



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Justin P., et al.,¹
Class Agent

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120080426

Hearing No. 210-2002-00691X, 210-2002-06117X

Agency No. 4-99-4106, 4-99-4127

DECISION

The Class Agent timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 5, 2007, final order concerning his equal employment opportunity (EEO) class complaint alleging 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue presented is whether the EEOC Administrative Judge's determination that the Agency's implementation of the October 1, 1998, Managers, Supervisors, and Staff (MSS) pay plan and its May 25, 1999, Movement Rules did not cause a disparate impact is supported by substantial evidence in the record.

¹ This case has been randomly assigned a pseudonym which will replace the Class Agent's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

On October 22, 1999, the Class Agent² alleged disparate treatment and disparate impact on the bases of their sex (female) and age (both men and women age 40 and above) when:

1. They were denied coverage under the Agency's MSS pay plan, effective October 1, 1998; and
2. The Agency's subsequently issued Movement Rules, issued on May 25, 1999, compounded the injuries the members of the class incurred as a result of their exclusion from the MSS pay plan.

Procedural Background

The Agency forwarded the case to an Equal Employment Opportunity Commission Administrative Judge (AJ) to determine whether to certify the class. In a decision issued on October 24, 2000, the AJ dismissed the class complaint for failure to state a claim. The Agency issued a decision on November 6, 2000, fully implementing the AJ's decision. The Class Agent appealed that decision to the Commission. The Commission reversed the Agency's dismissal, finding that the class complaint stated a claim, and remanded the case to the AJ to determine whether the class met the prerequisites for a class action. EEOC Appeal No. 01A11238 (Nov. 5, 2001), req. for recon. denied, EEOC Request No. 05A20407 (May 3, 2002).

The AJ subsequently issued a decision certifying the class. The Agency rejected the AJ's finding and appealed to the Commission. The Commission found that the AJ appropriately determined that the class met the prerequisites for a class action. The Commission remanded the case for a hearing on the merits. EEOC Appeal No. 07A40067 (May 5, 2005), req. for recon. denied, EEOC Request No. 05A50926 (Dec. 2, 2005). Thereafter, the AJ held a hearing from April 3 through 17, 2007.³

² In EEOC Appeal No. 07A40067 (May 5, 2005), the Commission noted that the AJ granted the class's request to replace the then-Class Agent. See also EEOC Appeal No. 01A11308 (Nov. 16, 2001) (complainant appealed the AJ's October 24, 2000, decision to decertify the class but the Commission found that she was no longer a viable Class Agent because she had filed a complaint on the same matter in federal district court).

³ The AJ made numerous pre-hearing rulings on a variety of motions and evidentiary matters. AJ March 19, 2007, Order; Hearing Transcript (HT) Day 1 at 7-21. One of the pre-hearing rulings granted the Class Agent's December 15, 2006, motion to voluntarily dismiss with prejudice all disparate treatment claims and claims arising under the Equal Pay Act of 1963 (EPA), as amended, 29 U.S.C. § 206(d) et seq. Because neither party raised any issue on appeal with respect to any of these rulings, the Commission declines to address the AJ's determination of these matters on appeal. The Commission exercises its discretion to review only the issues specifically raised by the parties. See Equal Employment Opportunity

AJ's Decision

The AJ issued a decision on August 8, 2007, finding that the Class Agent failed to prove that the Agency discriminated against the class as alleged. The AJ found the following facts: On November 17, 1995, Congress authorized the Administrator of the Federal Aviation Administration (FAA) to develop and implement a personnel management system for the FAA. AJ Decision at 5. The Administrator testified that this reform gave the Agency more flexibility to link pay to performance and organizational outcomes. Id. Moreover, new compensation systems allowed elements to be tailored to the individual needs of a specific line of business. Id. In order to implement the reform, the FAA Associate Administrator for Administration (Associate Administrator) was instructed to draft a Compensation Revision Plan to address issues relating to compensation at an FAA-wide level that would apply generally to all FAA employees. Id. The Associate Administrator was also instructed to draft compensation plans for different “line[s] of business,” including a system for Air Traffic Services. Id. The intent was to create different pay systems for each of the different service lines that exist at the Agency. Id.

Pursuant to the Congressional mandate, in April 1996, the Agency established a Core Compensation Committee (Compensation Committee) to oversee the development and implementation of a new compensation plan for the Agency. Id. The committee convened a team of representatives who created a Core Compensation plan proposal. Id. The primary result of this plan was to have broad, flexible pay bands rather than the rigid step/grade structure of the GS system and pay would be linked to performance. Id. The pay bands were based on the different types of positions at the Agency. Id. The Core Compensation plan was intended to apply to all lines of business within the Agency and all staff offices. Id. It was not intended to apply to political appointees, senior executives, or specialized pay plans created for unionized employee groups with special pay plans. Id.

Congress also authorized the FAA to negotiate compensation with its major union groups. Id. In the spring of 1998, the National Air Traffic Controllers Association (NATCA), the representative of the Air Traffic Controller Specialist (ATCS) FG-2152 series located in field facilities of the FAA, and the Agency agreed to the creation of the Air Traffic (AT) pay plan for all field facilities’ ATCS FG-2152 series in the bargaining unit. Id. The parties also agreed that the effective date of the system would be retroactive to October 1, 1996, but that the full implementation date would be in May 1999. Id. at 5-6.

After the NATCA agreement was signed in July 1998, a question arose with respect to the other “field folks who are out there in the field facility.” Id. at 6. These individuals are identified as

Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § IV(A)(3) (Aug. 5, 2015).

“Managers, Supervisors, and Staff”⁴ (MSS). There were discussions about whether to include the field MSS 2152s in the same pay plan as the ATCS 2152s because many MSS 2152s work directly with ATCS 2152s in the field offices. Id. The Air Traffic Specialized Pay Plan Development Team (“Pay Team”) proposed including field office, headquarters, and regional office MSS 2152s in the AT pay plan. Id. The Pay Team presented their proposal to the Compensation Committee, but members of the committee expressed concern about how the proposal would affect employees in other lines of business in HQ/RO. Id. The Compensation Committee recommended that the Administrator should keep all HQ/RO positions in the Core Compensation plan. Id. After commissioning a classification study to examine the 2152 job series, the Human Resources Division also recommended that the HQ/RO 2152s should remain in the Core Compensation plan because these employees performed policy, procedural, oversight, and administrative work that was similar to the work performed by HQ/RO employees in other lines of business. Id. at 7.

After much discussion and debate, on October 1, 1998, the Administrator decided to include in the new MSS pay plan only those MSS 2152s whose position of record on October 1, 1998 was in the field (MSS pay plan).⁵ Id., at 6-7. By letter dated March 5, 1999, and in an e-mail dated March 8, 1999, the Administrator announced that, after further reviewing the matter, no pay changes would be implemented with regard to the MSS 2152 personnel located in headquarters or in the regional offices (HQ/RO MSS 2152s). Id.

Under the MSS pay plan, the field MSS 2152s retained the rights, benefits, career progression, and pay reform associated with the positions they held as of October 1, 1998. Id. Thus, field MSS 2152s would receive a percentage pay-increase (pursuant to a 5% pay raise), while HQ/RO MSS 2152s would not receive the percentage pay-increase. Id.

On May 25, 1999, the Agency implemented new Movement Rules applicable to all headquarters, regional, and field MSS 2152s. Id. These rules governed promotions and transfers of MSS employees between headquarters or a regional office and the field. Id. The Movement Rules allowed personnel transferring from field facilities to headquarters or regional office positions to retain their higher pay, while not allowing those transferring from headquarters or a regional office to the field to receive the full benefits of the field MSS pay plan. Id.

The AJ rejected the Class Agent’s argument that the case was not a compensation case. Rather, the AJ analyzed the case as a claim of disparate impact discrimination in compensation and

⁴ “Staff,” otherwise referred to as “Staff Specialist,” was a non-supervisory, non-bargaining unit position. See Class Agent Hearing Exhibit 2; Agency Hearing Exhibit 4. In the hierarchy, Air Traffic Control Specialists were at the bottom, followed by Staff Specialists, Field Supervisors, and then Managers. See Class Agent Hearing Exhibit 2. Although some Staff Specialists remained current in Air Traffic Control Specialist competencies and would occasionally direct live traffic, it was primarily an office job. See HT Day 7 at 1986-89.

⁵ The new MSS pay plan was modeled after the AT pay plan, but it was a separate pay plan.

required evidence of pay disparities based on sex or age in order to establish that the class had incurred a harm. The evidence of a pre-existing statistical disparity between the percentage of field MSS 2512s who were female and/or age 40 and above compared to the percentage in HQ/RO was insufficient to establish disparate impact. *Id.* at 9. The AJ found that the statistical imbalance in the field and HQ/RO workforces did not establish that there was a statistically significant disparity in pay and did not establish that the disparity was caused by the Agency's decision to exclude HQ/RO MSS 2152s from the MSS pay plan. Rather, the AJ determined that, although the Movement Rules may have exacerbated certain pay disparities, those pay disparities pre-dated implementation of the MSS pay plan. *Id.* The AJ further found that the Class Agent's primary expert witness (CE1) failed to perform any regression analysis of compensation on the disparity of pay based on protected classes. *Id.* Therefore, the AJ concluded, the Class Agent failed to establish that the class had suffered any harm as a result of being excluded from the MSS pay plan and, as a result, failed to establish a prima facie case of disparate impact.

The AJ nonetheless found that, assuming arguendo that the Class Agent established a prima facie case of disparate impact, the Agency failed to prove that the employment practices were job-related and consistent with business necessity under Title VII. *Id.* at 10. The AJ found the Agency's proffered reasons were not supported by the evidence in the record. Regardless, however, the AJ concluded that, because the RO/HQ MSS 2152s worked in locations different than the field MSS 2152s, the Agency escaped liability under Title VII's location defense.

With regard to the class's age claims, the AJ determined that the Agency had met its burden of production under the ADEA.⁶

The Agency subsequently issued a final order that fully implemented the AJ's findings of fact and conclusions of law that the class failed to prove discrimination with respect to the Class Agent or class members in that they failed to establish a prima facie case of discrimination. The Agency also fully implemented the AJ's findings of fact and conclusions of law with respect to the Agency's establishment of the location defense. The Agency rejected all other aspects of the AJ's findings, noting that no further analysis was required after the AJ determined that the Agency established the location defense and that the class failed to establish a prima facie case of discrimination, affirming in part and rejecting in part the AJ's decision.

⁶ The AJ erred in finding that, for the ADEA claim, the Agency only had a burden of production to show business necessity or "at least a reasonable business purpose" justifying the employment policy at issue. AJ Decision at 4, citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The Commission's longstanding position is that the business necessity defense is the same for federal sector claims under Title VII and the ADEA. See, e.g., Brenton W. v. Dep't of Transp., EEOC Appeal No. 0120130554 (June 29, 2018)(agency may avoid liability under disparate impact theory by establishing contested policy is job-related and consistent with business necessity); Weinrauch v. Dep't of the Treasury, EEOC Appeal No. 01790210 (June 10, 1983), req. to recon. denied, EEOC Request No. 05830357 (February 22, 1984)(burden is on agency to establish business necessity).

CONTENTIONS ON APPEAL

Class Agent's Contentions

On appeal, the Class Agent argues that the AJ misidentified the claims. Class Agent's Appeal Brief at 6. The Class Agent contends that the challenged practice is not that women and individuals age 40 and over are paid less, but rather that the Agency disproportionality excluded women and individuals 40 and over when it decided to exclude the HQ/RO MSS 2152 employees from the MSS pay plan. Id. at 6-10. The Class Agent also argues that he presented statistical evidence to show that the challenged employment practice had a statistically significant impact on women and individuals age 40 and over. Id. The Class Agent contends that this case is more analogous to a "failure to promote" case rather than a pay inequity case. Id.

The Class Agent further argued that the class members exclusion from the pay plan caused harm, in the form of lost professional opportunities, career progression, actual compensation, benefits, and privileges of employment. Id. at 11-19. Additionally, the Class Agent argues that the HQ/RO MSS 2152s did not receive three MSS pay-plan related raises on October 1, 1998, 1999, and 2000. Id. According to the Class Agent, the implementation of the Movement Rules exacerbated the harm caused by exclusion from the pay plan. Id.

The Class Agent further contends that the AJ appropriately found that the Agency failed to meet its burden of proof in its affirmative defense. Id. at 20-30. However, the Class Agent argues that the AJ erred in finding the Agency successfully established a "location" defense under section 703(h) of Title VII. Id. at 30.

Agency's Contentions

The Agency's position is that the AJ appropriately found that the Agency met its burden of proof under the location defense. Agency's Brief in Opposition to Class Agent's Appeal at 15. Further, the Agency argues that the Class Agent is unable to establish a prima facie case with the statistical evidence he adduced and failed to present any evidence regarding pay discrepancies. Id. at 20-29. The Agency contends that it established its affirmative defense by showing reasonable factors other than age and reasons other than sex. Id. at 30-37. The Agency further contends that it also proved the business necessity defense. Id. at 37.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are

subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility, that a reasonable fact finder would not credit it. See EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B.

ANALYSIS AND FINDINGS

To establish a prima facie case of disparate impact, a class agent must show that an agency practice or policy, while neutral on its face, disproportionately impacted members of the protected class. This is demonstrated through the presentation of statistical evidence that establishes a statistical disparity that is linked to the challenged practice or policy. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (class agent must present "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion"). Specifically, the class agent must: (1) identify the specific practice or practices challenged; (2) show statistical disparities; and (3) show that the disparity is linked to the challenged practice or policy. Id.; Obas v. Dep't of Justice, EEOC Appeal No. 01A04389 (May 16, 2002). The class agent should explain the methodology used in such a way that the significance of the statistical results can be meaningfully understood by the finder of fact. See Frazier v. Consolidated Rail Corp., 851 F.2d 1447, 1451-53 (D.C. Cir. 1988). The burden is on the class agent to show that "the facially neutral standard in question affects those individuals [within the protected group] in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); see also Gaines v. Dep't of the Navy, EEOC Petition No. 03990119 (Aug. 31, 2000).

The Supreme Court has not endorsed a bright-line rule or precise number of "standard deviations" that would require a finding of discrimination. Generally, however, courts have held that disparities of two to three standard deviations are sufficient to raise an inference of discrimination. See, e.g., Castaneda v. Partida, 430 U.S. 482, 497 n. 17 (1977) (a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race). Instead, courts examine statistics on a case-by-case approach when analyzing the significance of a disparity. See Ottaviani v. State Univ. of New York at New Paltz, 875 F.2d 365, 371 (2d Cir. 1989) (declining to hold that two standard deviations as a matter of law presents a prima facie case). Moreover, courts should look not only at the statistics, but at the surrounding facts and circumstances. Id.; see also International Bd. of Teamsters v. U.S., 431 U.S. 324, 340 (1977) (describing statistics as refutable and that the usefulness of the statistical evidence as dependent on the surrounding facts and circumstances); Watson, 487 U.S. at 995 (superseded by statute on other grounds).

Once a class establishes a prima facie case, the burden shifts to the agency to establish that the employment practice that causes the disparate impact on the protected class is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). To show the practice at issue is related to the job, the agency must typically establish that the practice correlates with ability

to do a specific job or to successful performance of the job. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (job-related requirement measures the person for the job); Caviale v. Wisconsin Dep't of Health & Soc. Servs., 744 F.2d 1289, 1294 (7th Cir. 1984) (policy limiting consideration of candidates to those who were in career executive program was not job-related). To establish that a policy is consistent with business necessity, the agency must demonstrate that its policy significantly serves its business interests. See Anderson v. Zubieta, 180 F.3d 329, 80 FEP 765 (D.C. Cir. 1999) (no evidence that policy was necessary to retain employees who received enhanced benefits); Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 797 (8th Cir. 1993) (defense requires employer to prove a “compelling need” for the challenged policy).

Finally, if the agency satisfies its burden of proving business necessity, the class may nevertheless prevail if it identifies an alternative employment practice that would accomplish the same goal with a less-adverse impact on the protected class. See Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) and (C)).

The elements of a claim and defense of disparate impact under ADEA Section 633a are the same as those under Title VII. See, e.g., Brenton W. v. Dep't of Transp., EEOC Appeal No. 0120130554 (June 29, 2018); Weinrauch v. Dep't of the Treasury, EEOC Appeal No. 01790210 (June 10, 1983); Witkowski v. Dep't of the Navy, EEOC Petition No. 03970122 (Jan. 30, 1998).

Claim 1 – Denied Coverage Under the MSS Pay Plan

The AJ found that the Class Agent failed to show that the Agency’s actions caused a disparate impact on women as a protected class and on employees age 40 and older as a protected class.⁷ For the purposes of this decision, we will assume, without so deciding, that the Class Agent established a prima facie case of disparate impact with respect to the exclusion of the HQ/RO MSS 2152s from the new MSS pay plan.

Therefore, we will consider whether the Agency established that the decision not to include HQ/RO MSS 2152s in the MSS pay plan was job-related and consistent with business necessity. The Agency has a heavy burden to establish this affirmative defense and needs to have assessed the impact, the justifications, and the alternatives of various potential courses of action before proceeding. See Ricci v. DeStefano, 557 U.S. 557, 588-92 (2009). Most disparate impact cases challenge tests or qualification standards for hiring or promotion, where the evidence that a practice or policy is job-related establishes a relationship between the practice itself and successful performance of the job. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971) (neither high school completion nor general intelligence test had been shown to have demonstrable relationship to successful job performance). While inclusion/exclusion from a pay

⁷ We find that the AJ erroneously determined that the class needed to produce evidence of a pay disparity to establish a prima facie case of disparate impact.

plan is not the type of practice typically at issue in a disparate impact case in that the practice is not intended to measure aptitude or ability to perform a job, the same legal framework applies.

Upon further review, the Agency provided sufficient evidence to establish that its decision to include the field MSS 2152s in the MSS pay plan to maintain pay equity in field facilities was job related and consistent with business necessity. See Rogers v. International Paper Co., 510 F.2d 1340, 1346 (8th Cir. 1975) (“At the very least, it is necessary to identify the goals underlying the subjective criteria through a job analysis.”), vacated and remanded on other grounds, 423 U.S. 809 (1975). The record establishes that the Agency’s Administrator, after extensive deliberation, including a classification study and additional consultation with the Pay Team, the Compensation Committee, and the Human Resources Division, decided to include the field MSS 2152s in the MSS pay plan in order to avoid pay inequities between the MSS 2152s and their subordinates, the Air Traffic Controller Specialists, that would have otherwise resulted as a consequence of excluding the MSS 2152s from the pay raises the ATCSs received under the AT pay plan. The pay equity concern was that supervisors of ATCSs in the field could have been paid less than the employees they supervised, unless the field supervisors were included in the pay plan. These pay equity concerns were particularly pronounced in the context of field supervisors (as opposed to managers and staff), who directly supervised the Air Traffic Controllers. According to the record, more than half of the field MSS 2152s (2,060 out of 4,031) were supervisors. See Agency Hearing Exhibit 17. Thus, the magnitude of the pay equity concern in the field was substantial.

There were no comparable pay equity concerns in HQ/RO. Unlike the field, there were no Air Traffic Controller Specialists, or FG-2152s, located in HQ/RO and therefore no opportunity for pay equity issues to arise between such employees and the HQ/RO MSS 2152s. Further, there were no field supervisors, the group with the strongest link to the ATCSs, in headquarters or the regional offices. Therefore, the pay equity problem motivating inclusion of the Field MSS 2152s did not exist with respect to the HQ/RO MSS 2152s.

Moreover, the record reflects that giving a raise to HQ/RO MSS 2152s would have created pay equity issues among comparable employees in other lines of business at headquarters and in the regional offices. MSS 2152s in HQ/RO primarily “performed policy, procedures, oversight, and other administrative” functions vis-à-vis the field, just like the non-2152s in other lines of business in HQ/RO. The record reflects Agency leadership’s concerns that including the HQ/RO MSS 2152s would have created disparities among comparable HQ/RO employees.

The Class Agents challenged whether the Agency’s decision was the most effective policy for the Agency, but we find that the Agency has met its burden of establishing business necessity by demonstrating the business need for the policy decision. See EEOC v. Dial Corp., 469 F.3d 735, 743 (8th Cir. 2006). Although a different policy decision may also have been justifiable, we find that the Agency’s decision to implement the new MSS pay plan without including HQ/RO MSS 2152s was job-related and consistent with business necessity.

The only alternative policy identified by the Class Agent was to extend the new MSS pay plan to all MSS 2152s. However, as discussed above, the compensation of HQ/RO MSS 2152s did not implicate pay equity concerns because they did not work in field facilities with ATCS employees receiving raises under the new AT pay plan. Moreover, including HQ/RO MSS 2152s in the MSS pay plan would have created additional pay equity problems across other lines of business. Therefore, this was not an alternative policy that would accomplish the same pay equity objective with less adverse impact than the implementation of the new pay plan.

Claim 2 – Denied Coverage Under the Movement Rules

Regarding the effect of the subsequent Movement Rules, we find that substantial evidence of record supports the AJ's determination that the Class Agent failed to establish a prima facie case of disparate impact. The Class Agent did not provide any statistical evidence regarding the implementation of the Movement Rules,⁸ although several witnesses provided anecdotal testimony about the impact of the Movement Rules. The Class Agent testified during the hearing that HQ/RO MSS 2152s' ability to transfer, bid, or move to the field were not altered under the Movement Rules. HT Day 1 at 221-222. The Class Agent testified that the only thing that limited his ability to transfer or bid for a field position was the amount of money he would be paid for the position. *Id.* at 223. Although another witness testified that she was not permitted to bid on a field position, she testified that this was because there were too many vacancies in the RO after the field MSS 2152s were placed in the MSS pay plan. However, this anecdotal evidence is insufficient to establish that women and individuals 40 and over were adversely impacted by the implementation of the Movement Rules. Thus, the AJ's determination is supported by substantial evidence of record.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the AJ's finding of no discrimination is supported by substantial evidence. The Agency's final order implementing the AJ's decision is **AFFIRMED**.

⁸ Class Agent expert witness CE1 reiterated in her hearing testimony that she did not analyze the impact of the 1999 Movement Rules on women or on individuals age 40 and over. HT Day 5 at 1395.

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:

/S/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

August 11, 2020
Date