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

[redacted]
Willa B., et al.,[1]
Class Agent,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Request No. 2023003171

Appeal No. 2023000892

Hearing No. 550-2021-00060X

Agency No. 5P1C2000493C

DECISION ON REQUEST FOR RECONSIDERATION

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Willa B., et al. v. Department of the Air Force, EEOC Appeal No. 2023000892 (Apr. 5, 2023). For the following reasons, the Commission DENIES the Agency's request.

ISSUE PRESENTED

Whether the Agency's request for reconsideration of EEOC Appeal No. 2023000892 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

[1] This case has been randomly assigned a pseudonym which will replace Class Agent'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 an Attorney-Advisor at the Agency's U.S. Air Force Warfare Center, Office of the Staff Judge Advocate, in Nellis Air Force Base, Nevada.

Class Agent filed a class complaint alleging that the Agency discriminated against civilian employees based on disability (deaf, hard of hearing, and late-deafened) when it failed to provide reasonable accommodations, including, but not limited to, American Sign Language (ASL) interpreters and Communication Access Realtime Translation (CART) services in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

An EEOC Administrative Judge (AJ) permitted the parties to file statements requesting pre-certification discovery. Class Agent did so. At an initial conference before the AJ, the AJ ordered the Agency to produce responses to Class Agent's pre-certification discovery requests without objections based on relevance or burden, as the AJ determined that Class Agent's requests were relevant and not unduly burdensome. The AJ further ordered the Agency to designate a "most knowledgeable" official who could speak on the proposed deposition topics.

After the Agency failed to designate the appropriate officials who were "most knowledgeable" by the deadline, Class Agent filed a motion to compel and requested sanctions. The Agency opposed the motion and argued that it had in fact designated five people to Class Agent who were prepared to speak on the topics. The AJ found that the Agency's five designated officials were insufficient, declined to impose sanctions, and determined that the Agency's then-Disability Program Manager (DPM) should have been designated as the "most knowledgeable" person. The AJ therefore authorized Class Agent to depose DPM.

The Agency subsequently objected to one of Class Agent's discovery requests—that it provide a list of all civilian deaf and hard-of-hearing employees—voicing concerns that such disclosure could violate the Privacy Act.[2]

[2] We note, as did the prior decision, that matters concerning the Privacy Act are not within the regulations enforced by the Commission. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120111033 (Dec. 8, 2011).

Over the next several weeks, Class Agent filed two more motions to compel based on the Agency's noncompliance with the AJ's discovery orders. The Agency did not directly oppose these motions, but later submitted to Class Agent (and not the AJ) its "Fourth Supplemental Response to Complainant's Initial Request for Interrogatories, Request for Production of Documents," in which the Agency asserted objections to Class Agent's request for a list of all civilian deaf and hard-of-hearing employees as an unauthorized disclosure of employees' confidential medical information in violation of the Rehabilitation Act.

After the Agency failed to respond to an order from the AJ to show cause for its failure to fully comply with one of the AJ's pre-certification discovery orders, the AJ notified the parties of his intent to impose sanctions on the Agency. The Agency responded to the notice. In its response to the AJ's sanctions notice, the Agency argued that it had in fact provided the list of civilian deaf and hard-of-hearing employees (excluding their names and contact information) on April 6, 2022, and that on May 9, 2022, it had produced the ordered information to Class Agent under threat of sanctions. However, the Agency argued (for the first time before the AJ) that it should not have had to disclose confidential medical information of its employees, pursuant to the Rehabilitation Act. After hearing the Agency's concerns that producing the requested list of employees was a potential violation of the Rehabilitation Act, the AJ issued a "Limited Stay and Protective Order," suggesting that the Agency propose a protective order or certain stipulations in order to address its confidentiality concerns. Though the AJ stated that he did not believe production of the requested list presented any privacy concerns, he imposed a limited stay order on the Agency's production of the information as well as a limited protective and confidentiality order on the information the Agency had already produced.

DPM was later deposed, and discovery closed. On June 14, 2022, Class Agent then filed a motion to compel the Agency to produce certain documents referenced by DPM in her deposition. The Agency did not oppose the motion but failed to provide the documents. Class Agent next filed a motion for class certification, which the Agency opposed.

On October 13, 2022, the AJ issued a Decision Certifying Class. The AJ determined that the class members included employees, applicants, or former employees of the Agency who are "d/Deaf," a term the AJ used to mean those who are deaf or have serious difficulty hearing that encompasses both the disabilities associated with deafness as well as language/culture. AJ Decision at 4 & n.1

The AJ found that Class Agent identified centralized Agency policies and practices that allegedly resulted in the Agency's failure to accommodate, including denial of access to ASL interpreters, CART services, videophones, and other accessibility technologies/services. Class Agent also alleged that the Agency's reasonable accommodation process failed to consider its resources as a whole when determining whether to grant reasonable accommodation requests, such that managers did not budget for reasonable accommodations and funding was a unit-level challenge. Due to a lack of formal process to fund reasonable accommodations, according to DPM, requests often had to be elevated to higher officials, resulting in delays.

The AJ found that the Agency had only provided ASL interpretation 152 times since 2018, despite employing over 700 d/Deaf employees. DPM had also testified that she was aware of other organizations that had standing contracts for interpreters with secret or top-secret clearance but that the Agency had not attempted to obtain such services. The AJ also found that employees were sometimes informed that CART services were unavailable, including for participation in the EEO process. Employees had used the Federal Relay Service (a telecommunications service for deaf/hard-of-hearing individuals) through a contract with the U.S. General Services Administration (GSA), but the GSA's contract with the Federal Relay Service ended in February 2022, without the Agency providing a replacement. The Agency was also aware of issues with videophones and captioned telephones, but instead of addressing those issues uniformly, they were handled on a case-by-case basis and often were never resolved. The AJ also found that the record showed the Agency was aware of persistent complaints that mandatory training videos were not captioned, and there was no plan to ensure that such videos were consistently captioned.

Based on the above, the AJ certified the class to consist of all d/Deaf civilian employees who are currently employed by the Agency, as well as all d/Deaf civilians who either applied for civilian employment with the Agency, or were so employed at any time between January 1, 2018, and the present, who were discriminated against or denied reasonable accommodations because of specified common issues at the Agency.

The AJ next determined that the class complaint established commonality and typicality, noting that the common questions among the class addressed specific policies or practices common to some or all of the general class and did not focus on lower-level discretionary decisions.

The AJ further found that, despite the Agency's assertions, the Agency failed to provide evidence indicating that the allegations were merely infrequent occurrences at dispersed Agency installations. The AJ further noted that the Agency objected to the fact that Class Agent did not depose the five witnesses the Agency named as "most knowledgeable." However, the AJ found that the Agency did not provide any statements from those witnesses to contradict the evidence offered by Class Agent—including declarations by the class members and the deposition of DPM, who managed the Agency's policies and practices that allegedly resulted in the failure to accommodate deaf and hard-of-hearing employees.

The AJ found that there was evidence to support the factor of numerosity, as the Agency's "2020 Total Workforce Distribution by Disability Status Report" showed that more than 700 Agency employees identified as deaf or having serious difficulty hearing. DPM testified she believed there were more than 1,000 such individuals at the Agency. The Agency argued that numerosity could only be established by the evidence produced in pre-certification discovery to which it had objected based on confidentiality concerns, but the AJ found that the Agency had admitted to employing 2,589 self-identified deaf or hard-of-hearing individuals in its opposition brief. The AJ therefore found the required element of numerosity had been met, even when not considering the disputed list of civilian deaf/hard-of-hearing employees. The AJ further found that adequacy of representation was satisfied.

The AJ declined to impose any sanctions against the Agency, but ordered the Agency to produce the requested documents DPM had referenced in her deposition that were the subject of Class Agent's unopposed motion to compel filed on June 14, 2022.

Regarding the disputed list of civilian deaf and hard-of-hearing employees, the AJ found that Class Agent had provided sufficient legal authority to support her request. See, e.g., Scott v. Leavenworth Unified Sch. Dist., 190 F.R.D. 583, 587 (D. Kan. 1999) ("Congress never intended for a defendant charged with violating the [Americans with Disabilities Act (ADA)] to use the ADA's confidentiality provisions to impede a plaintiff's ability to discover facts that might help the employee establish his/her claims."). The Agency, on the other hand, had not provided the AJ with specific legal authorities prohibiting disclosure of civilian deaf and hard-of-hearing employees.

The AJ further noted that Class Agent had stated she did not oppose the entry of an appropriate protective order, but the Agency had never responded to the AJ's invitation to propose a protective order despite being the party asserting concerns about protecting the information.[3] Nevertheless, the AJ stated in the Decision Certifying Class that the list should not be produced at this time and decided to extend the limited stay and protective order indefinitely, noting that if his decision certifying the class was upheld, a notice procedure and class list would be addressed during the post-certification process.

After the AJ issued his decision, the Agency issued a final order rejecting the AJ's decision certifying the class and filed an appeal with the Commission. On appeal, we reversed the Agency's decision and remanded the complaint for further processing.

In the prior appellate decision, we first found that the AJ acted appropriately with regard to the Agency's objection to Class Agent's discovery request for a list of all civilian deaf and hard-of-hearing employees. We noted that an AJ has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and has broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). The Agency argued that complying with the request would be a violation of the Rehabilitation Act, which requires that "the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1); see 42 U.S.C. § 12112(d)(4)(C). However, when the Agency initially raised privacy concerns during the initial conference, the AJ suggested that the Agency propose a protective order or other solution, but the Agency failed to do so. The Agency also did not expressly raise concerns under the Rehabilitation Act to the AJ until after it had already released some of the information (the Agency had mentioned such concerns in discovery filings sent to Class Agent, but not to the AJ). Once the AJ was made aware of those concerns, the AJ immediately responded by issuing a stay order on the request and a protective order on any information already provided by the Agency.

[3] In its briefs on appeal and on reconsideration, the Agency points out that it proposed to Class Agent that the parties come up with a process to contact the deaf and hard-of-hearing employees whose information the Class Agent sought in order to obtain those employees' consent prior to the Agency's release of their information. Class Agent did not agree with this proposal.

Our prior decision therefore concluded that the Agency did not prove the AJ abused his discretion in this regard and declined to reverse the AJ's certification of the class based on this matter.

With regard to the designation of the "most knowledgeable" person, the prior decision noted that the Agency's arguments stemmed from Federal Rule of Civil Procedure 30(b)(6), which states that an organization (such as a government agency) that is subject to a deposition notice must designate one or more officials to testify as the corporate representative. The Agency contended that Rule 30(b)(6) does not allow the party *seeking* discovery to insist on a specific person as the corporate representative who the party believes to have the "most" knowledge on a given topic, and instead the Agency itself is the one who must designate such a representative. Therefore, the Agency argued, it should not have been bound by DPM's testimony since it did not designate her as the "most knowledgeable" person.

The prior decision concluded that the federal sector EEO administrative process is not required to follow the Federal Rules of Civil Procedure. See Complainant v. Dep't of Veterans Affs., EEOC Request No. 0520110587 (Nov. 15, 2011). Moreover, the AJ in his decision certifying the class stated that it was not necessary to determine if the DPM's testimony "binds" the Agency. Rather, the AJ found DPM's testimony "illustrative" on the issues of class certification and noted that the Agency had not provided any statements from witnesses to oppose DPM's testimony. Our prior decision found that DPM's testimony, obtained as part of pre-certification discovery, was properly considered based on the nature of her position managing the Agency's centralized policies and practices that allegedly resulted in the failure to accommodate d/Deaf employees. The prior decision also found that the record indicated DPM was personally aware of and actively involved in matters related to some of the class members' accommodation requests and that DPM even helped compile one of the Agency's supplemental discovery responses. Based on the prior decision's determination that DPM had direct knowledge about the relevant policies and practices that resulted in alleged delays or denials of reasonable accommodations for the class members, the decision found that the Agency failed to show the AJ abused his discretion in approving DPM's deposition and relying on it in deciding to certify the class. Our prior decision also noted that while the Agency argued that DPM's testimony contained "only highly speculative views and beliefs," it provided no evidence to show that her testimony was false. The AJ also had determined that the Agency's five proffered "most knowledgeable" designees were insufficient, which the Agency did not dispute.

With regard to the class certification, the prior decision found the AJ had not erred in finding that the class complaint met the required factors of numerosity, commonality, typicality, and adequacy of representation. Based on our review of the record on appeal, we found no reversible error in the AJ's conclusion that the putative class met the four prerequisites. The instant request for reconsideration followed.

CONTENTIONS ON REQUEST

The Agency's brief on reconsideration contests many aspects of the lengthy procedural history and discovery process leading up to the AJ's decision certifying the class and focuses its arguments mainly on the AJ's discovery orders requiring the Agency to produce a list of civilian employees who are deaf or hard of hearing (citing privacy concerns) and on the AJ's reliance on DPM's testimony as the "most knowledgeable" person to speak for the Agency on the topics at issue.

On reconsideration, the Agency argues that DPM's testimony "unequivocally undercuts" the conclusions made by the AJ (and in our prior decision) that "class certification criteria had been met, that the DPM was a most knowledgeable person when it came to the Agency's handling of accommodation requests, or that the bureaucratic obstacles cited by the Class Agent amounted to discrimination." As evidence of this, the Agency cites to portions of DPM's testimony where she stated the following: that employees requesting reasonable accommodations would normally speak to someone at their individual installation as opposed to DPM and that she was not responsible for dealing with individual accommodation requests; that centralized funding was a "best practice" she wanted to implement at the Agency; that she did not believe bureaucratic obstacles in handling accommodation requests were the result of animus towards deaf and hard-of-hearing employees or that there was "intentional discrimination" against them; and that it is difficult for the Agency to hire interpreters with top secret clearance. The Agency also seems to argue on reconsideration that there in fact did not exist a deponent with "Agency-wide knowledge" of "non-existent Agency-wide policies, procedures, and practices, for providing reasonable accommodations specifically to deaf and hard of hearing employees and applicants."

Class Agent opposes the Agency's request for reconsideration and argues that the Agency fails to show that our prior decision involved a clearly erroneous interpretation of material fact or law.

Class Agent also argues that the Agency misrepresents the factual record and fails to show an abuse of discretion by the AJ that would warrant reconsideration.

STANDARD OF REVIEW

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

ANALYSIS

Upon review, we find that our prior decision was not clearly erroneous. As an initial matter, we note that the Agency does not directly challenge the prior decision's finding that the class complaint meets the four criteria for class certification. While the Agency lists such a dispute as an "Issue[ ] Presented" in its brief on reconsideration and argues that "the AJ erred in finding that the Complainant alleged sufficient facts to satisfy the numerosity, commonality, and typicality requirements," the Agency provides no specific arguments or reasoning for why the prior decision was clearly erroneous in that regard.[4] We therefore decline to disturb the prior decision's conclusion that the four criteria for class certification are met in this case. The Agency also does not dispute the definition of the class.

As explained herein, the Agency's contentions on reconsideration are insufficient to show that the prior appellate decision was clearly erroneous.

[4] In its brief on reconsideration, the Agency argues that the prior decision was clearly erroneous in its interpretation of law by finding the AJ had acted appropriately even though he "shift[ed] the burden of proof to the Agency," when the party seeking certification carries the burden. However, the Agency provides no evidence or citations that show the AJ or our prior decision erroneously placed the burden of proof upon the Agency with regard to the class certification criteria.

As to the ordered production of the list of civilian employees that the Agency claims forced it to violate the Rehabilitation Act, we first note that any Agency production in that regard was not relied on by the AJ or in our prior decision in deciding whether numerosity or any other prerequisite for granting class certification was met. Furthermore, the privacy concerns the Agency raises about disclosing confidential non-party employee medical information appear to be moot at this stage of the class certification process. The AJ stayed his discovery order requiring the Agency to produce such information and also put in place a protective order on information the Agency had already produced. In his decision certifying the class, the AJ determined that the list should not be produced and extended the stay and protective order indefinitely, noting that the production of a class list could be addressed during post-certification processing. We therefore find the Agency's arguments opposing production of the list of civilian deaf and hard-of-hearing employees insufficient to establish that our prior decision was clearly erroneous.[5]

Regarding the AJ ordering and relying on DPM's deposition, we find that the prior appellate decision was not clearly erroneous. Class Agent deposed DPM as part of pre-certification discovery, and the AJ—in the absence of opposing statements from Agency witnesses—found DPM's testimony informative about Agency practices related to the various class issues. We find that none of the portions of DPM's testimony cited by the Agency in its brief sufficiently undercut the AJ's conclusions or indicate that the prior decision involved a clearly erroneous interpretation of law or material fact. For example, whether DPM was involved in initial reasonable accommodation requests has no bearing on the common class issues identified by the AJ, which we note emphasized higher-level Agency policies and practices as opposed to lower-level, individual accommodation decisions. Additionally, DPM's testimony that Agency officials did not harbor discriminatory animus against deaf and hard-of-hearing employees is irrelevant to the issue of whether the Agency failed to reasonably accommodate the putative class members, since failure to accommodate does not require proof of discriminatory intent.

[5] As we stated in the prior decision, given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016) (citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs "wide latitude" in directing terms, conduct, and course of administrative hearings before EEOC)).

Regarding the Agency's argument about "non-existent" Agency policies, we note that the absence of such reasonable accommodation policies for deaf and hard-of-hearing individuals is one of the common issues Class Agent identified. The AJ found that DPM's testimony was pertinent to that issue, and we find no clear error in our prior decision finding that the AJ properly considered DPM's testimony in that regard.

With regard to any remaining Agency arguments on reconsideration, we find that they do not call into question our prior appellate decision upholding class certification and the four certification factors. While the Agency may challenge some of the common issues identified in the AJ's decision as not supported by case law or regulations, we find that the record is sufficient to find that commonality and typicality (in addition to numerosity and adequacy of representation) are met given that there exist several common questions that are broadly applicable to the class and relevant to the issue of whether they were reasonably accommodated.

The Agency's brief on reconsideration largely reiterates arguments made, and fully considered, on appeal. We emphasize that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (Aug. 5, 2015), at 9-18; see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here.

We also note that the Agency has not challenged the Order in our prior decision, including an order to produce certain discovery.

CONCLUSION

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2023000892 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth herein.

ORDER

The Agency is ORDERED to perform the following:

1. Notify class members of the accepted class claim within 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 EEOC's Los Angeles District Office within 30 calendar days of the date this decision is issued. The Agency must request that an Administrative Judge 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).

3. Within 15 calendar days of the date this decision is issued, produce the documents and categories of documents identified as items 1 - 4 at pages 3 - 5 of Class Agent's Motion to Compel Responsive Documents, submitted on June 14, 2022.

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 (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.

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

January 21, 2025
Date