *Dukes,* the Court found that a very similar policy identified by the plaintiffs amounted to "just the opposite of a uniform employment practice that would provide the commonality needed for a class action" and "itself raise[d] no inference of discriminatory conduct." 564 U.S. at 355 (citing *Watson,* 487 U.S. at 990). The Court acknowledged that giving discretion to lower-level managers *can* be the basis of Title VII liability under a disparate impact theory, but clarified that the proposed class must somehow demonstrate that the discretion was exercised in a common way in order for commonality to be satisfied. *See id.*

Despite finding all of the class' statistical and anecdotal evidence unreliable, the AJ In this matter ultimately crafted and certified a new GS-11 class and found discrimination based exclusively on Dr. Simpson's observation of a disparity in the promotion of African-American females at the GS-11 level.[32] In *Dukes*, the Supreme Court made clear that a mere statistical disparity is not sufficient to establish commonality. *See id.* at 356. Although the new GS-11 class is geographically compact, unlike the class in *Dukes*, the organizational structure of Agency headquarters requires that same logic apply: the Agency's headquarters is made up of at

[31] *See* Class Opposition to Agency's Motion to Decertify the Class filed April 11, 2008 ("2008 Opp'n") at 3.
[32] Order Entering Judgment at 53-64.

least 50 independently operating Associate Commissioner's offices and hundreds of individual decision-makers.[33] Moreover, the statistical disparities were not widespread or dispersed evenly across these numerous offices and decision-makers. To the contrary, as discussed above, Dr. Simpson found that only 17 of the 695 promotion pools for competitive permanent positions at the GS-11 level accounted for the significance of the statistical disparity.[34] Moreover, those 17 promotion pools were concentrated in information technology jobs affiliated with only a handful of Associate Commissioner offices.[35] This is the very same type of disconnect described by the *Dukes* majority as foreclosing a showing of commonality based on an overarching statistical disparity standing alone. *See* 564 U.S. at 356.

In fact, particularly problematic for the GS-11 class, the *Dukes* Court clarified that "the bare existence of delegated discretion," in and of itself, did not constitute a "specific employment practice." *Id.* ("Merely showing that Wal-Mart's policy of discretion has produced an overall sex based disparity does not suffice."); *see also Aurore C., et al. v. Pension Benefit Guaranty Fund,* EEOC Appeal No. 0120150342, *4 (May 18, 2018) (finding that the proposed class did not establish commonality where "the proposed class consist[ed] of employees at various grade levels, various positions, and under various supervisors in various divisions.").[36] Accordingly,

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[33] See Hr'g Tr. vol. I at 154:9-23 (Gower); Joint Hr'g Exs. 9a-h (agency organizational charts for 2000-2006); Agency Hr'g Ex. 25a, Simpson Rev. Report at 4 (noting competitive promotions occurred across 57 Associate Commissioners' offices from 2000-2006).

[34] *See* Agency Hr'g Ex. 25a, Simpson Rev. Report at 28.

[35] *See* Hr'g Ex. 25a, Simpson Rev. Report at 28, Table C5. Dr. Simpson's report indicated that the 17 promotion pools causing the statistically significant disparity were confined to eight of the more than 50 Associate Commissioners' offices at agency headquarters. *See id.; see also* Order Entering Judgment at 27-28 (¶ 117) (each three-digit "Standard Administration Code" included in the table designates a different Associate Commissioner Office); *cf.* Hr'g Tr. vol XV at 29:13-23 (Simpson) (individuals working in a common Associate Commissioner office were all working under "the same type of decision-maker").

[36] Although *Aurore C.* distinguished itself from *Wal-mart*, the Commission ultimately upheld the denial of class certification for failure to establish commonality, typicality, and numerosity in a case where the class agent sought to pursue a discrimination claim on the basis of race, color, sex, age and reprisal on behalf of employees who were employed in a department that was subsequently reorganized). Thus, even if the Commission in the present matter was inclined to distinguish itself from *Wal-mart*, recent precedent establishes that a class agent cannot establish commonality when there are different supervisors, divisions, and positions involved in the same class. By allowing

even if the disparity in the promotion of African American women at the GS-11 level could be extrapolated to apply equally throughout Agency headquarters, it still would not constitute "significant proof" of a "general policy of discrimination," as necessary for the GS-11 class to establish commonality.

In the wake of *Dukes*, the anecdotal evidence offered by the class similarly failed to "bridge the gap" between their allegations of discriminatorily exercised discretion and the "significant proof" necessary to establish commonality. The *Dukes* Court found that the 120 affidavits submitted by class members from 235 stores – even if uniformly true – were insufficient to demonstrate that Wal-Mart "operate[d] under a general policy of discrimination" when the class comprised roughly 1.5 million employees working at 3,400 stores. *Id.* at 358. In comparison, the Supreme Court cited *Teamsters,* 431 U.S. 324, where the class submitted roughly 40 accounts of discrimination – about one account for every eight members of the 334 person class – from class members "spread throughout" the company and in operational centers with the largest concentration of class members. *See id.* (citing *Teamsters*, 431 U.S. at 337-38; *U.S. T.I.M.E-D.C., Inc.,* 517 F.2d 299, 308, 315, n.30 (5th Cir. 1975) *overruled on other grounds, Teamsters*).

Here the anecdotal evidence for the newly created GS-11 class was limited to a single proffer by Karen Better-Bastfield and was certainly insufficient to establish class wide discrimination within the new GS-11 class.[37] Significantly, as discussed above, the AJ explicitly found that Ms. Better-Bastfield's testimony was not indicative of class wide discrimination.[38]

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the newly created GS-11 class to remain certified, the Commission's Decision is based on clearly erroneous interpretation of law, requiring reversal in favor of the Agency.

[37] *See* Order Entering Judgment at 60; Hr'g Tr. vol. X at 262:20-298:10 (Better-Bastfield). There is no information in the record reflecting the size of the new GS-11 Class, because there was no notice that the number that of original class members at the GS-11 grade might be relevant.

[38] Order Entering Judgment at 60.

Based both on its inadequate volume and its substantive failure to support the class' discrimination claims, the relevant anecdotal evidence did not constitute "significant proof" of a "general policy of discrimination," as necessary for the GS-11 class to establish commonality.

In sum, the evidence presented does not "bridge the gap" from the class allegations – that excessive discretion resulted in discrimination – to a showing of commonality. Thus, the Commission's decision allowing the class to remain certified is premised on a clearly erroneous interpretation of law, requiring reversal of the AJ's certification of the newly crafted GS-11 class.

CONCLUSION

For the reasons detailed above and in the Agency's Brief in Support of its Appeal, the Commission's decision was contrary to law and material fact. Therefore, the decision must be reversed and judgment should be entered in favor of the Agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I served a copy of the Agency's Request for Reconsideration as follows:

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[39] It does not appear David L. Rose is practicing law anymore, nor does it appear that Rose Legal Advocates exists. In recent correspondence, Timothy B. Fleming stated that Mr. Rose retired. Therefore, Agency counsel can only serve Mr. Fleming as class counsel at his firm's new address.