



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Paulette L. Taylor et al., a/k/a
Elly C.,¹
Complainants,

v.

Nancy A. Berryhill,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 0720140019
Hearing Nos. 120-2003-00305X, and 012-2003-00304X
Agency Nos. 03-0224-SSA, and 03-0208-SSA

DECISION

Following its February 18, 2014, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) requesting that the Commission affirm its rejection in part of an Equal Employment Opportunity Commission Administrative Judge's (AJ's) finding, after a hearing, of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Additionally, the Class Agents filed a cross-appeal on the Agency's final order. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final order.

ISSUES PRESENTED

The issues presented in this case are whether the AJ erred in finding that: (1) the Class Agents did not fall within the class of employees who were discriminated against; (2) only part of the class was subjected to discrimination; and (3) total attorneys' fees and costs should have been reduced.

BACKGROUND

The two Class Agents in this case are African-American female employees of the Social Security Administration (SSA). On February 27, 2003, the Class Agents filed a formal complaint alleging that the Agency discriminated against a class of employees on the bases of race (African-

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

American), sex (female), and in 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 AJ recommended acceptance of the formal complaint and certified the class:

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 [the] 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.²

The Agency declined to fully implement the AJ's decision on certification of the class and filed an appeal to the Commission. On May 5, 2006, the Commission upheld the certification of the class:

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 the 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.³

The Commission denied the Agency's request for reconsideration of the class certification decision in EEOC Request No. 05A60801 (July 5, 2006). On April 4, 2011, the AJ issued an Interim Decision on Liability in which she concluded that the Class prevailed in showing class-wide discrimination against non-supervisory GS-11 African-American female employees who were denied promotions to the GS-12 grade level from December 9, 2000, to the present based on the Agency's statistical evidence of disparity in promotions.

The AJ found, however, that the Class did not prove that African-American females were discriminated against when they were not promoted from December 9, 2000, to the present with respect to any other grade-level positions. The AJ further found that neither Class Agent proved that she was discriminated against in obtaining promotions in her individual complaint, both of which were subsumed into the class complaint involving the specific vacancies regarding which they testified.

² The basis of reprisal was not certified because the AJ found insufficient evidence to demonstrate that the class members, as a whole, had been subjected to reprisal.

³ EEOC Appeal No. 07A50060 (May 5, 2006).

On September 1, 2011, the Class attorney submitted a Memorandum in Support of Petition for Attorneys' Fees and Costs. On September 30, 2011, the Agency filed a Motion to Decertify the Class. On October 17, 2011, the Class opposed the Agency's motion. On October 28, 2011, the Agency filed a Reply to the Opposition. On January 26, 2012, the Agency submitted its Response in Opposition to Class Motion for Attorneys' Fees and Expenses. On June 27, 2013, the Class filed the Class's Reply in Support of the Petition for Attorneys' Fees and Costs, which was not considered by the AJ due to the Class's delay in filing the reply.

On December 13, 2013, the AJ issued an Order Entering Judgment finding that the Class prevailed in showing that class-wide discrimination against non-supervisory African-American GS-11 female employees who were denied promotions to the GS-12 grade level from December 9, 2000, to the present based on the Agency's un rebutted or unexplained statistical evidence of disparity in promotions. The AJ found that the Class did not prove that African-American females were discriminated against when they were not promoted from December 9, 2000, to the present to any other grade-level positions.

The AJ also found that neither Class Agent proved that they were discriminated against in obtaining promotions in their individual complaints which were subsumed into the class complaint involving the specific vacancies to which they applied. Specifically, Class Agent 1 did not prove that she was discriminated against when she was not selected under vacancy announcements (VANs) W-1115, W-1139, W-1153, W-1160, W-1183, W-M 89, W-1235, and W-1236, W-1256 and the SSA Leadership Development Program (SSA LDP-3). The AJ found that Class Agent 2 did not prove that she was discriminated against when she was not selected under VANs T-531, Z-349, J-416, J-422, J-426, J-436 and J-440.

On December 13, 2013, the AJ denied the Agency's motion to decertify the class. The AJ also addressed the Class's attorneys' fees petition. The Class attorney sought \$2,824,663.12 in attorneys' fees based on 14,355.86 attorney and staff hours and \$533,845.00 in costs. The Class attorney argued that fees should not be reduced based on partial success because the claims for relief involved a common set of core facts and related legal theories that were litigated as an integrated whole.

The AJ noted that when a fee reduction is required due to a failure to succeed on severable claims, it is not necessary for the Commission to perform a detailed analysis to determine the precise number of hours or types of work for which no compensation is allowed; rather, it is appropriate to reduce the hours claimed by an across-the-board reduction. Gunther v. U.S. Postal Serv., EEOC Appeal No. 0120110103 (Sept. 28, 2012) (75% percent across-the-reduction in fees); Garrett v. VA, EEOC Appeal No. 01996394 (Sept. 5, 2002) (40% reduction in total hours billed deemed reasonable regarding work on unsuccessful claims); Donelson v. Dep't of Veterans Affairs. EEOC Appeal No. 01996394 (Jul. 27, 2001) (15% across-the-board reduction for unsuccessful severable claims approved). The AJ found that a 70% reduction was fair and reasonable considering the degree of success in this case. An additional 10% reduction was also ordered because of the billing irregularities detailed by the Agency and largely unaddressed by the class. Thus, the AJ reduced the total amount of attorneys' fees, \$2,824,663.12, by 70% to

\$847,399.12; and then an additional 10% to \$762,659.19. Finally, the AJ awarded costs in the amount of \$23,571.73, after finding that the Class attorney did not provide documentation in support of the amount sought.

CONTENTIONS ON APPEAL

On appeal, the Agency indicates that it will implement the AJ's decision with respect to the following:

1. The Class did not establish that 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 [the] General Counsel and the Office of the Inspector General, were discriminated against for grade levels GS-7, GS-8, GS-9, GS-10, GS-12, and GS-13 who sought promotion into grade levels GS-8, GS-9, GS-10, GS-11, GS-13, and GS-14 levels, respectively;
2. Complainant 1 did not prove that she was discriminated against regarding her individual complaints that were subsumed into the class complaint when she was not selected under VANs W-I 115, W-1139, W-1 153, W-I 160, W-N 83, W-1189, W-1235, W-1236, W-1256 and the SSA Leadership Development Program (SSA LDP-3); and
3. Complainant 2 did not prove that she was discriminated against regarding her individual complaints that were subsumed into the class complaint when she was not selected under VANs T-531, Z-349, J-416, J-422, J-426, J-436 and J-440.

The Agency declined to implement the AJ's decision with respect to the following:

- 1). The Class prevailed in establishing class-wide discrimination against nonsupervisory African-American females who were employed in GS-11 positions, 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 [the] General Counsel and the Office of the Inspector General, and who were denied promotions into the GS-12 grade level, from December 9, 2000, to the present; and
2. It must reimburse the Class attorneys' fees in the amount of \$762,659.19, and costs in the amount of \$23,571.73.

The Class Agents, in their cross-appeal, contend that the AJ should have found that the entire class was discriminated against as the Agency put forth no evidence at trial which demonstrated or even purported to support the notion that the challenged promotion selection procedures were either job-related or required by business necessity. According to the Class Agents, all the

claims for all the GS levels were the same, and no separation of the GS-11s or any GS levels within the Class were ever contemplated since the Class certification was affirmed by OFO. There was never a suggestion of “discrete and separable” claims for each GS level.

The Class Agents also maintain that the AJ erred in ignoring the Class Agents’ experts’ testimony, which focused on demonstrating that the Agency’s deeply flawed and invalidated promotion selection system, which was unsupported by any job analysis, was vulnerable to bias because it was excessively subjective, uncontrolled, unmonitored, undocumented, and lacking in rudimentary and essential safeguards for the prevention or detection of bias. The Class Agents maintain that their experts’ testimony focused precisely on the salient issue, i.e., that the policy of unfettered discretion exercised by a selecting official in selecting a candidate from the best-qualified list resulted in bias against Black women and caused a disparate impact on their promotability. The Class Agents assert that the AJ’s decision to entirely discard their experts’ testimony thus was reversible error.

With respect to the Class Agents’ individual disparate treatment theory claims, the Class Agents maintain that the Agency erred in asserting that the Class Agents must present sufficient individual instances of discrimination to show a pattern or practice of discrimination. The Class Agents argue that the Agency erred in its table of promotions which the Agency claimed justified the AJ’s finding that the anecdotal evidence failed to support their claims of discrimination. The Class Agents assert that the Agency’s argument – that there was no discrimination in a few cases because African-American and/or a female made the promotion selection decision or a recommendation for a selection – fails. The Class Agents also contend that the AJ erred by limiting their witnesses to ten class members. This decision, the Class Agents maintain, was not based on a determination that the testimony would be repetitious, because the testimony would have involved different positions. The AJ, they maintained, put the Class Agents in a situation where they were not able to show anecdotal evidence.

Further, the Class Agents contend that the AJ erred in excluding their expert’s supplemental report. According to the Class Agents, the AJ exceeded her authority to regulate the admission of evidence by excluding their witnesses and by excluding the explanation of the career-ladder codes. The Class Agents also argue that the AJ erred in excluding the supervisors and team leaders from the class.

Additionally, the Class Agents argue that the AJ clearly exceeded her authority to regulate the admission of evidence by refusing to consider the Class Agents’ reply submission concerning attorneys’ fees and costs. The AJ, according to the Class Agents, never set a time limit for the reply. During the period after the Agency filed its opposition, the parties entered settlement mediation as ordered by the AJ. Many months passed while the Class Agents awaited the Agency’s response to their settlement proposal. During this time, the parties agreed and the AJ concurred, there would be a cessation of activities in the case. These delays, together with other case responsibilities, led to the delay in filing the Class Agents’ reply. According to the Class Agents, it would be “manifestly unfair” not to consider their Reply.

In response to the Class Agents contentions, the Agency maintains that the Class Agents are simply contesting everything that occurred in the case and relitigating the entire hearing. The Agency contends that the Class Agents disagree with the AJ's decision, but have failed to point out where and why the AJ's findings are not supported by substantial evidence in the record. The Agency further contends that the Class Agents also have failed to show that the AJ abused her discretion in excluding evidence or in reducing the Class Agents' request for attorneys' fees and costs. According to the Agency, the Class Agents cannot demonstrate that the AJ committed reversible error on any of their points on appeal.

Further, the Agency argues that the AJ properly reduced the Class Agents' attorneys' fees because they submitted a flawed fee petition. The Agency maintains that the AJ properly refused to consider the untimely Reply and concluded that the Class Agents' "poorly drafted fee petition" warranted an additional 10% across-the-board reduction because the Class Agents: 1) provided insufficient information on class attorneys' billing records; 2) sought excessive or duplicative fees; and 3) billed for improper subject matter, such as clerical tasks, internal firm administration, matters unrelated to the class action, time spent on non-witness consultants, and media activities.

Finally, the Agency maintains that the AJ's reduction of the Class Agents' fee request by 70% was appropriate based on the degree of success in this case and the work expended by class counsel for the favorable result; and that the AJ properly excluded the Class Agents amended expert reports because they "were untimely, unduly prejudicial, and contained new information that was not contained in the initial expert reports." The Agency requests that its final order therefore be affirmed.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

Class Complaint

As noted in prior proceedings, the Class identified the discriminatory practices at issue as the Agency's promotion process, which permits a high level of subjectivity in selection decisions,

and the conveyance of promotional opportunities by word-of-mouth from supervisors, which operates to exclude African-Americans candidates. EEOC Appeal No. 0720050060 (May 5, 2006).

Based on the evidence presented, we agree with the AJ that the evidence supports the conclusion of unlawful discrimination with respect to the promotion of GS-11 African American females to the GS-12 grade level. We find that the AJ's modification of the class from all GS-7 through GS-13 African American female employees to only GS-11 African American employees is supported by the Agency's expert witness testimony. The Agency's expert concluded that the Agency under-promoted African-American females to the GS-12 grade-level from 2001 through 2006 in a statistically significant manner.

More specifically, the Agency's expert determined that there were approximately 5,109 permanent and temporary competitive promotions to GS-8 through GS-14 available at the Agency's Headquarters in Baltimore, Maryland, excluding OIG and OGC, from October 1, 2000 through September 30, 2006. The expert used a statistical test analyzing promotion rates between African-American females and other employees. The expert examined selection decisions to evaluate whether the number of African-American females selected for promotion was consistent with what would be expected if promotions were made randomly, without regard to race and gender of employees. The magnitude of the difference between the expected number and actual number of promotions was expressed as numbers of standard deviations.

The 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. See 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 matter of law presents a prima facie case). Moreover, courts should look not only at the statistics, but at the surrounding facts and circumstances. Id.; see also, International Bd. of Teamsters, 431 U.S. at 340 (describing the usefulness of statistics as dependent on the surrounding facts and circumstances); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 995 (1988) (superseded by statute on other grounds). Generally, however, courts have held that disparities of two to three standard deviations are sufficient to raise an inference of discrimination. See, e.g., Castaneda v. Partida, 430 U.S. 482, 496-97 n. 17 (1977) (a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race).

To establish liability, plaintiffs' cases alleging a pattern or practice of discrimination are characterized by a "heavy reliance on statistical evidence." Reynolds v. Barrett, 685 F.3d 193, 203 (2d Cir.2012) (quoting Robinson, 267 F.3d at 158 n. 5); see also Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79, 691 F.Supp.2d 372, 388 (S.D.N.Y.2009) ("[S]tatistical evidence is critical to the success of a pattern-or-practice disparate treatment claim."). "[T]he liability phase is largely preoccupied with class-wide statistical evidence directed at establishing an overall pattern or practice of intentional discrimination." Robinson, 267 F.3d at 168. Statistics are so central to pattern-or-practice cases that they "alone can make out a prima facie case of

discrimination if the statistics reveal a gross disparity” in employee treatment. *Id.* at 158 (internal quotation marks and citation omitted); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (“Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”).

A disparity of less than two standard deviations can be regarded as reasonably attributable to chance factors or statistically insignificant. Both Complainant’s and the Agency’s expert applied the threshold of two standard deviations in assessing whether a disparity was statistically significant. The Agency’s expert found that the level of under-promotion of GS-11 African American female employees was 3.48 standard deviations from what would have been expected to have occurred by chance, where 2.00 standard deviations was considered statistically significant.

With regard to a disparate treatment analysis, the AJ found that the Class could not establish a prima facie case for statistically significant disparity in promotions for Black female class members because of the Class’s flawed statistics; as such, the Class could not prevail in its case for class-wide discrimination as set forth in the complaint. Notwithstanding, the AJ found, and we agree, that the Agency’s evidence was an admission on the part of the Agency of a gross disparity in promotions for Black Females to the GS-12 level that raised an inference of discrimination in this matter. The AJ further found, and we agree, that this constituted a prima facie case for the pattern or practice analysis of disparate treatment. Moreover, the Agency did not rebut this inference of discrimination or otherwise proffer any evidence to explain the gross disparity. This failure on the part of the Agency to explain the level of underpromotion for Black females was made worse because the evidence appeared in its own expert’s report and not the class expert’s report. Thus, the Agency was on notice regarding this evidence and that it could be used to support a finding of discrimination. Accordingly, the unrebutted inference was sufficient for a finding that Black female employees as defined in the class complaint were discriminated against in receiving promotions from the year 2000 to the present into GS-12 level positions. While this finding differed slightly from the complaint brought previously by the Class, we agree that the evidence supports this modification from all GS-7 through GS-13 African American females to the under-promotion of GS-11 African-American female employees.⁴

Finally, the AJ found that the Class failed to prove their disparate impact argument, as their expert’s statistics were flawed. Moreover, the AJ concluded that the Class’s argument that there was bias against African-American women by selecting officials was little more than an argument for intentional discrimination against the Class cloaked in disparate impact language. Specifically, while the class alleged that the selection process at the agency included the practice

⁴ Supplemental analysis completed by the Commission’s Office of Federal Operations Reports and Evaluation Division indicated that promotions from the GS-11 to the GS-12 grade level accounted for approximately 58% of the 2.44 overall statistical disparity reported by the Agency’s expert across all grade levels. In particular, the disaggregated analysis showed standard deviations above 2 only for the GS-11 to GS-12 promotional decisions.

of “unfettered discretion” exercised by selecting officials, the AJ found that the class did not prove the existence of a specific employment practice that operated to cause a statistically significant hiring gap in all grade levels. This factual determination is supported by substantial evidence in the record and has not been proven otherwise by the class.

Accordingly, we will reverse in part the Agency’s final order with respect to its finding of no discrimination with regard to the AJ’s finding that the Class prevailed in establishing class-wide discrimination against nonsupervisory African-American females who were employed in GS-11 positions, 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 the General Counsel and the Office of the Inspector General, and who were denied promotions into the GS-12 grade level, from December 9, 2000 to the present.

Individual Complaints

Complainant 1

Complainant 1 started with the Agency at the GS-12 level and applied for GS-13 and GS-14 positions. In 2001, after not being selected for the Building Manager position, Complainant 1 stated that the selecting official told her that she was “not what management wanted,” and then the selecting official looked down at his hand. Complainant 1 interpreted this as a reference to her gender and race. In November 2001, she applied for a GS-13 Management Analyst position. The Agency did not select her for the position, but the person who was selected had previous experience in an administrative position. Complainant 1 did not have this type of experience.

In March 2002, Complainant 1 applied for a GS-13 Lead Management Analyst position. She did not receive the position because the selectee had previous experience with the Agency’s rent budget program. Complainant 1 filed a grievance in 2002, and, as a result, received a retroactive promotion to a GS-13 position because the arbitrator found that she was performing higher-graded work in an equivalent position to a building manager. After her retroactive promotion, Complainant applied for a GS-14 Executive Officer position but did not receive the position, because she did not have the level of administrative experience that the selectee had. Although Complainant 1 claimed that there were no African-American females holding executive positions in the front office, the AJ found that this was not credible because at least four African-American females worked in the front office positions as executive officers.

In October 2003, Complainant 1 applied for a GS-13 Management Analyst position. While she scored higher on the “weights and factors” portion of the test than other applicants, Complainant 1 did not receive the position because she had less budget experience than the person who was selected. In addition, when interviewed, there were discrepancies on Complainant 1’s resume that caused the interviewer to question her credentials and work experience.

In the following year, Complainant 1 applied for a Space Coordinator, GS-14, position but was not selected because another candidate was determined to be more qualified. Also in 2004,

Complainant 1 was not selected for a leadership development program that would have allowed her to work in other offices to gain greater skills.

In December 2005, Complainant 1 applied for the Building Manager, GS-13, position. The two individuals who received the position previously had served details in that position, while Complainant 1 had not. In her application for this position, the record indicates that Complainant 1 copied, word for word, portions of one of the recommending official's resumes, to which she had access because of previous EEO complaints. Also in her application for this promotion, Complainant 1 claimed that she held positions that she did not hold, but which were held by another employee.

In January 2006, Complainant 1 applied for the GS-14 Building Manager position. The individual who was selected already had been serving, temporarily, in the Building Manager position. The recommending official wrote in a memorandum to the selecting official that he found Complainant 1 to be unable to answer questions in the interview and that some of her answers were inaccurate. In September, Complainant 1 applied for another GS-14 Building Manager position under a new announcement. She did not receive the position. The interviewer wrote that he felt that Complainant 1 exaggerated her experience and gave inaccurate answers in her interview.

In April 2008, Complainant 1 received a temporary promotion to a GS-14 position for 120 days. When the Agency later advertised the position, Complainant 1 applied for the vacancy and received a permanent promotion to the position.

With respect to the Complainant 1's individual complaint, we agree with the AJ that, assuming *arguendo* that Complainant 1 established a *prima facie* case of race and sex discrimination with respect to all the above positions, the Agency articulated legitimate, nondiscriminatory reasons for its decisions, which Complainant 1 did not demonstrate were pretext for discrimination. Specifically, Complainant 1 did not establish that her race or sex play a role in the selection decisions regarding the positions for which she was not selected.

Complainant 2

Complainant 2 began working for the Agency in 1967. In 1988, she became a Program Analyst at the GS-12 level and, starting in 2000, began applying for GS-13 positions. She was not selected for any of the positions to which she applied. Complainant 2 maintained that her nonselections were based on discriminatory animus.

The Agency, however, articulated legitimate, nondiscriminatory reasons for its actions. The Agency explained that, in 2000, Complainant 2 applied for a GS-13 Computer Specialist position. She did not receive the position because she had only the fourth-highest score from the selecting panel and was previously told she had performance problems, e.g., needing too much assistance with her work and being too difficult to work with.

On August 31, 2001, Complainant 2 applied for the GS-13 position of Computer Specialist. She was not selected for the position. She was not selected based on the level of her work performance, and because those who were selected had previous experience working in the Division of Quality Testing and Validation (DQTV).

Early in 2003, Complainant 2 applied for the position of GS-13 IT Specialist, but did not receive the position. The Agency selected eleven other individuals to fill the vacancies and of the eleven, three were African-American females. The Agency justified its decision to forego selecting Complainant 2 because she did not perform well during the interview, did not obtain a high management endorsement for her work performance, and was not familiar with the work of the DQTV. Also in 2003, Complainant 2 applied and was not selected for an IT Specialist position. Those selected had technical knowledge of the work in the DQTV, had leadership skills, and worked closely with the contractors in the division, while Complainant 2 had not and did not.

In 2004, Complainant 2 applied for the position of Lead IT Specialist, GS-13, on two separate occasions. She did not receive the promotion either time she applied, but out of the five individuals selected to fill the vacancy, three were African-American females. The recommending official did not recommend Complainant 2 for the position because she did not work well with others and did not have the knowledge or experience needed for the position.

On February 3, 2006, Complainant 2 applied for the position of Lead IT Specialist (Systems Analysis), GS-13. Again, she was not selected. Those selected were determined to have been more experienced and knowledgeable than Complainant 2, and had demonstrated leadership skills, unlike Complainant 2.

In 2006, Complainant 2 inquired of management why she was not being selected for positions to which she had applied. She was informed that coworkers complained about her, maintaining that she “did not know her job,” was “difficult to get along with,” and did not perform her work. In addition, she learned that she did not perform one of her primary responsibilities satisfactorily, i.e., taking meeting notes well. Her notes, she was informed, contained errors. She also was told that she was untimely in meeting deliverables or deadlines regarding the projects assigned to her. Other employees also told Complainant 2 that her behavior was “out of control” and that the negative opinion people had of her was her own fault.

Based on the above, we find, regarding Complainant 2’s individual complaint, that assuming *arguendo* that Complainant 2 established a *prima facie* case of race and sex discrimination with respect to all the above positions, the Agency articulated legitimate, nondiscriminatory reasons for its decisions. Like the AJ, we find that Complainant 2 did not demonstrate that the Agency’s reasons were pretext for discrimination. Specifically, Complainant 2 did not establish that her race or sex more likely than not played a role in the selection decisions regarding the numerous positions for which she was not selected.

Accordingly, we will affirm that part of the Agency’s final order which accepted the AJ’s finding of no discrimination regarding Complainant 1’s and Complainant 2’s individual complaints.

Attorneys' Fees and Costs

We find that the reductions in attorneys' fees and costs that were directed by the AJ were appropriate given the limited degree of success in this case and the work expended by class counsel for the favorable result, and the lack of documentation supporting a higher reimbursement for costs. Likewise, we find that the record supports the AJ's determination that the Class provided insufficient information on the Class attorneys' billing records; 2) sought excessive or duplicative fees; and 3) billed for improper subject matter, such as clerical tasks, internal firm administration, matters unrelated to the class action, time spent on non-witness consultants, and media activities.

With respect to the Class Agents' contentions that the AJ erred by rejecting their untimely reply brief, we note that AJs have broad discretion in the conduct of hearings, including discovery, and the determination of whether to admit evidence, or permit or compel the testimony of witnesses. See 29 C.F.R. § 1614.109(e). Upon review of the record, the Commission finds no evidence that the AJ abused her discretion in these matters.

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM in part and REVERSE in part the Agency's final order.

ORDER

The Agency is ORDERED to take the following remedial actions **within one hundred and twenty (120) calendar days** of the date this decision is issued:

1. The Agency will identify all affected African-American female employees 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 eleven (GS-11), after December 9, 2000, who applied but were not selected for promotion. The Agency will provide each of these class members a copy of the Decision. The Agency further will inform class members that they may secure attorney or non-attorney representation of their own choosing to assist in securing relief. The class members may seek relief in accordance with 29 C.F.R. §1614.204.
2. The Agency will conduct an inquiry pursuant to §717(b) of Title VII to determine what factors are responsible for the significant statistical disparity in promotion of Black females beyond the GS-11 level and propose solutions for eliminating such disparities in the future.

3. The Agency will pay attorneys' fees in the amount of \$762,659.19 and costs in the amount of \$23,571.73.
4. The Agency must issue a Posting of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted and maintained for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted at the Agency facility(ies). The Agency shall take reasonable steps to ensure that said notices are not altered, defaced or covered by any other material.
5. The Agency is further directed to submit a Report of Compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The Report will include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its facilities in Baltimore, Maryland copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainants have been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSIONS DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket

number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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 (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (T0610)

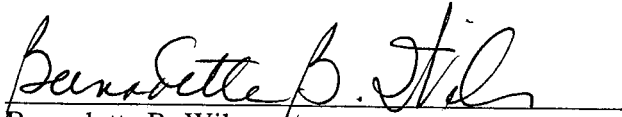
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

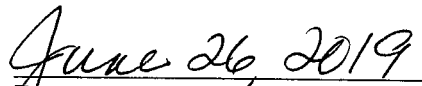
RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter

the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:


Bernadette B. Wilson
Executive Officer
Executive Secretariat


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:

Paulette L. Taylor, et al.
5 Caitlins Ct
Baltimore, MD 21244

Timothy B. Fleming, Esq.
1850 M St NW #700
Washington, DC 20036

Kojuan Almond, Acting Associate Commissioner
Office of Civil Rights and Equal Opportunity
Social Security Administration
P.O. Box 17712
Baltimore, MD 21235-7712

June 26, 2019
Date

Charmon Jones
Compliance and Control Division