



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

████████████████████  
Tessa L.,<sup>1</sup>  
Complainant,

v.

Sonny Perdue,  
Secretary,  
Department of Agriculture,  
Agency.

Appeal No. 0720170021

Hearing No. 570-2015-00061X

Agency No. CRSD-2014-00665

**DECISION**

Following its January 23, 2017, final order, the Agency filed a timely appeal to the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.405(a). On appeal, the Agency requests that the Commission affirm its rejection of an Equal Employment Opportunity Commission Administrative Judge's (AJ) decision to certify the above-captioned matter as a class complaint. The Agency asks that the Commission affirm its final action rejecting the AJ decision. For the following reasons, the Commission **REVERSES** the Agency's final order.

**ISSUE PRESENTED**

Whether the EEOC AJ properly determined that the complaint at issue in this case met the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification.

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<sup>1</sup> 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

The Agency's Departmental Management (DM), Office of Operations, centrally administered the provision and funding of sign language interpreting services for Agency employees in the National Capital Region (NCR), but in May 2014, that role was transferred to each sub-agency. Between September 27, 2013, and May 19, 2014, DM issued several memoranda explaining the forthcoming changes in the administration and funding for sign language interpreting services. On June 23, 2014, Complainant (Class Agent) initiated contact with an EEO counselor to file an informal EEO class complaint regarding the change in the provision of interpreting services. On July 2, 2014, Class Agent initiated contact with an EEO Counselor to file an informal, individual EEO complaint regarding the change in interpreting services. Class Agent received counseling and a Notice of Right to File, in both her individual and class complaints.

On August 27, 2014, Class Agent filed a formal, individual EEO complaint alleging that the Agency failed to accommodate her disability and affected her working conditions. On September 4, 2014, Class Agent filed a formal class EEO complaint on behalf of herself and other employees with hearing impairments, alleging that they were subjected to disability discrimination based on their hearing impairments when, between September 27, 2013, and May 19, 2014, the Agency transitioned funding for sign language interpreting services from the Department level to the sub-agency level without using the appropriate process and without providing adequate time and training, which allegedly resulted in denial and delay of interpreting services and inhibited Class Agent from performing her job duties.

The Agency forwarded the class complaint to the EEOC's Washington Field Office. On December 7, 2015, the AJ issued an Order to Produce Information on or before January 22, 2016. The parties submitted their respective briefs on January 22, 2016. The Agency's brief included a Motion to Dismiss Class Agent's untimely claims. On February 1, 2016, Class Agent responded to the Agency's brief.

On December 14, 2016, the AJ issued an Order Conditionally Accepting Class Complaint (Order). In the Order, the AJ dismissed all of the class members' claims that arose prior to May 9, 2014, as untimely<sup>2</sup>, granted Class Agent's motion to change the class agent to a different employee (Class Agent 2), and conditionally certified the class, finding that the requirements of commonality, typicality, and numerosity had been met. The AJ determined that the class had not shown that adequacy of representation had been met. However, the AJ ruled that the class may present further evidence of the adequacy of representation requirement, by demonstrating that the Class Agent has retained counsel with the specialized experience, training, professional competence, and resources necessary to prosecute a class complaint, if and when the litigation resumes before the AJ.

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<sup>2</sup> Class Agent did not appeal the AJ's decision. Accordingly, the issue of timeliness is not before us.

The AJ conditionally certified the class as follows:

From May 9, 2014, and continuing, all deaf and hard of hearing employees in USDA's National Capital Region who, based on their physical disability (hearing impairment), have been or will be subjected to discrimination (the denial of a reasonable accommodation, specifically, qualified sign language interpreting services) resulting from the Agency's implementation of its decision to decentralize the system for the provision and funding of such services.

### ANALYSIS AND FINDINGS

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." Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982). 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.

#### *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 (Sept. 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). In determining whether the class is sufficiently numerous, the AJ needs to consider the number of persons who possibly could have been affected by the agency's discriminatory practices and who, thus, may assert claims. Simon V., et al. v. Dep't of Justice, EEOC Appeal No. 0720110008 (Sept. 15, 2015). While there are no specific numerical cut-off points, most courts are generally reluctant to certify a class with thirty or fewer members.

Contrary to the Agency's assertion, Class Agent was not required to prove that each of the 40 deaf and hard of hearing employees she had spoken to have a viable claim. Rather, she only has

to show that there were 40 deaf and hard of hearing USDA NCR employees who possibly could have been affected by DM's decision to decentralize interpreting services and who, thus, may assert claims. We agree with the AJ that Class Agent did that. Class Agent stated that she had a list of 40 deaf and hard of hearing individuals who had come to her in her capacity as the USDA Deaf and Hard of Hearing (DHH) President to express concerns about the decentralization of interpreting services and its impact on their ability to do the essential functions of their positions. There is no requirement that these 40 employees file individual claims before they can be counted for the purpose of numerosity. We agree with the AJ that numerosity has been demonstrated by the existence of multiple filed claims and the approximately 40 deaf and hard of hearing employees who have expressed concerns and/or complaints about DM's decentralization of interpreting services.

### *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 Gen. Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982). Both commonality and typicality serve as guideposts for determining whether, under the circumstances, maintenance of a class action is economical and whether a proposed class agent and the remaining potential class members' claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Id.* 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. Garcia v. Dep't of the Interior, EEOC Appeal No. 07A10107 (May 8, 2003). Typicality, on the other hand, requires that the claims or discriminatory bases of the class agent be typical of the claimed bases of the class. *Id.* A class agent must be part of the class he seeks to represent, and must "possess the same interest and suffer the same injuries" as class members. Falcon, 457 U.S. at 160. Moreover, claims must be sufficiently typical to encompass the general claims of the class members so that it will be fair to bind the class members by what happens with the class agent's claims. Conanan v. Federal Deposit Insurance Corp., EEOC Appeal No. 01952486 (Jan 13, 1993) (citing 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. *Id.*

The AJ concluded that the requisite nexus exists to establish common questions of fact and law between Class Agent and the putative class members. The AJ noted that the class complaint challenges the effect of the Agency's decision to decentralize the system for administering and funding requests from deaf and hard of hearing employees for qualified sign language interpreter services. The AJ further noted that the specific accommodation denied in these instances (the lack of consistent, reliable, or any sign language interpreter services at all) is typical of Class Agent's claims as well as those of the putative class members. Accordingly, the AJ concluded that Class Agent and the putative class members consist of a uniform group of individuals, in that they are all deaf or hard of hearing employees employed by the Agency in the NCR. The AJ further noted that the record contains affidavit testimony demonstrating that the putative class

members have suffered or will suffer similar, or in some cases, the same injury. Specifically, the AJ noted that Class Agent avers that deaf or hard of hearing employees have failed to receive (or have received inconsistent and/or unreliable) qualified sign language interpreting services for Department services (including the Health Unit, Gym facilities, postal services, security office, parking office) and Department-wide events (such as specific-themed fairs). Accordingly, the AJ concluded that the class complaint satisfies the commonality and typicality prerequisites.

The Agency argues on appeal that since decentralization, the sub-agency policies and practices regarding interpreter administration do not have a common administrator, a common standard, a common process, a common policy, or a common outcome. Accordingly, the Agency argues that there is no “glue” holding together the reasons for all of the sub-agencies’ responses to requests for interpreters and, thus, no commonality among the putative class members’ claims.

We disagree with the Agency’s argument. We agree with the AJ that the Departmental Management decision to dismantle the centralized interpreting fund is the “glue” that holds the reasons for the alleged discrimination experienced by each class member together. The class complaint asserts that if it were not for this policy change, Class Agent and the members of the class would not be experiencing a lack of consistent, qualified interpreting services both within their respective sub-agencies and at Department-wide functions. The degree of centralized administration involvement in the present matter is high, given that the decision was made by DM and allegedly has an adverse impact on all U.S. Department of Agriculture (USDA) sub-agencies in the NCR. DM provides “overall direction and coordination for the administrative programs and services of USDA . . . [and] direct[s] customer service to Washington, D.C. employees.” According to the class complaint, the decision by a high-level centralized administration to dismantle the centralized interpreting fund has been applied to the class as a whole, which caused a systematic failure to provide consistent and qualified interpreting services for deaf and hard of hearing employees to perform essential functions and to access the benefits and privileges of employment both at the sub-agency level and at Department-wide events.

We also agree with Class Agent that the cases cited by the Agency are distinguishable from the facts herein. Contrary to the cited case law, this class action argues that the Department’s discriminatory policy (the decentralization of interpreting services) has the effect of discriminating against the proposed class of deaf and hard of hearing USDA NCR employees as a whole. This single policy has caused a common discriminatory act (i.e., failure to provide, across the entire Department, the reasonable accommodation of consistent qualified interpreting services). This case is about the discriminatory conduct of DM, which oversees accommodations for all deaf and hard of hearing employees. This class complaint is not about the sub-agencies’ violation of the law, but rather the DM’s refusal to retain effective means of providing consistent, qualified interpreting services, and deciding to dismantle the centralized system without regard for the needs and rights of deaf and hard of hearing employees. The sub-agencies allegedly had no opportunity to allocate costs for interpreting services in their budgets or to train their staff to ensure that consistent qualified interpreting services would be provided in an uninterrupted manner. The Class Agent claimed that DM’s action allegedly left the sub-agencies in a state of total disorder.

We also agree with the AJ that the typicality requirement is met. While typicality is met when there is some nexus between the class agent's claims and the class members' claims, this prerequisite does not mandate that the class agent's circumstances be identical to those of the class members'. See Meyer v. Portfolio Recovery Assoc., LLC, 707 F.3d 1036, 1042 (9<sup>th</sup> Cir. 2012) (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9<sup>th</sup> Cir. 1998)). Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist. See Milonas v. Williams, 691 F.2d 931, 938 (10<sup>th</sup> Cir. 1982). Class Agent and the putative class members claim that the DM discriminated against them through the dismantling of the centralized interpreting fund which resulted in lack of reasonable accommodations. The Class Agent's claims do not need to be identical in every respect to the claims of the class members. The basic premise underlying Class Agent's claim and the class members' claim is the same - the very same act of dismantling the centralized fund caused everyone to suffer lack of reasonable accommodations in the form of consistent, qualified interpreting services for essential functions of their respective employment and Department-wide functions. Complainant's specific job responsibility of handling her agency's interpreting requests does not distinguish her from the other class members. She, as a deaf USDA employee, has allegedly suffered a lack of consistent, qualified interpreting services as a result of the decentralization of interpreting services.

#### *Adequacy of Representation*

The final criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification is that the class agent, or his/her representative, adequately represents the class. To satisfy this criterion, the agent or representative must demonstrate that he or she has sufficient legal training and experience to pursue the claim as a class action, and will fairly and adequately protect the interests of the class. Belser, et. al. v. Dep't of the Army, EEOC Appeal No. 01A05565 (Dec. 6, 2001); Woods v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961033 (Feb. 13, 1998). In this regard, it is necessary for the class agent, or the representative, to demonstrate sufficient ability to protect the interests of the class so that the claims of the class members do not fail for reasons other than their merits. Id. 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 No. 01942377 (Feb. 13, 1995).

The AJ concluded that Class Agent did not possess any interests that conflict with those of the class. However, the AJ also concluded that Class Agent has not established that her designated counsel has the requisite specialized legal background or resources to pursue the class action. The AJ stated that "the designated representatives certainly possess the requisite experience in the substantive area of disability law" but she found that "Class Agent's January 22, 2016 Brief is not sufficiently specific regarding the extent of class action experience possessed by counsel."

We agree with the AJ. Accordingly, assuming Class Agent can meet the pre-condition of establishing that the class counsel has the requisite specialized legal representation, we agree that the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification has been met.

Upon remand, we note that Class Agent 2 should be substituted for Class Agent, in accordance with the AJ's finding in her Order that substitution was appropriate based on the current employment status of the original Class Agent.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's decision and conclude that the class is properly conditionally certified.

### ORDER

The Agency is ORDERED to perform the following:

1. Notify potential class members of the accepted class action within fifteen (15) calendar days of the date this decision is issued, in accordance with 29 C.F.R. § 1614.204(e).
2. Forward a copy of the class complaint file and a copy of the notice to the Hearings Unit of the Washington, D.C. Field Office within thirty (30) calendar days of the date this decision is issued. The Agency must request that an AJ be appointed to hear the certified class claim, including any discovery that may be warranted, in accordance with 29 C.F.R. § 1614.204(f).

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 shall include supporting documentation of the Agency's actions.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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:

  
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 Carlton M. Hadden, Director  
 Office of Federal Operations

November 9, 2017  
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 Date