



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

[REDACTED]
Ty S.,¹
Complainant,

v.

Michael R. Pompeo,
Secretary,
Department of State,
Agency.

Appeal No. 2020005030

Hearing No. 570-2019-00562X

Agency No. DOS-0029-19

DECISION

Complainant, the putative Class Agent, filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 26, 2020, which adopted an EEOC Administrative Judge's denial of class certification of his complaint alleging unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Financial Economist, FO-04, at the Agency's Headquarters facility in Washington D.C.

On December 13, 2018, Complainant filed a class complaint alleging that the Agency discriminated against him on the basis of age (45) when, in August 2018, Complainant learned that he had not been selected for promotion from FS-04 to FS-03.

Pursuant to 29 C.F.R. § 1614.204(d), the Agency forwarded the complaint for class certification review by an EEOC Administrative Judge (AJ).

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.

Complainant alleged before the AJ that the Agency's promotion system, while utilizing facially-neutral annual selection boards, relies on subjective factors that manifest bias by taking into consideration career promise, mentor/mentee input, and relationship-forming potential, and that the reliance on such subjective criteria negatively impacts the advancement prospects of Foreign Service Officers over the age of 40, and further, that the net result of the subjective advancement evaluation system is a statistically significant finding of age discrimination against Foreign Service Officers over the age of 40.

The AJ found that Complainant failed to establish commonality and typicality. With regard to commonality, the AJ found that Complainant failed to establish how the use of the identified subjective criteria such as career promise, mentor/mentee input, and relationship forming potential impacted those aged 40 or older. The AJ found that not only did Complainant fail to provide evidence of the application of such allegedly discriminatory criteria to himself, but he also failed to provide evidence from other class members concerning how they were harmed by the use of such subjective criteria. The AJ noted that while Complainant provided information in support of his claim of a statistically significant disparate impact on older workers seeking promotion from FS-04 to FS-03, he failed to show how the use of the subjective criteria he identified acted to negatively affect other older Foreign Service Officers. The AJ further found that the Agency also applied other criteria when considering promotions "including specific career paths or cones, postings, discipline, and employee evaluation reports (EERs). The criteria [are] applied to eligible Foreign Service officers 'in direct competition with others of their skill code and grade'" and that Complainant "failed entirely to address the application of these other criteria and control for them in any way, and has failed to take into account the impact that a comparison of these factors between eligible Foreign Service officers may have. Indeed, other than age over 40, the class agent has failed to identify facts common to the class as a whole."

The AJ next found that Complainant failed to meet the typicality requirement because he had unique circumstances that undermined his assertion that his claim was typical of the class. Specifically, that AJ noted that Complainant received a negative employee evaluation report (EER) in 2014, which he grieved, alleging that his 2014 EER caused the 2014 and 2015 Selection Boards to give him a lowered rank and the 2016 and 2018 Boards to give him a mid-level rank. The AJ found that Complainant's negative EER made his claim and circumstances not typical of the claims of Foreign Service Officers over 40 who had not received low and/or mid-level rankings. In addition, the AJ found that the arguments Complainant made when grieving his 2014 evaluation regarding the importance of EER's to his promotion prospects undercut his argument before the AJ that promotions are based on subjective criteria.

The Agency issued its final order adopting the AJ's decision not to certify the class complaint and indicating it would process Complainant's claim as an individual complaint. The instant appeal followed.

ANALYSIS AND FINDINGS

The purpose of class action complaints is to economically address claims “common to [a] class as a whole . . . turn[ing] on questions of law applicable in the same manner to each member of the class.” General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982); Mitchell, et al. v. Dep't of the Air Force, EEOC Appeal No. 01A41492 (Oct. 18, 2005); Mastren, et al. v. U.S. Postal Service, EEOC Request No. 05930253 (October 27, 1993).

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 Def., EEOC Appeal No. 01A41492 (Oct. 18, 2005).

An agency must forward a class complaint to an EEOC 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).

With regard to commonality and typicality, the purpose of these 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 Falcon. 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 the same agency action or policy affected all members of the class. As the putative 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 own 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 agree with the AJ that, while Complainant has presented statistical evidence showing that older FS Officers are promoted less often than those under 40, he has not shown how the Agency's use of subjective criteria in promotions, such as “career promise, mentor/mentee input, and relationship forming potential” acted to discriminate against those aged 40 or older.

Complainant asserts that “the net result of this subjective advancement evaluation system is a statistically significant finding of age discrimination.” However, as the AJ points out, the argument that subjective criteria hamper promotions for those over 40 is undercut by his claim during his grievance that promotions are negatively impacted by objective criteria like low EERs. Nor has Complainant shown that, besides being Foreign Service Officers over 40, there are questions of fact common to the purported class. Complainant has provided no affidavits or other evidence indicating that other FS Officers over 40 were negatively impacted by the Agency’s use of subjective criteria in promotions. Instead, Complainant relies almost exclusively on his statistical analysis of the Agency’s undifferentiated promotion data.

As regards typicality, Complainant argues on appeal that the AJ’s reliance on Complainant’s 2014 EER in finding that Complainant was not typical of the class, is misplaced, noting that Complainant’s “claims need not be perfectly aligned with the rest of the class in order to serve as class agent.” While we agree that his claims need not be perfectly aligned, we note that the fact that Complainant received a poor 2014 EER and was low and mid-ranked in subsequent years as a result is a significant factor in determining that his situation is not typical of other potential class members. We note in this regard that if the Agency can show that Complainant’s failure to be promoted was solely based on the residual effects of his 2014 ranking his claim would not be typical of other Foreign Service Officers over 40 who were similarly not promoted but who did not have poor EERs followed by low to mid-range rankings in the years leading up to the promotion year in question.

For these reasons, we find that the AJ properly concluded that Complainant failed to establish the commonality and typicality requirements for class certification. As such, we need not also address whether Complainant satisfies the numerosity and adequacy of representation requirements. We affirm the AJ’s decision to deny class certification in this case.

EEOC regulations provide that, when the Agency dismisses a class complaint, it shall inform Complainant either: (a) that the complaint is accepted and filed as an individual complaint of discrimination; or (b) that the individual complaint is also dismissed in accordance with 29 C.F.R. § 1614.107(a). 29 C.F.R. § 1614.204(d)(7). Pursuant to this regulation, we note that the Agency, in its final order, has indicated that it will process Complainant’s non-promotion age discrimination claim as an individual complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the denial of class certification of Complainant’s class complaint. The related individual complaint is REMANDED for further processing in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency is directed to provide Complainant written notification that it will (or has already begun to) process his complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall issue Complainant a copy of the investigative file with a notification of the appropriate rights within one hundred fifty (150) calendar days of the date this decision is issued, unless the matter is otherwise resolved prior to that time. If Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request.

A copy of the Agency's written notification of processing to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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, 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 his or her 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision.

In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 14, 2020
Date