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DENNIS R. TURNER, et al.,)	EEOC No. 541-2008-00255X
Complainant,)	
)	Agency No. P-2004-0296
v.)	P-2000-0138
)	
ERIC HOLDER, Attorney General of the)	
United States, Department of Justice,)	
Bureau of Prisons,)	
Agency.)	
)	
)	Date: September 30, 2010

CLASS CERTIFICATION DECISION

The captioned matter comes before the undersigned pursuant to 29 C.F.R. §1614.204(d)(7) (2007) for a ruling as to whether it should be certified as a class complaint.

On July 9, 2009, the Class Agent filed his Memorandum in Support of Class Certification (Cert. Brief). On July 21, 2009, the Department of Justice, Bureau of Prisons (Agency), filed its Agency's Response to Complainant's Submission on Class Certification. (Resp. Cert.). On August 3, 2009, Complainant filed Class Agent's Reply to Agency's Response to Complainant's Submission on Class Certification. (Cert. Reply). In support of his Motion for Class Certification, Class Agent filed five volumes of exhibits, numbered from 1-174. Class Agent filed a Motion to submit a Corrected Brief on Class Certification. I GRANT that Motion, and note for the record that Exhibits 173 and 174 are attachments to that Corrected Brief.

The Agency also filed three Motions to Dismiss, on June 11, 2007, July 15, 2008 and August 5, 2008. There are also two other relevant sets of briefing pending – (1) Class Agent's Motion to Amend Caption by Adding Agency Case No. P-2000-0138 to Reflect the Proper Agency Case Number and (2) Briefs regarding timeliness filed in response to an Order of the Administrative Judge dated April 10, 2009. The issues in all of these motions relate to some element of the decision regarding whether to certify a class. The issues regarding timeliness and whether to amend the caption are addressed in a separate Order, issued simultaneously. The Motions to Dismiss will be addressed herein to the extent that the issues have not been addressed in the Order regarding timeliness and amending the caption.

To the extent that certain exhibits submitted in support of Class Agent's response regarding timeliness are referenced in this Order, they are identified as "Timeliness Exh." to distinguish them from the Exhibits submitted in support of the Class Certification Motion, identified as Cert. Exh.

I. BACKGROUND

Procedural Background

This case has been ongoing in some form since 1999, when Class Agent first sought EEO counseling. On May 28, 1999, Class Agent filed a class complaint on behalf of African American employees, asserting claims of retaliation and race discrimination alleging numerous issues, including discrimination based on prior EEO activity, including retaliatory failure to promote. This complaint was issued Bureau of Prisons case no. P-2000-0138. Mr. Turner sought class certification, and on December 5, 2000, the Administrative Judge determined that the case was not appropriate for class certification. In 2001, the Agency adopted the Commission's decision and processed Class Agent's individual complaint under that same number.

Case P-2000-0138 was finally investigated and in 2003 returned to an Administrative Judge who issued an Acknowledgement and Order on June 18, 2004. On July 12, 2004, Turner gave the Agency notice that this case included class implications. On August 16, 2004, Complainant sought to amend P-2000-0138 to add class allegations, but the Agency refused to allow him to amend and issued a new Agency Number for the case, P-2004-0296. Judge Humphrey noted that Complainant learned on August 10, 2004 that supervisors had told other workers to monitor his activity management officials had instructed Complainant's co-worker to watch Complainant and report back, a repetition of behavior that had led to discipline before. Based on that information, she found the EEO contact timely. Exh.10, Class Agent's Timeliness Brief, Turner v. DOJ, Administrative Judge's Class Certification Decision (December 2, 2005).

On September 28, 2004, in the hearing process regarding BOP complaint P-2000-0138, Turner gave notice of his intent to pursue a class complaint. Exh. 6, Class Agent's Timeliness Brief, p. 1. The Agency responded that the Administrative Judge does not have jurisdiction over subsequent efforts to amend to state a class complaint. Exh. 7, Class Agent's Timeliness Brief. On December 29, 2004 the Commission ceased processing P-2000-0138 and subsumed that complaint into P-2004-0296, the class complaint. Exh. 6, Class Agent's Timeliness Brief, Class Agent's Timeliness Brief. On January 5, 2005, the Commission issued a Class Acknowledgement and Order for the BOP claim no. P-2004-0296.

Administrative Judge Humphrey issued a decision granting class certification, on December 2, 2005, and the Agency filed a Final Agency Decision rejecting the Administrative Judge's decision, and appealing the issue to the Commission's Office of Federal Operations. Ultimately, on July 17, 2007, the Commission upheld the FAD,

while rejecting the Agency's procedural arguments regarding the amendment of the complaint and the untimely EEO contact. *Turner v. Department of Justice, Bureau of Prisons*, Appeal 0720060041 (July 19, 2007).

On March 19, 2008, the Commission issued an Order to the Agency Ordering it to Produce Complainant file for Class Agent's pending individual claim. Class Agent asserts this was his first knowledge that his claim had been returned to the Denver EEOC Office. Sometime in March 2008, The Agency notified Class Agent that it was treating his Complaint as a Mixed Complaint and not forwarding it to the Commission.

On April 14, 2008, Complainant contacted the Agency's EEO officer. Again he attempted to amend his individual complaint to allege a class Complaint. The Agency refused to allow him to do so. On April 25, 2008, the Commission issued its Acknowledgement and Order in Complainant's pending individual complaint. On April 25, 2008, Complainant filed a Notice of Intent to Pursue Class Complaint and Acknowledgment Order. Exh. 14, Class Agent's Timeliness Brief. On May 13, 2008, the Commission issued Acknowledgement and Order for Class Certification.

Discovery ensued regarding the class.

Factual Background Regarding Class Promotion Claim

The class issue is defined as: whether agency employees from January 1, 1994 to the present have been denied promotions based upon the agency's policy or pattern and practice of retaliating against employees because they engaged in protected Title VII EEO activity. The scope of this case is nationwide.

In discovery, the Class Agent conducted depositions regarding the Agency's structure for the purpose of identifying the promotion process. The Bureau of Prisons is comprised of a Central Office in Headquarters in Washington, DC, six regional offices, and approximately 115 institutions. Cert. Exh. 154. The Central Office, which includes the Director's office and the eight divisions, are located in Washington DC. The eight divisions include Administration, Correctional Programs, Health Services, Human Resources Management, Industries, Education and V.T., National Institute of Corrections, Office of General Counsel and Program Review. Cert. Exh. 154.

All personnel policies are developed and disseminated by Central Office's Executive Staff. Cert. Exh. 162, LeBlanc dep., pp. 83-84. This Executive Staff is composed of the Director, eight Assistant Directors and six Regional Directors. In-person meetings of the Executive Staff are held approximately four times annually. In these meetings, the Executive Staff makes all selection decisions for positions at grade GS-14 and above, and all "leadership" positions, regardless of grade. See Cert. Exh. 162, LeBlanc dep., pp. 33-36, 40. The purpose of this process, where decisionmaking is limited to a small group of individuals, is to maintain uniformity and consistency. *Id.* at 46.

Moreover, the Bureau only promotes from within. The Agency provides individuals the opportunity to start at an entry level position and work their way up to a managerial position, including Wardens. *Id.* at 47, 50.

Mr. LeBlanc, Assistant Director, Human Resources Management Division is a member of the Executive Staff. He testified that the selection position involves some subjectivity. He spoke of the Executive Staff having "some sense of who that leader may be" and described the decision as being at least partly intuitive. *Id.* at 107. Mr. LeBlanc characterizes the selection process as basically consensus, where the Staff members "know" who is the appropriate person for the job. *Id.* at 36, 107.

The Regional Directors, who are part of the Executive Staff, make promotion decisions for GS-12 positions. *Id.* at 45, 80-81. Associate Wardens are also chosen by the Executive Staff. *Id.* at 40. Supervisory staff at the institutions are selected by the Regional Directors, with the Warden's input. *Id.* at 45.

Wardens select non-supervisory positions at the GS-11 level or below. There are approximately 115 wardens, also referred to as CEOs. The Warden has considerable discretion, including the ability to select someone who is not on the Best Qualified list.

Most lower level selections are based upon personal knowledge. *Id.* at 105. If the Warden does not know the individual, he can "voucher" that applicant. Mr. LeBlanc testified that reference checking and vouchering are the same, but acknowledged that there is nothing that prohibits informal discussions regarding individuals during which no records are kept. Cert. Exh. 162, p. 89. The main difference between vouchering and reference checking appears to be its informality and the fact that no records are kept of the discussion in a "voucher" conversation. See Cert. Exh. 162, p. 89 and Cert. Exh. 155, pp. 18-20, 26. Thus, there is no control over what information is shared in the vouchering process. Individuals in their affidavits refer to being "vouchered" in a manner that reflects they believe some improper information may be being shared, including EEO activity. See *e.g.*, Cert. Exh. 18, pp. 4, 5.

Moreover, these same selecting officials, the Executive Staff and the Wardens, are informed of who files EEO complaints. Ms. Raskin, the Agency EEO Officer, stated that her office notifies the CEO (Warden) when an EEO investigation would be conducted at his institution. Cert. Exh. 163, Raskin dep., pp. 25-26. When the Warden is notified, the appropriate Regional Director is copied on email traffic. *Id.* at 84.

II. ISSUE

Whether the instant complaint satisfies the requirements of 29 C.F.R. § 1614.204(a) (1999) for acceptance as a class complaint.

III. ANALYSIS

Complainant brings his Complaint under Title VII of the Civil Rights of 1964 as amended, 42 U.S.C. § 2000e-1, *et seq.* Title VII prohibits discrimination against an employee because “he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e-3(a).

A. Definition of the Class

“Although not explicitly mentioned [in EEOC regulations], the definition of the class is an essential prerequisite to maintaining a class action.” *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976). While the actual identity of individual class members need not be determined before class certification, the definition of the class must allow for class membership to be ascertained through objective criteria. MANUAL FOR COMPLEX LITIGATION, §21.222 (4th Ed. 2005). The class definition should therefore “avoid subjective standards (*e.g.*, a plaintiff’s state of mind) or terms that depend on resolution of the merits of the underlying claim(s) (*e.g.*, persons discriminated against).” *Id.*

Here, the class definition has been approved as follows: whether agency employees from January 1, 1994 to the present have been denied promotions based upon the agency’s policy or pattern and practice of retaliating against employees because they engaged in protected Title VII EEO activity. The scope of this case is nationwide.

I note that the Class Agent raised allegations of class wide reprisal. Retaliation claims may be the subject of class actions where a class agent establishes a general practice of retaliation against employees who oppose discriminatory practices or exercise rights protected under Title VII. *See Holsey v. Armour & Co.*, 743 F.2d 199, 216-17 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). The Commission also has concluded that reprisal is an appropriate basis for a class complaint when there is a showing that specific reprisal actions were taken against a group of people for challenging agency policies, or where reprisal was routinely visited on class members. *Levitoff v. Dep’t of Agriculture*, EEOC Appeal No. 01913685 (March 17, 1992), *request for reconsideration denied*, EEOC Request No. 05920601 (Sept. 10, 1992); *George, supra*. *See also Howard v. Dep’t of Commerce*, EEOC Appeal No. 01956455 (June 4, 1997); *request for reconsid. denied*, EEOC Request No. 05970855 (Oct. 24, 1997)(remanding a class complaint alleging racial and reprisal discrimination in the areas of training, promotions, performance awards, performance evaluations and work assignments/environment for a determination of whether it meets the standards under an “across-the-board” theory); *Alston v. Dep’t of Veterans Affairs*, EEOC Appeal No. 01971752 (May 13, 1999); *Powell v. Dep’t of the Navy*, EEOC Appeal No. 01974349 (Aug. 2, 2000).

In the federal sector EEO process, before the merits of a class complaint can be adjudicated, the complaint must be certified as a class complaint in accordance with 29 C.F.R. §1614.204. This regulation was patterned after the standards established by Federal Rule of Civil Procedure 23, which governs certification of federal court class actions. The criteria set forth by 29 C.F.R. §1614.204(a)(2) for certification of an administrative class complaint are as follows:

(i) the class is so numerous that a consolidated complaint of the members of the class is impractical [numerosity]; (ii) there are questions of fact common to the class [commonality]; (iii) the claims of the agent of the class are typical of the claims of the class [typicality]; and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class [adequacy of representation].

“Class complainants are not required to prove the merits of their claims at the class certification stage; however, they are required to provide more than bare allegations that they satisfy the class complaint requirements.” *Boord v. U.S. Department of Justice*, EEOC No. 07A00021 (2000), citing *Mastren v. U.S. Postal Service*, EEOC No. 05930253 (1993).

B. Commonality and Typicality

In addressing whether a class complaint warrants certification, it is important to first resolve the requirements of “commonality” and “typicality” in order to “determine the appropriate parameters and size of the membership of the resulting class.” *Fusilier v. Department of the Treasury*, EEOC Appeal No. 01A14312 (Feb. 22, 2002); *Moten v. Federal Energy Reg. Commission*, EEOC Request No. 05960233 (April 8, 2007). The purpose of the commonality and typicality requirements is to ensure that the class agent possesses the same interests and suffers the same injury as the members of the proposed class. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156-57 (1982). Typicality exists where the class agent demonstrates some “nexus” with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. United States Postal Serv.*, EEOC Appeal No. 01A03195 (Mar. 22, 2001). A class agent need not demonstrate the total absence of factual variation among class members in order to satisfy these requirements. *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1981), *cert. denied*, 460 U.S. 1085 (1982); *Donald v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1976), *cert. denied*, 434 U.S. 856 (1977). Although 29 C.F.R. §1614.204(a)(2) identifies commonality and typicality as two individual requirements for certification, they are normally analyzed together, because in application, they tend to merge and are often indistinguishable. *Falcon*, 547 U.S. at 157, n.13; *Carter v. Postal Service*, EEOC Appeal No. 01A24926 (Nov. 14, 2003).

“Commonality requires that there be questions of fact common to the class. Factors to consider in determining commonality are whether the practice at issue affects

the whole class or only a few employees, the degree of local autonomy or centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact." *Mastren v. U.S. Postal Service*, EEOC No. 05930253 (1993).

Initially, I address the Agency's position that the Commission has already found that the Class Agent has failed to establish commonality. That position is a misreading of the Commission's decision in 2007. Specifically, the Commission was analyzing whether there was commonality when the complaint involved issues of classwide retaliation, including failure to transfer, failure to promote, disparate treatment in terms and conditions of employment, and harassment. Timeliness Exh. 10, p. 6 (December 2005 Certification Decision). That is a considerably different issue than merely classwide retaliation resulting in failure to promote, and that issue has not yet been decided by the Commission.

Here I find the requisite nexus exists to establish common questions of fact and law between the class agent and the putative class members. First and foremost, the class complaint challenges the intent and effects of one common official practice regarding promotions. The Agency admits that the Executive Committee determines who receives all GS-14 level promotions, as well as selecting for "leadership" positions at any grade. That same group has knowledge of who has filed EEO complaints, either nationally or in their region. The next level of promotions is controlled by the regional directors, who are also part of the Executive Committee staff. Moreover, there is also evidence that this practice is informally enforced via vouchering and the approval of selections by higher managers.

There is some evidence which Class Agent alleges establish a culture of retaliation, based on the widespread nature of the practice. In addition, at least two Wardens are alleged to have referred to the GNC club – "Got Nothing Coming." Cert. Exh. 5, p. 3, ¶¶ 20-21. This reference allegedly was made to Melvin Dunlap by Warden Booker, who explained if you file a complaint of discrimination, "you got nothing coming from the Bureau." *Id.* At least one other individual also referenced a very similar statement. See, Cert. Exh. 154 (correctional officer was told that the Warden said he "didn't have anything coming" because of his EEO activity) Moreover, the Class Agent's evidence is replete with statements alleged by Assistant Wardens, EEO officers and Regional Directors that their promotions were not being considered because of their prior EEO activities. Michele Salazar Aff., Cert. Exh. 127, Hardman Aff. Cert. Exh. 135, Spell Aff. Cert. Exh. 149, Gibson Aff., Cert. Exh. 137, Tompkins Aff. Cert. Exh. 128, Cline Aff. Cert. Exh. 134, Sniezek Aff. Cert. Exh. 139.

The Class Agent's expert provides evidence that supports class certification. Despite receiving less than complete information from the Agency, the Expert concluded that individuals who filed EEO complaints were promoted at a significantly lower rate than those who did not. See Cert. Exh. 173, Cert. Brief, p. 27. Even when the promotion rate for all employees was at its lowest, 12 percent, the promotion for individuals who filed EEO complaints lagged significantly behind at 3 percent. In

addition, the deposition of Mr. LeBlanc reflects that there is considerable subjective decisionmaking in the process, where “most of us know, yeah, that’s probably the right person for the job.” Cert. Exh. 162, pp. 104-5. This statistical analysis, combined with the anecdotal evidence, creates more than “bare allegations” of commonality and typicality on which to determine whether class certification is appropriate.

The Agency argues that the evidence shows that the hiring process is actually decentralized, rather than centralized. While Mr. Pearce’s declaration was stricken, even if had not been, this evidence and this argument does not defeat class certification. It is primarily an argument on the merits, rather than significant to the class certification issue. The facts as set forth in Mr. LeBlanc and Ms. Raskin’s depositions are not refuted – that a small group of individuals, who are aware of EEO filings, has tight control over many of the promotions. Wardens make individual hiring decisions, and Wardens also have first hand knowledge of who has filed EEO complaints. For example, if Wardens “get the message” that one is not to promote individuals who file EEO complaints, then their independent selection is still part of the pattern or practice. Thus, that is a matter of proof at the next stage, but the Agency’s representations even if accepted would not undermine the possibility that Class Agents’ can establish a pattern or practice claim.

While the potential class claimants may have applied for different jobs and would potentially receive differing remedies, that does not defeat commonality. The possibility of divergence among remedies will not defeat a finding of commonality and typicality where common issues of law and fact prevail with respect to the underlying claim of discrimination. *Flight Officers v. United Air Lines*, 572 F. Supp. 1494 (N.D. Ill. 1983), *aff’d*, 756 F.2d 1274 (7th Cir. 1985). As stated above, the common practice and the evidence of a widespread practice establish commonality.

Typicality requires that the claims of the class agent be typical of the claims of the class. 29 C.F.R. § 1614.204(a)(2)(iii). The overriding typicality principle is that the interests of the class members must be fairly encompassed within the class agent’s claim. *Falcon*, 457 U.S. at 160. See also *Hopkins*, EEOC Appeal No. 01A02840.

The Class Agents’ claims are typical of the claims of the class. They all assert the same action – denial of promotion – based on the same policy – a pattern or practice of refusing to promote individuals who filed EEO claims or engaged in EEO activity. They all suffered the same harm of having their promotion opportunities curtailed after their protected activity. For the foregoing reasons, I conclude that the Class Agent has satisfied the commonality and typicality prerequisites.

C. Numerosity

EEOC regulation 29 C.F.R. §1614.204(a)(2)(i) requires that the class membership be so numerous that a consolidated complaint of the members of the class would be impractical. Although courts have demonstrated reluctance to certify classes with thirty or fewer members, there are no specific numerical cut-off points. See

Anderson v. Dep't of Defense, EEOC Appeal No. 01A41492 (Oct. 18, 2005) (citing *Harris v. Pan Am. World Airways*, 74 F.R.D. 24 (N.D. Cal. 1977)). Rather, proper analysis of the “numerosity” criterion calls for examination of various case-specific factors beyond the number of class members, such as (1) the geographical dispersion of the class; (2) the ease with which class members may be identified; (3) the nature of the action; and (4) the size of each plaintiff’s claim. See *Gen. Telephone Co. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330 (1980); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

Over 100 affidavits of individuals were submitted. Cert. Brief, Exh. 1-117. Class Agent also submitted numerous EEO complaints. Cert. Brief 159. Those affidavits and complaints come from every region of the Bureau. Class Agent’s expert identified approximately 2900 individuals who may be part of the class. Only 21 of 2929 employees received more than one promotion after filing a claim. Cert. Exh. 173. Approximately 2700 never received another promotion after engaging in protected activity. Moreover, a number of other potential class members have been indentified in the pendency of this case. As of July 9, 2010, the Agency identified approximately 80 complaints raising the issue of retaliatory failure to promote that have placed in abeyance pending the certification decision in this case.¹ See, Agency’s Notice to AJ and Complainant’s Representatives.

The Agency challenges the affidavits submitted as “canned” and bare bones. Some of the affidavits contain no particular details regarding the affiant’s treatment. However, a number of the affidavits contain specific details regarding the instance in which the denial of promotion occurred and what management officials told these individuals. See e.g., Cert. Exhs. 127, 128, 134, 135, 137, 139, and 149. Review of the Affidavits reflects considerable different circumstances with one common theme – these individuals received no promotions after engaging in EEO protected activity. Despite the Agency’s complaints, the affidavits contain a number of anecdotes that appear to support the claim that there is a pattern and practice. The evidence from the affidavits cover all of the regions and cover the time period since 1994 to the date of the filing. As noted above, a number of the affidavits contain statements allegedly made by management asserting that EEO activity was indeed the reason for the denial of a promotion. Moreover, the pure number of complaints and the statistical analysis further support the potential for a class claim.

Here, the complaint undoubtedly meets the numerosity requirement.

D. Adequacy of Representation

The adequacy of representation criterion set forth in EEOC Regulation 29 C.F.R. §1614.204(a)(2)(iv) requires that the representative of the class fairly and adequately protect the interests of the class. In order to satisfy this element, “[t]he class representative should have no conflicts with the class and should either have sufficient

¹ This count does not include cases on that submission which are identified as being removed from abeyance.

legal training and experience to pursue the claim or designate an attorney with the requisite skills and experience.” *Sedillo v. Dep’t of Agriculture*, EEOC Appeal No. 07A20071 (Aug. 7, 2002); *Kennedy v. National Aeronautics & Space Admin.*, EEOC Appeal No. 01993626 (Apr. 26, 2001). *Goldin v. Nat’l Aeronautics & Space Admin.*, EEOC Appeal No. 01993626 (Apr. 26, 2001). Indeed the Commission has described the “adequacy of representation” criterion as “perhaps the most critical requirement because the judgment [on the class complaint] will determine the rights of the absent class members.” *Bailey v. Dep’t of Veterans Affairs*, EEOC Request No. 05930156 (July 30, 1993). The following factors are considered in determining the adequacy of the class’s legal representation: (1) the representative’s prior experience handling class complaints; (2) the representative’s level of professional competence; and (3) the representative’s access to the resources necessary to prosecute the class complaint. See *Hight v. Dep’t of Agriculture*, EEOC Appeal No. 01942377 (Feb. 13, 1995) (citing *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 534-41 (W.D. La. 1976), *aff’d* 577 F.2d 1132 (5th Cir. 1978)).

The class representatives are two attorneys, John Mosby and Marilyn Cain Gordon. The class representatives have the experience and professional competence to litigate this case. They also possess adequate resources to represent the class. Class Cert. Motion, Exh. 172. Mr. Mosby has over 20 years of experience in EEO law, particularly with federal sector class actions. While Ms. Gordon has somewhat less years of experience, she also has considerable experience in the area of EEO and class actions. Mr. Mosby and Ms. Gordon have been approved as class representative in several EEO cases, including *Glover v. U.S. Postal Service*, EEOC Appeal No. 01A04428 (April 2001). The EEOC’s Office of Federal Operations has found them to be adequate representatives in several nationwide federal sector class complaints. I therefore find that the class representatives will diligently and actively represent the interests of the class and are appropriate class representatives. See *Holtgrewe v. FDIC*, EEOC NO. 01973144 (1999); *Hadnot v. Department of Housing and Urban Development*, EEOC No. 05940202 (1994); *Byrd v. Department of Agriculture*, EEOC No. 05900291 (1990).

E. Agency’s Motions To Dismiss

The Agency filed three Motions to Dismiss, on June 11, 2008, July 26, 2008, and August 5, 2008. I will address the issues raised in those motions to the extent they are not already addressed above or in the Order re Timeliness.

In its first Motion to Dismiss, the Agency argues that the class complaint should be dismissed on the basis of laches. Some of this argument is addressed indirectly in the timeliness motion, since I find that Class Agent has repeatedly and in a timely manner sought to amend complaints to add his class allegations. Moreover, to establish laches, the Agency must assert some harm, and to date it has not done so. Thus, I reject the Agency’s laches defense.

Similarly the Agency asserts that Class Agent unduly delayed in seeking to

amend his complaint to add class allegations. Again, this was addressed in the Timeliness Order.

In its Second Motion to Dismiss, the Agency primarily restates it laches and undue delay arguments previously rejected.

The third Motion to Dismiss asserts that the Complaint should be dismissed as too vague. I reject this argument. The allegations have been expanded and supported by numerous EEO complaints, affidavits, and an expert. These claims can be investigated and proven or disproved. Thus, I will not dismiss the complaint for vagueness.

F. Order to Identify and Hold in Abeyance

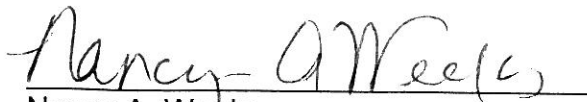
The Agency shall upon receipt of this order continue to identify all those pending complaints that raise the same issue as this class complaint during the time frame encompassed by this class complaint, e.g., January 1, 1994 to the present. For those cases which are pending and have not yet been forwarded to an Administrative Judge, the Agency shall, consistent with *Roos v. U.S Postal Service*, EEOC No. 05920101 (1992), issue a decision notifying the complainants that their complaints will be held in abeyance while awaiting the decision to accept or reject the class complaint and of the complainant's right to appeal to the Commission if they disagree with the decision to hold the complaint in abeyance.

Copies of the Agency documents which serve to place pending cases in abeyance shall be provided to this office and to class counsel.

V. Conclusion

This captioned complaint satisfies the requirement of 29 C.F.R. § 1614.204(a)(1999) for acceptance as a Class Complaint. The class claim shall be identified as: whether agency employees from January 1, 1994 to the present have been denied promotions based upon the agency's policy or pattern and practice of retaliating against employees because they engaged in protected Title VII EEO activity. The scope of this case is nationwide.

For the Commission:


Nancy A. Weeks
Administrative Judge

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the Class Agent whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the Class Agent's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

TO THE CLASS AGENT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.204(a)(7). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission

P.O. Box 77960
Washington, D.C. 20013

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE, Suite 5SW12G,
Washington, DC 20507

BY FACSIMILE:

Number: (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

CLASS CERTIFICATION

If the decision is to accept (certify) the class complaint, Commission regulations require the Agency to notify all class members. 29 C.F.R. § 1614.204(e)(1). The Agency must use all reasonable means to notify all class members of the acceptance of the complaint within 15 days of receipt of the Administrative Judge's decision or within a reasonable time frame specified by the Administrative Judge. See also Management Directive 110, 8-5, 8-6 (1999).

In order to ensure compliance with the requirements of 29 C.F.R. § 1614.204(e)(1) and (2), the Agency is required to submit to the undersigned a proposed notice along with a proposed method of notification within 15 days of receiving a copy of this decision. The EEOC encourages the parties to stipulate to the form and content of a proposed notice to the class and the manner in which it would be issued, consistent with this decision and the requirements of 29 C.F.R. § 1614.204(e). If the parties are unable to so stipulate, the class agent may submit his objections to the Agency's proposal within five (5) days of receiving the same from the Agency. Once the undersigned approves the notice and the method of its distribution, the Agency shall notify all class members of the acceptance of this class complaint within 15 days of the date the agency issues a final order fully implementing this decision pursuant to 29 C.F.R. § 1614.204(d) (7) (1999) or within 15 days of the date this decision otherwise becomes the agency's final action because of its failure to timely issue a final order.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. § 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the Class Agent believes that the agency has failed to comply with the terms of this decision, the Class Agent shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the Class Agent knew or should have

known of the alleged noncompliance. The agency shall resolve the matter and respond to the Class Agent in writing. If the agency has not responded to the Class Agent, in writing, or if the Class Agent is not satisfied with the agency's attempt to resolve the matter, the Class Agent may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The Class Agent may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.

Certificate of Mailing

For timeliness purposes, the EEOC will presume that this document was received within five (5) calendar days of transmission by U.S. mail.. I certify that on 10/6/10 I sent the foregoing via U.S. mail to each of the following persons:

Complainant (via U.S. mail)

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