



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

[REDACTED]
Orval T.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2022002966

Agency No. DON-20-62381-02096

DECISION

Complainant (Class Agent) filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 28, 2022, dismissing his complaint of unlawful employment discrimination in violation of 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.

ISSUE PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision granting Class Agent's class certification request; and dismissing unrelated EEO claims based on age (over 40) and disability(physical/mental-multiple).

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, Class Agent worked as a Captain, WM-9902-29 at the Agency's Military Sealift Command Atlantic (MSC). Class Agent was the Master of the U.S. Navy Ship (USNS) Trenton (T-EPF5). A "Master" is a Civilian Mariner (CIV Mariner) who is in overall command of a Navy vessel.

Class Agent requested EEO counseling of a class complaint on June 12, 2020. On June 19, 2020, Class Agent through counsel, submitted a "Request for Certification of Class Complaint" in which he asserted claims against the Agency on behalf of himself and for a putative class of roughly 5,500 CIVMARs, of all ages, employed by MSC. Class Complaint File at 76-9. Class Agent asserted that there were two types of CIVMARs included in the putative class (1) regular CIV Mariners employed directly by the Agency; and (2) Contract Mariners (CON Mariners), who are CIV Mariners directly employed by "Patriot Services, Inc." and jointly employed by the Agency.

On July 23, 2020, Class Agent filed a formal complaint alleging that the Agency subjected him and other potential class members to discrimination on the bases of disability (physical/mental-multiple) and age (over 40) when:

1. On or about March 1, 2020, the Agency issued an order restricting the freedom of all CIV Mariners aboard its vessels, requiring these civilian employees to remain on board at all times, seven days a week, twenty-four hours a day, from the date of the order's issuance to the present. The order mandated that employees shelter in place at their workplace, citing concerns related to the average age (47) of all CIV Mariners employed by MSC; and
2. Since March 21, 2020, MSC has placed CIV Mariners under a strict lockdown order, known as a "gangway up" order, preventing CIV Mariners from leaving their vessels – even when tied up to a pier and even when they are off duty.

Class Agent alleged that his work group was singled out/targeted by the MSC Commander due to age discrimination for COVID-19 restrictions not applied to the remainder of the U.S. Navy or even to the remainder of the military and civilian employees supervised by Class Agent's supervisor. According to him, his supervisor restricted/confined/falsely imprisoned some of the supervisor's subordinates and not others. This, Class Agent asserted, was a targeted action.

Class Agent also alleged that this policy decision was not in accordance with federal government-wide or U.S. Navy-wide policy. He alleged that this decision was inconsistent with CDC recommendations and placed Class Agent and other class members at an increased risk of harm. On behalf of himself and other potential class members, Class Agent asserted that his basic human rights, civil liberties, and constitutionally-protected due process rights had been violated by a facially unlawful and age-motivated order suspending him to his ship 16 hours per day.

On March 8, 2021, the AJ assigned to the case issued a Notice of Intent to Dismiss Claim and Order to Show Cause (the Notice). The AJ noted, in part, that the Liberty Restriction Order (LRO) was a facially neutral policy of general applicability; and as long as it has been applied even-handedly to all employees, the policy itself could not be a basis for a finding of disparate treatment discrimination. The AJ also stated that there appeared to be no legal basis for the assertion that the Agency perceived Class Agent and all of its other CIV Mariners as having any current "impairment whatsoever" for purposes of the Americans with Disabilities Act (ADA).

The AJ identified several "non-EEO claims," which fell out of the Commission's subject matter jurisdiction. Besides the constitutional claims, the AJ dismissed the following non-EEO claims alleging that: (1) the Agency placed CIV Mariners in an unsafe work environment; (2) the Agency acted negligently; (3) the Agency unlawfully confined and falsely imprisoned CIVMARs; and (4) the Agency unlawfully failed to pay CIV Mariners overtime, penalty pay and premium pay for time quarantined on a ship while off-duty. Like the constitutional claims, the AJ found the other non-EEO claims were properly dismissible because they did not involve statutes protected by the Commission and failed to state a claim under 29 C.F.R. § 1614.103(a) and §1614.107. Both parties responded to the notice.

On May 28, 2021, the AJ issued an "Order Dismissing Disability Discrimination Claim, Dismissing Non-EEO Claims For Lack Of Jurisdiction, Reserving Ruling On Dismissal Of Age Discrimination Claim, and Ordering Agency To Produce Documents." The order required the Agency to produce certain documents potentially relating to the age discrimination claim and reserved ruling on whether or not to dismiss this claim.

Having reviewed the Agency's submission of documents, the parties' various submissions as to the viability of Class Agent's ADEA claim and the propriety of class certification, and the governing law, the AJ found and concluded: (1) that Class Agent's ADEA claim related to the Agency's issuance of the LRO

states a claim under 29 U.S.C. § 633a(a), as interpreted by the Supreme Court in Babb v. Wilkie (Bab), 140 S.Ct. 1168 (U.S. 2020); and (2) that the class complaint submitted by Class Agent should be accepted (in part) and the class certified (in part).

In ruling on the Notice, the AJ assumed *arguendo* that all CON Mariners referred to by Class Agent were, in fact, jointly employed by the Agency. The AJ also noted that, absent joint employment, CON Mariners would not have standing to pursue any claim for violation of the ADEA's federal sector provision via the Commission's Part 1614 process. Con Mariners (or Contract Mariners) are CIV Mariners directly employed by a contractor, Patriot Services, Inc." and jointly employed by the Agency.

The AJ asserted that other than using the words "disparate impact," Class Agent does not articulate how the LRO had a disparate impact on CIV Mariners over 40 or provide any other information about any alleged disparate impact. Rather, observed the AJ, he circularly implies that such disparate impact is inherent in the LRO, because the LRO is discriminatory on the basis of age. Citing to applicable Commission precedent, the AJ determined that absent some indication of actual disparate impact, Class Agent's assertion that the LRO inherently causes a disparate impact is far too speculative and attenuated to state a valid disparate impact claim.

The AJ dismissed any and all claims for disparate treatment based on the application and/or enforcement of the LRO to CIV Mariners for failure to state a claim upon which relief can be granted. The AJ also dismissed any and all claims for disparate treatment based on the application and/or enforcement of the LRO to CIV Mariners as any such claims are not amenable to resolution on a class wide basis as each such claim would, by necessity, focus on each individual CIV Mariner's particular circumstances.

The AJ concluded that any and all claims for disparate treatment and/or disparate impact potentially encompassed in the foregoing claim and asserted on behalf of CIV Mariners under the age of 40 must be and hereby are dismissed for failure to state a claim upon which relief can be granted as 29 U.S.C. § 633a(a) clearly and explicitly applies only to employee or applicants over the age of 40.

On February 14, 2022, the AJ issued a "Decision and Order on Class Certification." The order accepted the class complaint in part as follows:

Did the Agency's Military Sealift Command discriminate against Class Agent and the other Civilian Mariners (CIVMARs) who at 40 years of age or older and directly or jointly employed by the Agency when, on or about March 21, 2020, it issued the Liberty Restriction Order, after (allegedly) considering the average age of the CIVMAR workforce, such that the Agency's decision to issue the LRO was not "untainted by any consideration of age" as required by the federal sector provision of the ADEA as interpreted by the Supreme Court in Babb v. Wilkie.

With respect to the remainder of the Class Complaint, the order stated that any and all claims allegedly within the scope of the Class Complaint which are not explicitly encompassed within the foregoing Accepted Class Claim (including, without limitation, any claims related to the application or enforcement of the LRO to CIVMARs and all claims related to CONMARs assigned to Government Owned, Contractor Operated (GOCO) and Contractor Owned, Contractor Operated (COCO) ships) should be dismissed. Con Mariners (or Contract Mariners) are CIV Mariners directly employed by a contractor, Patriot Services, Inc." and jointly employed by the Agency. The order also required the Agency to identify all members of the Certified Class and each Certified Sub-Class; to provide notice to the Class; and to provide personal contact information about certified class members including the name, address, email address, and telephone number of each class member to Class Counsel within 21 days of the date of the AJ's Decision and Order.

On February 23, 2022, the Agency filed a Motion to Stay Deadlines (Agency's motion). In response to the Agency's motion, on March 7, 2022, the AJ issued an order extending deadlines for the Agency to provide the personal contact information to Class Counsel and to notify members of the certified class. On March 28, 2022, the Agency issued a final order fully implementing the AJ's February 14, 2022 Decision, as modified by the March 7, 2022 Order. On March 31, 2022, the Agency filed a "Motion to Eliminate Sub-Class 2 and For Reconsideration." The Agency requested reconsideration of the requirement to identify all members of the certified class by providing the name, address, email address, and telephone numbers of each class member to Class Counsel. The Agency expressed privacy concerns regarding releasing personal contact information of certified class members to Class Counsel. The Agency also noted that, unlike the notification requirement, there is no regulation in the Code of Federal Regulations, the MD-110, or the Federal Rules of Civil Procedure requiring the Agency to identify the class members and their contact information to Class Counsel.

The Agency explained that the purpose of the notification requirement mandated in 29 C.F.R. § 1614.204(e) is fully met by the Agency notifying all class members of the class certification decision because all class members will have the name and contact information of their class counsel and will have all information necessary to pursue a claim of relief if discrimination is found. The Agency timely complied with the Notice of Class Certification requirements in the AJ's February 14, 2022 Order.

However, the AJ had not yet ruled on the Agency's request for reconsideration. In an April 1, 2022, email the AJ stated "in light of the current procedural posture of this case – meaning that it is currently "closed" as a hearings case until the deadline for Class Agent/Class Counsel to appeal the dismissal and certification decisions (which, I will note, the Agency has fully implemented) – I do not have jurisdiction/authority to rule on any motions. If Class Agent opts not to appeal the previous dismissal and certification decisions or, if there is an appeal, after OFO (the Commission's Office of Federal Operations) issues its decision, we will open a new hearing case to address all post-certification issues including any protective order requests and/or a motion to eliminate Sub-Class." See Attachment 1 at 2.

Class Agent appealed the Agency's final order, among other things, contesting the AJ's decision on behalf of the class, and reiterating previously raised arguments that the AJ had addressed. To support his assertions, Class Agent states that no evidentiary hearing was held, no discovery was allowed, and that the AJ made findings solely on the formal complaint and written submissions of the parties.

Class Agent challenges dismissal of the non-EEO claims, positing, for the first time on appeal, that the Commission possesses jurisdiction over the Class's constitutional claims as a mixed case complaint because the Agency's LRO was a constructive suspension appealable to the Merit Systems Protection Board (MSPB). While the appeal was still pending, on June 1, 2022, Class Agent filed a Motion for Default Judgment as a sanction against the Agency (Complainant's motion), asserting that the Agency violated an AJ order by failing to provide personal contact information of certified class members to Class Counsel.

In response, citing to 29 C.F.R. § 1614.103(a), the Agency states that the AJ properly dismissed the constitutional and other non-EEO claims because they do not assert violations of a statute enforced by the Commission. The Agency also cites to 29 C.F.R. § 1614.302(a), asserting that the constitutional claims also do not form the basis of a mixed case complaint because the LRO did not

involve absence or suspension from work, loss of pay, or wrongful Agency action or otherwise constitute a constructive suspension appealable to the Board; and because the non-EEO claims, including those asserting constitutional violations, are not based on race, color, religion, sex, national origin, age, disability, or genetic information and do not meet the definition of a mixed case complaint.

The Agency asserts that the Class's Motion for Sanctions is premature and frivolous, observing the Class's failure to mention that the Agency requested reconsideration of that order because of concerns about releasing personally identifiable information of certified class members to a third party. The Agency also states that the Class's statement points to no evidence that under common law theory of agency, the Agency exercises the same level of control over its employees as it does CON Mariners. The Agency notes its previous submission of statements demonstrating that the Agency was not the joint employer of CON Mariners.

CONCLUSION

We find that the AJ properly dismissed Class Agent's constitutional (and other non-EEO) claims because, as the AJ rightly stated, they fail to specify violations of a statute enforced by the Commission. I.e., Complainants claims that his basic human rights, civil liberties, and constitutionally protected rights had been violated; and (1) the Agency placed CIV Mariners in an unsafe work environment; (2) the Agency acted negligently; (3) the Agency unlawfully confined and falsely imprisoned CIVMARs; and (4) the Agency unlawfully failed to pay CIV Mariners overtime, penalty pay and premium pay for time quarantined on a ship while off-duty.

We also agree with the Agency's assertions that because Class Agent's non-EEO claims do not involve statutes enforced by the Commission, they cannot form the basis of a mixed-case complaint. See 29 C.F.R. § 1614.302 (A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address). Here, Class Agent's constitutional claims are not based on a protected category and do not meet the definition of a mixed case complaint.

We disagree with the Agency's position that Complainant brought up on appeal other concerns that the Commission possesses jurisdiction over Class Agent's constitutional claims as a mixed case complaint because the Agency's LRO was a constructive suspension appealable to the MSPB. Rather, Complainant's concerns are variations on the LRO and all revolve around the order.] The Commission has held that a complainant may allege discrimination on all applicable bases, including sex, race, national origin, color, religion, age, disability, genetic information and reprisal, and may amend his or her complaint at any time, including at the hearing, to add or delete bases without changing the identity of the claim. See Almaguer v. Dep't of Agriculture, EEOC Appeal No. 0120130256 (Sep. 4, 2014); Dragos v. U.S. Postal Serv., EEOC Request No. 05940563 (Jan. 19, 1995).

We find no basis for Class Agent's due process arguments, including that there was no evidentiary hearing or discovery, because the AJ made no ruling on the sole claim in this case other than to certify the class. Nor did the AJ defer to the Agency's statement of facts, only using those statements as background information.

Based on the AJ's April 1, 2022 email to the parties, we decline to address Class Agent's motion because it was filed before the AJ had an opportunity to rule on the Agency's request for reconsideration, which placed the processing of this case at the hearings stage on hold pending the Commission's ruling on the instant appeal.

We therefore AFFIRM the Agency's final order adopting the AJ's decision. We conclude that Class Agent may proceed with the sole claim as reframed by the AJ in the instant complaint.

We REMAND the case to the AJ for continued class complaint processing at the point at which the processing ceased, and in accordance with the order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is ordered to submit a renewed hearing request on Class Agent's behalf, as well as a copy of the complaint file and this decision, to the Hearings Unit of the EEOC's Charlotte District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit.

Thereafter, an Administrative Judge shall process the matter at the point at which processing ceased in accordance with 29 C.F.R. § 1614.109 and 29 C.F.R. § 1614.204.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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 5, 2025

Date