



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Thaddeus N.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Western Area),
Agency.

Appeal No. 0120142701

Hearing No. 551-2014-00140X

Agency No. 1E-981-0005-14

DECISION

Complainant, the putative Class Agent, filed an appeal from the Agency's July 7, 2014, final decision concerning his class equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission accepts the appeal pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues presented are: 1) did the Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) properly determine that the class complaint should not be certified on the grounds that it failed to meet the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2); and 2) if the class should not be certified, should the Class Agent's underlying individual complaint be dismissed for failure to state a claim and for expressing dissatisfaction with the processing of a previous EEO complaint.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Custodian at the Agency's Tacoma, Washington Processing and Distribution Center (P&DC).

Class Complaint

On February 19, 2014, the Class Agent filed a class complaint. The Class Agent alleged that the Agency discriminated against him and up to ten other employees on the bases of race ("various"), sex ("both"), disability (Class Agent: Distressed Heart; a coworker: Sleep Apnea), age (over 40 years old), and in reprisal² for prior protected EEO activity when his supervisor (S1) violated the Agency's "zero tolerance policy" against threats, verbally berated employees, and did not treat employees with dignity and respect. The Class Agent also alleged that S1 abused her position, engaged in "reckless indifference and malice," and overall violated postal policy and regulations, federal statutes, and the United States Constitution.

AJ's Denial of Class Certification

The Agency processed the complaint as a class complaint, and on April 11, 2014, forwarded it to an AJ pursuant to 29 C.F.R. § 1614.204. On April 21, 2014, the AJ issued a scheduling order to the parties that provided the deadline for submitting briefs, but neither party responded.

The AJ found that the Class Agent failed to establish that the class met the requirements of numerosity, commonality, and typicality to warrant certification of the class. 29 C.F.R. § 1614.204(a)(2). The AJ also determined that the Class Agent is not an attorney and does not have a legal background, but it was not necessary to make a finding on adequacy of representation because the request for class certification did not meet the requirements of numerosity, commonality, and typicality. The AJ further noted that the Class Agent and other complainants could proceed thereafter with their individual complaints.

Agency's Final Order

In its July 7, 2014, final order, the Agency implemented the AJ's decision denying class certification. The Agency also dismissed the Class Agent's individual complaint on the basis that it failed to state a claim, and that it expressed dissatisfaction with the processing of a previous EEO complaint.

CONTENTIONS ON APPEAL

Neither party presents any arguments on appeal.

² In his class complaint, Complainant noted that the basis of reprisal only applied to himself.

ANALYSIS AND FINDINGS

Class Certification

EEOC Regulation 29 C.F.R. § 1614.204(a)(2) states that a class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent are typical of the claims of the class; and (iv) the agent of the class, or if represented, the representative will fairly and adequately represent the interests of the class. EEOC Regulation 29 C.F.R. § 1614.204(d)(2) provides that a class complaint may be dismissed if it does not meet the four requirements of a class complaint or for any of the procedural grounds for dismissal set forth in 29 C.F.R. § 1614.107. The class agent, as the party seeking certification of the class, carries the burden of proof, and it is his obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. [Anderson, et al. v. Dep't of Def., EEOC Appeal No. 01A41492 \(Oct. 18, 2005\)](#); [Mastren, et al. v. U.S. Postal Serv., EEOC Request No. 05930253 \(Oct. 27, 1993\)](#).

An agency must forward a class complaint to an AJ, who will determine whether the class complaint meets the criteria for certification. 29 C.F.R. § 1614.204(d). The AJ may reject a class complaint if any one of the four prerequisites is not met. See [Garcia v. Dep't of Justice, EEOC Request No. 05960870 \(Oct 10, 1998\)](#); 29 C.F.R. § 1614.204(d)(2).

Commonality and Typicality

The purpose of the commonality and typicality requirements is to ensure that a class agent possesses the same interests and has experienced the same injury as the members of the proposed class. See [General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 \(1982\)](#). While these two criteria tend to merge and are often indistinguishable, they are separate requirements. *Id.* Commonality requires that there be questions of fact common to the class; that is, that the same agency action or policy affected all members of the class. As the Class Agent, Complainant must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. [Belser, et al. v. Dep't of the Army, EEOC Appeal No. 01A05565 \(Dec. 6, 2001\)](#). Typicality, on the other hand, requires that the claims, or discriminatory bases, alleged by a class agent be typical of the claims of the class, so that the interests of the putative class members are encompassed within a class agent's claim. [Falcon](#), 457 U.S. at 156. The underlying rationale of the typicality and commonality requirement is that the interests of the class members be fairly encompassed within the class agent's claim. [Falcon](#), 457 U.S. at 147.

Regarding commonality, the Commission is not persuaded that common questions exist among the purported class members. Although the class complaint generally alleges that S1 engaged in actions that violated policies and laws, it does not provide details about the specific actions of S1 or how each purported class member was impacted by the conduct.

Moreover, as noted by the AJ, it is unclear whether S1 disciplined any class members other than the Class Agent. As such, the class complaint does not reflect that there was a shared injury among the class members.

Regarding typicality, we note that the Class Agent stated that the class members were of “various” races and “both” sexes. Further, the Class Agent alleged that only two complainants had disabilities, and only one previously had engaged in EEO activity. Thus, we find that the AJ properly found that the Class Agent failed to establish commonality or typicality. See Latham, et al. v. U.S. Postal Serv., EEOC Appeal No. 01A30357 (Sept. 24, 2003) (class complaint cannot satisfy commonality and typicality as to race and sex, because complainant claims discrimination on the bases of his race and his coworkers’ race, and on the bases of both sexes).

Numerosity

The numerosity prerequisite states that the potential class must be sufficiently numerous so that a consolidated complaint by the members of the class, or individual, separate complaints from members of the class is impractical. See 29 C.F.R. § 1614.204(a)(2)(i). The focus in determining whether the class is sufficiently numerous for certification is the number of persons affected by the Agency’s alleged discriminatory practice(s). See White, et al. v. Dep’t of the Air Force, EEOC Appeal No. 01A42449 (Sep. 1, 2005). The Commission has held that the relevant factors to determine whether the numerosity requirement has been met are the size of the class, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action at issue, and the size of each member’s claim. Carter, et al. v. U.S. Postal Serv., EEOC Appeal No. 01A24926 (Nov. 14, 2003). The United States Supreme Court has held that the numerosity requirement of Federal Rule of Civil Procedure 23 does not impose a numerical minimum or cut-off point for the size of the class but, instead, requires an examination of the facts of each case. General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 (1980).

In this case, the purported class consists of 11 members. According to the Class Agent, all the class members worked on Tour 2 at the Tacoma P&DC. We concur with the AJ’s finding that this purported class fails to meet the numerosity requirement because the class is not so large that consolidated or separate complaints would be impractical. See Jones v. U.S. Postal Serv., EEOC Appeal No. 0120083637 (Sept. 10, 2010) (class complaint involving 11 employees who worked at same postal facility did not meet numerosity requirement); Complainant, et al. v. Dep’t of the Navy, EEOC Appeal No. 0120131451 (July 15, 2014) (geographic proximity of the putative class members favors the consolidation of complaints and not class certification).

Adequacy of Representation

“Adequacy of representation” means simply that the Class Agent has demonstrated that he, or a designated representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2)(iv). The Class Agent must show that he is qualified, experienced, and generally able to conduct proposed litigation. See Drummond v. Dep’t of the Army, EEOC Appeal No. 01940520 (Aug. 19, 1994).

The Commission has generally held that a non-attorney Class Agent who does not possess the necessary experience, knowledge, or skills to represent a class is not an adequate representative. See Anderson, et al. v. Dep't of Defense, EEOC Appeal No. 01A41492 (Oct. 18, 2005) (class certification denied where Class Agent did not possess the necessary experience, knowledge, or skills to represent the class, and she did not obtain experienced counsel to represent the class).

In this case, the Class Agent, who is not an attorney, has not retained counsel. Given the complex nature of EEO class litigation, it does not appear that the Class Agent possesses the skills, experience, time, and resources necessary to represent the interests of the class, nor has he identified an attorney who might do so. Accordingly, we find that the Class Agent cannot adequately represent the class.

In summary, the putative class does not satisfy the prerequisites to certify a class complaint. Accordingly, the Commission AFFIRMS the Agency's final order with respect to class certification.

Dismissal of Complainant's³ Individual Complaint

EEOC Regulation 29 C.F.R. § 1614.204(d)(7) provides that the Agency must inform a class agent whose class claim has not been certified that it will either process the complaint as an individual complaint of discrimination or that the complaint is being dismissed as an individual complaint in accordance with 29 C.F.R. § 1614.107.

The Agency dismissed Complainant's complaint for failure to state a claim, as well as on the basis that it expressed dissatisfaction with the processing of a previous EEO complaint. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because: of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

In Complainant's individual complaint, he alleged that he was subjected to discrimination on the bases of race, sex, age, and in reprisal for previous EEO activity⁴ when S1 failed to enforce

³ Because the Class Agent's class complaint is not certified as a class, we hereafter refer to him as "Complainant."

⁴ In Complainant's two previous EEO complaints (Agency Nos. 1E-984-0001-13 and 1E-981-0029-13), he alleged the Agency subjected him to unlawful discrimination when S1 denied early starts on weekends; subjected him to a "bogus" investigative interview; charged him absent

policy/regulations, created a hostile work environment by bullying, intimidating, and harassing him, and failed to enforce statutes and policies. The Agency found that although Complainant offered vague references to the failure of S1 to enforce policies and statutes, he failed to indicate how S1 misapplied them or how he was adversely affected by S1's actions. The Agency concluded that Complainant failed to state a claim because he did not show he suffered individual or unique harm that rendered him aggrieved under the EEO regulations.

Upon review, we also find that Complainant has not shown that he suffered sufficient harm or loss to the privileges, conditions, or terms of his employment to render him aggrieved. Further, Complainant has not alleged any actions that are severe or pervasive enough to create a hostile work environment based on his protected classes. Therefore, we find that the Agency properly dismissed Complainant's individual complaint for failure to state a claim.

The Agency noted that Complainant also alleged that during mediation for a previous complaint, the Agency demanded that he agree to a global settlement for all his claims, which led to his rejection of a settlement agreement. He further stated that he later invited the Agency "back to the table," but management refused to continue negotiations. The Agency concluded that to the extent that Complainant expressed dissatisfaction with the processing of a prior complaint, this matter was dismissed under 29 C.F.R. § 1614.107(a)(8).

Upon review of this matter, we find this matter is more appropriately dismissed as failing to state a claim. In so finding, we note that the Commission has previously held that settlement negotiations are to be treated as confidential and privileged in order to facilitate candid interchanges that foster informal settlement of disputes. Floyd L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130919 (Feb. 23, 2016). Therefore, to allow a new complaint based on mediation discussions would defeat this purpose. See Gomez v. U.S. Postal Serv., EEOC Appeal No. 0120080526 (Oct. 21, 2009) (finding complainant's claim that he was tricked into participating in REDRESS and was displeased with the mediation outcome failed to state a claim of discrimination); Leonhardt v. Dep't of Army, EEOC Appeal No. 0120065185 (Dec. 7, 2007) (citing to Montague v. Dep't of the Army, EEOC Request No. 05920321 (May 7, 1992), in finding that statements made by agency officials and managers during mediation cannot be grounds for a claim of discrimination). Consequently, we AFFIRM the Agency's dismissal of this matter.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final order denying class certification and dismissing Complainant's individual complaint for the reasons set forth in this decision.

without leave (AWOL); threatened him; and accused him of insubordination and failure to follow instructions.

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 (S0610)

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. 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:



Carlton M. Hadden, Director
Office of Federal Operations

February 6, 2019

Date