



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

████████████████████
Mario H.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120171707

Hearing No. 550-2017-00098X

Agency No. ARPOM16SEP04087

DECISION

Complainant, the putative class agent, filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 16, 2017, dismissing his complaint of unlawful 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. For the reasons set forth below, the class complaint is REMANDED.

ISSUE PRESENTED

The issues presented on appeal are whether the EEOC Administrative Judge (AJ) properly denied Complainant's request for pre-certification discovery and determined that the class complaint should not be certified because it did not meet the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2).

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

Complainant previously worked as an Assistant Professor, AD-1701-00, at the Agency's Defense Language Institute (DLI) in Presidio of Monterey in California. Complainant worked for the Agency from April 6, 2015 until he resigned in lieu of termination on May 12, 2015.

Complainant initiated EEO counseling on September 19, 2016, and on November 24, 2016, filed a "formal class complaint" in which he alleged that the Agency subjected him and others to harassment and discrimination on the bases of national origin (Syrian) and religion (Muslim) when it:

1. Formed teams, transferred employees in/out based on religion and nationality, which led to segregated teams and feeding hostility among groups;
2. Promoted and demoted employees based on religion and nationality;
3. Over and under evaluated employees based on religion and nationality;
4. Lacked affirmative action that allowed Muslims to reach higher positions; on the contrary, there were disparate impacts for not selecting Muslims; and
5. Had lax policies and failed to enforce existing policies to fight religious and national origin discrimination.

Essentially, Complainant alleged that the former Dean of the Middle East School systematically promoted Christians and Lebanese persons for key positions; demoted or transferred employees because they are Muslim or non-Lebanese; used derogatory language and mannerisms against Muslims and non-Lebanese persons; and micromanaged on the bases of their religion and national origin. Additionally, Complainant alleged that the Chair of the Department posted a large Lebanese flag in the conference area of the office in a manner that harassed employees based on their national origin.

AJ's Decision

In a brief submitted to the AJ dated December 14, 2016, the Agency opposed class certification of Complainant's complaint. On February 24, 2017, the AJ assigned to the case dismissed Complainant's class complaint on the basis that Complainant, as putative class agent, failed to meet the class-certification requirements found at 29 C.F.R. § 1614.204(a)(2). The AJ noted that the absence of a class certification brief from Complainant made it difficult to ascertain whether there was any evidentiary proffer to support certification, but the Report of Investigation (ROI) for his individual complaint (Agency No. ARPOM15JUN02181) regarding his termination contained some of the necessary information.

The AJ determined that Complainant did not identify by name any other members of the class, but he requested pre-certification discovery related to “fired or demoted employees in the 3 Middle Eastern Schools in the past 10 years, EEO and administrative complaint filers over the past ten years, and the structure and membership of the monthly teams over the past ten years.” Thus, regarding numerosity, the AJ concluded that Complainant did not proffer the requisite number of fired or demoted employees, nor did he show that a large number of individuals have filed EEO or administrative complaints based on their placement on teams segregated by religion and/or national origin. The AJ noted that Complainant appeared to claim that there was a realignment that allowed for an all-Christian and pro-Syrian regime unit, but he still only proffered evidence that approximately six to seven Muslims were affected by this realignment segregation and provided no evidence that there were other realignments prior to his hiring in April 2015 that allegedly created segregated units. The AJ found that although Complainant wanted to conduct discovery to see if there were class members affected before the May 2015 realignment, his proffer was insufficient to justify requiring pre-certification discovery.

Regarding commonality and typicality, the AJ determined that Complainant did not establish this element of certification because he worked for the Agency for thirty-six days, and there was no indication in his brief that he was eligible for promotion, was demoted, or was “under-evaluated” based on his religion or nationality. Additionally, the AJ noted that Complainant was not a current employee, and was subjected to school reorganization and realignment for 12 days. The AJ concluded that the extremely short duration of Complainant’s tenure with the Agency made him ill-suited to serve as the Class Agent for a class of employees who, according to Complainant, were subjected to promotion, demotion, and evaluation decisions, “none of which he was around long enough to experience.” Additionally, the AJ found that Complainant did not proffer any evidence that prior to the 2015 Middle East School realignment, other Muslim and/or non-Lebanese employees were subjected to the alleged discrimination to which he was subjected.

Regarding representation, the AJ determined that Complainant did not meet this certification requirement because, as class representative, he had not presented any information that indicated that he had the skill and experience to represent the class. Consequently, the AJ dismissed Complainant’s class complaint and remanded Complainant’s complaint to be processed individually. The Agency’s final order implemented the AJ’s decision and noted that Complainant’s individual complaint would continue to be processed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that as a former employee, he did not have access to information to support class certification, and that the AJ denied his request for discovery before deciding the issue of certification. The Agency maintains that the AJ properly determined that pre-certification discovery was not warranted because Complainant did not establish a prima facie case of class disparate treatment. The Agency further maintains the AJ properly found that Complainant’s complaint did not establish the requirements for class certification.

ANALYSIS AND FINDINGS

Denial of Request for Discovery

In an email to the AJ dated January 9, 2017, Complainant requested pre-certification discovery on the basis that he did not possess information necessary to prove certification requirements. On January 10, 2017, the Agency objected to Complainant's request for pre-certification discovery, to which Complainant responded in opposition. The AJ denied certification of Complainant's class complaint without granting his request for discovery.

We note that the purpose of class action complaints is to economically address claims "common to [a] class as a whole . . . turn[ing] on questions of law applicable in the same manner to each member of the class." General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982); Mitchell, et al. v. Department of the Air Force, EEOC Appeal No. 01A41492 (Oct. 18, 2005); Mastren, et al. v. U.S. Postal Service, EEOC Request No. 05930253 (Oct. 17, 1993). EEOC regulations provide 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. 29 C.F.R. § 1614.204(a)(2). The regulations further provide, at 29 C.F.R. § 1614.204(d)(2), 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.

Upon review of this matter, we find that the AJ improperly denied class certification without conducting discovery. In so finding, we note that 29 C.F.R. § 1614.204(f) provides that parties are entitled to reasonable development of evidence on matters relevant to issues raised in a class complaint. This includes discovery relevant to establishing class certification. Regarding numerosity, Complainant alleged that he and an unknown number of other Muslim and non-Lebanese employees were subjected to a hostile work environment that included derogatory comments and mannerisms, segregation, and the posting of the Lebanese flag. Although the AJ concluded that Complainant could not meet the numerosity certification requirement, it is unclear from the record how many Muslim and non-Lebanese employees were subjected to the alleged harassing treatment. Without this critical information in the record, we find it improper for the AJ to conclude that Complainant cannot meet the numerosity requirement. See Devon H. v. Dep't of Homeland Security, EEOC Appeal No. 0120152087 (Jan. 26, 2017).

Regarding commonality and typicality, the AJ determined that Complainant did not establish this element of certification because he worked for the Agency for only thirty-six days, and there was no indication that he was eligible for promotion, was demoted, or was under-evaluated based on his religion or nationality. However, as noted above, the class complaint involved an allegation of a hostile work environment that included segregation, derogatory comments/actions, and the brandishing of a Lebanese flag in a harassing manner.

While Complainant was only employed with the Agency for approximately 36 days, this amount of time could have been sufficient to have exposed Complainant to harassment that is common or typical of the class.

In summary, we find that the record is insufficiently developed for a determination of class certification. Therefore, we find that the AJ abused her discretion in deciding the issue of class certification without allowing for pre-certification discovery. See Devon H. v. Dep't of Homeland Security, EEOC Appeal No. 0120152087 (Jan. 26, 2017), req. for recon. denied, EEOC Request No. 0520170354 (Aug. 10, 2017).

We note that the Agency notified Complainant it would resume processing of his individual complaint when it implemented the AJ's decision, but that the record does not reflect the current processing status of his individual complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order and REMAND this matter to the Agency for further processing consistent with this decision and the ORDERS below.

ORDER

The Agency shall undertake the following actions:

1. Within thirty (30) calendar days from the date this decision is issued, the Agency shall forward the entire record to the Hearings Unit of the San Francisco District Office. In its transmittal letter, the Agency shall request that an EEOC Administrative Judge be assigned for the purpose of undertaking pre-certification discovery.
2. Thereafter, the Administrative Judge shall allow the parties to engage in pre-certification discovery for a period of no less than ninety (90) days. During the discovery period, the AJ shall require that the parties cooperate to produce affidavits from the class members detailing the individual, specific incidents which comprise specific incidents that comprise the overall claim of a hostile work environment.
3. If the Administrative Judge finds that the proposed class satisfies the criteria of numerosity, typicality, and commonality but lacks adequacy of representation, the AJ shall conditionally certify the class and allow Complainant a period of sixty (60) days thereafter in which to obtain adequate representation. The AJ shall subsequently issue a decision on the class complaint in accordance with 29 C.F.R. § 1614.204(d).

4. While the above action is pending, the Agency shall hold the processing of Complainant's individual complaint in abeyance. If the AJ's decision denies class certification, the Agency shall resume the processing of Complainant's individual complaint.

The Agency is directed to submit a Report of Compliance, as provided in the statement entitled, "Implementation of the Commission's Decision." The report shall contain supporting documentation verifying that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court.

“Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (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