



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

[REDACTED]
William G,¹
Complainant,

v.

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

Appeal No. 2019001459

Hearing No. 550-2018-00428X

Agency No. 1E-971-0008-17

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 December 11, 2018, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Clerk at the Agency's Processing and Distribution Center facility in Portland, Oregon.

In 2016, Complainant filed an EEO complaint alleged race-based discrimination when, in 2015, the Agency chose a coworker (Caucasian) over him for a promotion. Subsequently, in March 2017, Complainant learned that the same coworker was promoted to an EAS-20 manager position. Complainant did not apply for the EAS-20 manager position.

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.

On April 28, 2017, Complainant contacted the EEO counselor again alleging discrimination. On June 12, 2017, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, on March 17, 2017, the coworker, who had previously been promoted to an EAS-17 position instead of Complainant, was now promoted to an EAS-20 position. Complainant asserted that he was not being provided the same promotional opportunities because of his race.

The Agency processed the June 2017 complaint as a class complaint and forwarded it to an EEOC Administrative Judge (AJ) pursuant to 29 C.F.R. § 1614.204. The AJ issued a scheduling order to the parties that provided the deadline for submitting briefs.

Complainant provided his response on July 6, 2018. In his response, Complainant argued that African-American employees as a class are discouraged from applying for managerial positions. In support of his assertion, he noted that he and others have failed to obtain a position in management. As such, he claimed that it has affected all African-Americans trying to obtain a promotion in the Portland District. He also asserted that he has been informed by two different managers that management has a negative perception about African-Americans and that they must move to another location to be promoted.

He summarily asserted that he has met the prerequisites of commonality and typicality based on his 2016 non-selection complaint and indicated that he was in the process of obtaining legal representation. Finally, Complainant submitted the names of ten African-American employees he knows who have been discouraged from pursuing management positions in the Portland District. In sum, Complainant stated that he has met the requirements for class certification. On October 18, 2018, Complainant filed an amendment including the names of 18 individuals purported to be class members.

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 noted that the purported class size was not sufficient to meet the requirement of numerosity. More significantly, the AJ found that Complainant had not alleged a common policy or practice, or showed that his personal claim was typical or common of the experiences of the class. The AJ noted that the specific non-selection to which Complainant was subjected occurred in 2015 when the coworker was selected for the EAS-17 position, but his class complaint concerned a subsequent promotion to the EAS-20 for which Complainant did not apply. Because of the specific circumstances of Complainant's case, the AJ held that Complainant failed to allege a timely claim. The AJ also determined that the Class Agent was not an attorney and did not have a legal background. Therefore, the AJ concluded that the request for class certification did not meet the requirements of numerosity, commonality, typicality, and/or adequacy of representation. The AJ advised that Complainant and other purported class members could proceed with their individual complaints.

In its final order, the Agency implemented the AJ's decision denying class certification. The Agency also dismissed the Complainant's individual complaint on the basis that it failed to state a claim and that it stated the same claim as Complainant's prior EEO complaint. Finally, the Agency dismissed the matter for untimely EEO Counselor contact.

This appeal followed without specific comment from Complainant.

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 Defense, 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).

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.

Here, we are not persuaded that common questions exist among the purported class members. Although the class complaint does not provide details about the specific actions of the Agency or how each purported class member was impacted by the conduct beyond Complainant's assertion that African-American employees are not promoted to management. Moreover, as noted by the AJ, Complainant as class agent has not alleged a timely denial of promotion. Furthermore, Complainant indicated that he was subjected to discrimination when the coworker was promoted to the EAS-20 position for which Complainant did not apply. As such, the class complaint does not reflect that there was a shared injury among the class members. Thus, we find that the AJ properly found that the Class Agent failed to establish commonality or typicality.

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, 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. As a consequence, we find that the class complaint fails to meet the numerosity prerequisite for certification. See Harris v. U.S. Postal Serv., EEOC Appeal No. 01994220 (Mar. 15, 2002) (class of 30 members from the same facility, in addition to 15 more identified on appeal, insufficient to establish numerosity); Crazythunder v. Dep't of Health and Human Serv., EEOC Appeal No. 0120043485 (Aug. 23, 2007), req. for recon. den., EEOC Request No. 0520080016 (Feb. 21, 2008) (28 identified members an insufficient number to satisfy the numerosity prerequisite).

"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). Here, Complainant, who is not an attorney, did not retain counsel. Given the complex nature of EEO class litigation, it does not appear that he 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's Individual Complaint

The Agency dismissed Complainant's individual complaint for failure to state a claim, as well as on the basis that he had raised the same matter in 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 the instant complaint, Complainant asserted that he was subjected to discrimination when the coworker was selected for a promotion. Complainant clearly stated that he did not apply for the position in question. As such, we find that the Agency's dismissal was appropriate.

Furthermore, the essence of Complainant's complaint was that he was subjected to discrimination because the coworker who had previously been selected over Complainant in 2015 when selected for the EAS-17 position. Because of the Agency's prior alleged discriminatory action, the coworker has been placed in a better position for future promotions such as the 2017 promotion to the EAS-20 position. To the extent Complainant has alleged discrimination based on the EAS-17 promotion, we find that such a claim should be dismissed, pursuant to 29 C.F.R. § 1614.107(a)(1), for stating the same claim as the one already raised in Complainant's 2016 EEO complaint.²

² Complainant's prior complaint (Agency No. 1E-971-0008-16), concerning his non-selection for the EAS-17 position, is currently pending appeal before this Commission (EEOC Appeal No. 2019003002).

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.

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).

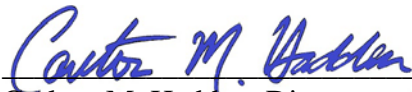
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

May 23, 2019

Date