



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

Otis Johnson, Jr.
Complainant,

v.

Michael S. Regan,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 2019005355

Hearing No. 410-2017-00416X

Agency No. 2002-0102-R4

Prior Hearing No. 110-2003-08434X

DECISION

On July 14, 2019, Complainant 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 June 17, 2019, final order concerning his equal employment opportunity (EEO) 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.

ISSUES PRESENTED

The issues presented on appeal are: (1) whether an Equal Employment Opportunity Commission Administrative Judge (AJ) properly denied class certification and dismissed Complainant's class complaint; and (2) whether substantial evidence in the record supports an AJ's post-hearing determination that Complainant did not establish by preponderant evidence in the record that he was subjected to discrimination based on race, sex, age, and/or reprisal as alleged in his individual complaint.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a non-supervisory GS-0819-13 Environmental Engineer in the Agency's Resource Conservation and Recovery Act (RCRA) Programs Branch, Waste Management Division, Region 4 in Atlanta, Georgia. Complainant is an African-American male, and he was born in October 1951. Complainant had previously engaged in protected EEO activity, including by filing an EEO complaint in 1998.

Complainant began working for the Agency in August 1974 as an Environmental Engineer. From March 1980 to June 1985, Complainant supervised between two and 11 employees in the Region 4 Office of Civil Rights and Urban Affairs. Complainant worked as the GS-0819-13 Residuals Management Branch Chief, Waste Management Division from July 1985 to January 1990. According to Complainant, he supervised 14 employees while he was a Branch Chief. From February 1994 to the time of events giving rise to the instant complaint, Complainant occupied the GS-0819-13 Environmental Engineer position in the RCRA Programs Branch.

In 1996, the Agency completed a reorganization of Region 4. As part of the reorganization, Region 4 phased out the 0401, 0819, and 1101 job series for supervisors and managers and reclassified supervisory positions in the 0340-Program Management job series. According to Complainant, beginning in July 1996, he applied for nine supervisory Program Management Officer positions. For these vacancies, Complainant was either not referred to the selecting official for consideration or was not selected. Complainant alleged that he was subjected to a hostile work environment.

In July 2001, Complainant applied for a GS-0340-13/14 Program Management Officer position advertised under vacancy announcement number MPP-2001-59. Complainant only applied for consideration at the GS-14 level. The selectee for the Program Management Officer position would serve as a supervisory Section Chief in the Water Programs Enforcement Branch, Water Management Division. Applicants were asked to address their qualifications by responding to six Knowledge, Skills and Abilities (KSAs) for the position: (1) ability to communicate orally in performing supervisory or leader work; (2) ability to communicate in writing performing supervisory or leader work; (3) ability to meet and deal with others in performing supervisory or leader work; (4) ability to accomplish work through others; (5) ability to supervise; and (6) ability to analyze organizational and operational problems and develop solutions.

The Human Resources Specialist (HR1) who was responsible for vacancy announcement number MPP-2001-59 conducted an initial qualification review of the applicants before referring the applications to the Rating Panel. According to HR1, the qualification review entailed checking that the application packages were complete and that the applicants met the time-in-grade criteria for the grade(s) for which they had applied. HR1 stated that Human Resources did not review the applications to determine whether the applicants met the specialized experience requirement. HR1 averred that it was the responsibility of the Rating Panel to evaluate the qualifications of the applicants. According to the record, the Rating Panel evaluated 29 applicants at the GS-13 level and 33 applicants at the GS-14 level.

The three Rating Panel Members for vacancy announcement number MPP-2001-59 were the Acting Deputy Director of the Air, Pesticides and Toxics Management Division (P1), an Acting Branch Chief in the Environmental Services Division (P2), and a Program Management Officer in the Groundwater and Drinking Water Branch, Water Management Division (P3). P3 served as the subject matter expert because he worked in the Water Management Division. The Rating Panel rated the qualifications of the applicants in response to six areas, awarding one to four points.

According to HR1, if there was more than a two-point difference in scores awarded by the Rating Panel Members for one of the six criteria, he asked the panel to meet to discuss the discrepancies and adjust the scores if warranted. HR1 averred that he asked the Rating Panel Members to discuss the divergent scores of five applicants and that Complainant was not one of those five applicants. After the Rating Panel evaluated the applications, HR1 scored the applications, ranked the applicants, determined a cut-off score for referral, and created GS-13 and GS-14 certificates to refer the highest scoring applicants to the selecting official.

The selecting official chose a candidate from the GS-13 merit promotion certificate (C1). According to the record, C1 is a white male, and he was under 40 years old at the time of his selection. Complainant was not one of the candidates referred to the selecting official on the GS-14 merit promotion certificate. There were 10 candidates referred on the GS-14 merit promotion certificate: a 54-year-old white male; a 39-year-old white female; a 48-year-old white male; a 41-year-old white male; a 33-year-old white male; a 41-year-old white female; a 41-year-old white male; a 39-year-old white male; a 45-year-old African-American male; and a 38-year-old white male. There were nine applicants referred on the GS-13 merit promotion certificate: a 40-year-old white male; a 36-year-old white male; a 42-year-old African-American female; a 33-year-old white male; a 41-year-old white male; a 39-year-old white male; a 45-year-old African-American male; a 34-year-old white male; and a 38-year-old white male. There were also two applicants referred on a noncompetitive referral certificate: a 41-year-old African-American female; and a 49-year-old white female.

According to P1, Complainant's responses to the KSAs described actions that he had taken, but Complainant did not describe the results of those actions. P1 stated that Complainant's application did not describe his accomplishments, making it hard to determine the quality of his experience. For example, P1 noted that, while Complainant stated in his application that he had supervised employees, he did not discuss the success of his subordinates while he was their supervisor. P1 added that, since Complainant had not served as a supervisor since 1990, he would not have received recent supervisory training, including new training on performance evaluations.

P2 stated that he scored the applications based on the information provided in the applications. According to P2, he compared what was in each candidate's application to the GS-13 and/or GS-14 crediting plan, but he did not compare the qualifications of the candidates to the qualifications of the other candidates. P3 stated that Complainant did not effectively write his responses to the KSAs to show the scope and effectiveness of his leadership and accomplishments.

According to P3, Complainant briefly stated in his KSA responses that he had 10 years of supervisory experience, but he did not provide examples showing his ability to supervise.

Complainant stated that Region 4's Merit Promotion Program was biased against applicants like him because the Region's Divisions appointed representatives as panelists, who lobbied for the candidates who already worked in their Divisions. Complainant alleged that the selection process for Program Management Officers appeared to be very subjective and that panelists have selected applicants who do not meet the eligibility requirements for the Program Management Officer position. According to Complainant, the selection process allowed for unqualified applicants to be selected, which he alleged had a disparate impact based on race, sex, and age.

On August 15, 2002, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), age (born in October 1951), and reprisal for prior protected EEO activity when:

1. he was not selected for the GS-0340-13/14 Program Management Officer position advertised under vacancy announcement number MPP-2001-59; and
2. he was subjected to a hostile work environment, culminating in the decision not to select Complainant for inclusion on the promotion certificate for the vacancy.

When the Agency failed to investigate the complaint in a timely manner, Complainant requested a hearing before an EEOC AJ on May 16, 2003, which was after 180 calendar days had passed from the filing of the complaint. The Commission ordered the Agency to conduct the investigation of the EEO complaint. The Agency issued the Report of Investigation (ROI) on August 7, 2003.

On September 25, 2003, Complainant filed a motion for class certification. The AJ assigned to the case (AJ1) denied Complainant's motion as untimely filed, noting that it was filed less than two weeks before Complainant's scheduled hearing date. AJ1 also denied class certification based on Complainant's inability to represent the potential class.

Both Complainant and the Agency moved for partial summary judgment, but AJ1 found that there were factual disputes that warranted a hearing on Complainant's individual EEO complaint. AJ1 held a hearing on October 14, 2003, and issued a bench decision. The Agency subsequently issued a final order adopting AJ1's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant appealed the Agency's final order to the Commission.

On appeal, the Commission found that AJ1 inappropriately dismissed Complainant's motion for class certification as untimely filed, noting that Complainant had requested a hearing before the Agency had started the investigation of his complaint and finding that any delay in moving for class certification was attributable to the Agency's delay. See EEOC Appeal 0120041688 (Nov. 8, 2005).

The Commission also found that AJ1's denial of class certification based on inadequacy of representation was premature, as the AJ should have advised Complainant of his rights and responsibilities as class agent upon Complainant's notification of intent to pursue the case as a class complaint. The Commission vacated the Agency's final order, remanded the matter to the Hearings Unit of the Commission's Atlanta District Office for the processing of Complainant's class complaint, and stated that Complainant's individual complaint must be held in abeyance pending an AJ decision on class certification.¹

Complainant filed a motion for class certification on April 23, 2018. Complainant supplemented his motion for class certification on August 31, 2018, and on February 8, 2019. On March 15, 2019, the Agency filed its opposition to Complainant's motion for class certification.

On March 22, 2019, the AJ assigned to the case (AJ2) issued a Notice of Intent to Deny Class Certification because Complainant was unable to meet the adequacy of representation requirement for class certification. AJ2 afforded Complainant until May 21, 2019, to secure adequate representation for the putative class. On May 21, 2019, Complainant notified AJ2 that he had not been able to secure adequate representation by the deadline. On May 29, 2019, AJ2 issued an Order Denying Class Certification and Dismissing Class Complaint. AJ2 ordered the Agency to issue a final order notifying Complainant whether it would implement AJ2's order concerning his class complaint and whether it would implement AJ1's bench decision concerning his individual complaint.

On June 17, 2019, the Agency issued its final order, which fully implemented AJ2's order denying class certification and dismissing the class complaint and fully implemented AJ1's decision finding no discrimination on Complainant's individual complaint.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant's Contentions on Appeal

On appeal, Complainant challenges AJ1's decision on his individual complaint and AJ2's decision denying class certification and dismissing his class complaint. He contends that the GS-0340-13 and GS-0340-14 certificates for vacancy announcement number MPP-2001-59 were invalid because they contained the names of applicants who did not meet the basic requirements of the Office of Personnel Management (OPM) for the Program Management Officer position.

¹ The Agency filed a request for reconsideration regarding a footnote in EEOC Appeal 0120041688 that directed the Agency to consolidate the instant EEO complaint with separate claims regarding Complainant's nonselections for other vacancies. On request for reconsideration, the Commission rescinded the footnote in question, finding that Complainant had not appealed the other nonselection claims. See EEOC Request No. 0520060319 (Oct. 26, 2006).

According to Complainant, referring the names of applicants who are not qualified to a selecting official is a violation of 5 C.F.R. § 335.103(b)(3). Complainant alleges that the Agency allowed Caucasian males who did not meet the qualification standards to compete for these positions, which subjected him to disparate treatment when he was not referred or selected for a position and which also caused a disparate impact on African-American candidates and candidates 40 and older. Complainant also alleges that he was subjected to a hostile work environment when the Agency repeatedly and continuously denied him consideration for promotional opportunities.

Regarding AJ1's decision, Complainant contends that AJ1 misunderstood his argument. According to Complainant, AJ1 framed his claim as a contention that he was more qualified than the applicants whose names appeared on the certificate, but his actual contention was that some of the applicants on the certificate did not have the specialized experience required for consideration for the position and that Complainant, despite meeting the requirements for consideration, did not have his name added to the GS-0340-14 certificate. Complainant claims that he had ten years of specialized GS-13 experience when the vacancy announcement closed, although he was only credited for one year of time-in-grade for promotional consideration to GS-0340-14. Complainant also suggests that AJ1 erred in finding that he could not establish a prima facie case of disparate impact because some African-American candidates made the certificates.

Complainant contends that he should have been afforded pre-certification discovery on his class complaint, questioning why he needed to be represented at the certification stage. Complainant states that litigating his complaint without the prospect of being reimbursed would cause a financial hardship for him. Complainant notes that, even if he prevailed on his age discrimination claims, the Agency would not be liable for paying his attorney's fees and costs. According to Complainant, the Commission should be lenient regarding adequacy of representation for this reason. Complainant requests that the Commission remand the class complaint for discovery and allow Complainant a reasonable amount of time to obtain adequate representation.

The Agency's Contentions in Response to Complainant's Appeal

In response to Complainant's appeal, the Agency contends that Complainant raises the same arguments on appeal that he raised at the hearing regarding his individual complaint and that he raised in his motion for class certification. According to the Agency, substantial evidence in the record supports AJ1's conclusion that Complainant did not establish that he was subjected to disparate treatment, disparate impact, or a hostile work environment.

The Agency also contends that Complainant has not presented any arguments for disturbing AJ2's decision denying class certification, noting that Complainant admits on appeal that he has not secured adequate representation and that litigating a class complaint would be a financial hardship for Complainant. The Agency requests that the Commission affirm its final order.

ANALYSIS AND FINDINGS

Denial of Class Certification

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." Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982) (citations omitted). Under EEOC regulations, a class complaint must allege that: (1) the class is so numerous that a consolidated complaint concerning the individual claims of its members is impractical; (2) there are questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class; and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2). Regulation 29 C.F.R. § 1614.204(d)(2) provides that a class complaint may be dismissed if any of the four prerequisites are not met or for any of the procedural grounds for dismissal set forth at 29 C.F.R. § 1614.107. The putative 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. William G. v. U.S. Postal Serv., EEOC Appeal No. 2019001459 (May 23, 2019); Mastren, et al. v. U.S. Postal Serv., EEOC Request No. 05930253 (Oct. 27, 1993).

"Adequacy of representation" means simply that the class agent has demonstrated that he, or a designated representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2)(iv). The class agent must show that he is qualified, experienced, and generally able to conduct proposed litigation. See Drummond v. Dep't of the Army, EEOC Appeal No. 01940520 (Aug. 29, 1994). The Commission has generally held that a non-attorney class agent who does not possess the necessary experience, knowledge, or skills to represent a class is not an adequate representative. See Anderson v. Dep't of Defense, EEOC Appeal No. 01A41492 (Oct. 18, 2005); Woods v. Dep't of Housing and Urban Development, EEOC Appeal No. 01961033 (Feb. 13, 1998); Wirkler v. Dep't of Defense Dependents Schools, EEOC Appeal No. 01881849 (Aug. 16, 1988). A putative class agent who is unable to procure sufficient funding is unlikely to adequately represent the interests of the class. See Juli Z. v. Environmental Protection Agency, EEOC Appeal No. 2019003557 (Aug. 19, 2020); Thompson v. Tennessee Valley Authority, EEOC Appeal No. 01A34535 (Sep. 23, 2004).

In the instant case, we agree with AJ2 that the record does not establish that Complainant has the knowledge or skills to represent the interest of the class as class agent. Complainant filed the instant complaint on August 15, 2002, and he filed his first motion for class certification on September 25, 2003. Complainant, who is not an attorney, has not retained legal counsel, and he has not demonstrated that he has the necessary skills and experience to adequately and fairly protect the interests of the class. Moreover, there is nothing in the record that would establish that a qualified attorney has indicated a willingness to act as a legal representative for the class. Additionally, Complainant admits that he does not have the funds needed to represent the class, and he has not identified how he could obtain the funds needed to represent the class. Accordingly, Complainant has not satisfied the adequacy of representation requirement.

AJ2's decision denying class certification and dismissing the class complaint only addressed adequacy of representation. However, upon review, we find that Complainant also has not demonstrated that the class complaint meets the commonality or typicality criteria for class certification. The purpose of the commonality and typicality requirements is to ensure that a class agent possesses the same interests and has experienced the same injuries as unnamed class members. Falcon, 457 U.S. at 156. The commonality and typicality requirements tend to merge and are often indistinguishable. Id. at 157 n. 13.

"Commonality requires that there be questions of fact common to the class, [that is, t]he putative class agent must establish an evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination." Garcia v. Dep't of Interior, EEOC Appeal No. 07A10107 (May 8, 2003). Generally, this can be accomplished through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony from other employees who were allegedly discriminated against in the same manner as the class agent, and evidence of specific adverse actions taken. Id.; Belser v. Dep't of Army, EEOC Appeal No. 01A05565 (Dec. 6, 2001) (citing Mastren, EEOC Request No. 05930253). Conclusory allegations, standing alone, do not show commonality. Garcia, EEOC Appeal No. 07A10107 (citing Mastren, EEOC Request No. 05930253). Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact. Id.

Typicality, on the other hand, requires that the claims or discriminatory bases of the class agent be typical of the claimed bases of the class. Id. A class agent must be part of the class he seeks to represent, and must "possess the same interest and suffer the same injur[ies] as the class members." Falcon, 457 U.S. at 156. Moreover, claims must be sufficiently typical to encompass the general claims of the class members so that it will be fair to bind the class members by what happens with the class agent's claims. Matthews-Frazier v. U.S. Postal Serv., EEOC Appeal No. 01A44789 (April 20, 2006).

We find that Complainant has not established questions of fact common to the class and therefore has not established commonality. There is no evidence in the record to support the finding that other class members possess the same interests and suffered the same harm as Complainant. For example, there are no affidavits from other putative class members containing anecdotal evidence describing harm that they suffered similar to Complainant. Instead, Complainant has provided broad conclusory allegations of class-wide harm. Mere conclusory allegations of discrimination, standing alone, do not establish commonality. Williams v. Dep't of Agric., EEOC Appeal No. 01A30562 (Sep. 23, 2004). Accordingly, we find that AJ2 properly denied class certification and dismissed the class complaint, and we will next consider AJ1's post-hearing decision on Complainant's individual complaint.

Complainant's Individual Complaint

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. Nat’l Labor Relations Bd., 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.

Complainant alleged that he was subjected to disparate treatment when he was not referred on the GS-14 merit promotion certificate for vacancy announcement number MPP-2001-59. To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep’t of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency’s explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep’t of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

AJ1 found that the Agency’s legitimate, nondiscriminatory explanation for not referring Complainant was that the Rating Panel Members credited applicants for their relevant outside volunteer experience and Team Leader experience that could help the applicants succeed in the position and that the highest rated applicants were referred on the relevant certificates. AJ1 noted that Complainant argued that the subjectivity afforded to the Rating Panel Members was unfair and benefited employees with less experience. AJ1 concluded that Complainant failed to establish by preponderant evidence that the Agency’s legitimate, nondiscriminatory reasons for its actions were pretextual. We agree with AJ1’s determination that Complainant did not establish by the preponderance of the evidence in the record that the Agency’s proffered legitimate, nondiscriminatory reasons were a pretext designed to mask discriminatory animus.

Complainant also alleged that the selection process had a disparate impact based on race, sex, and age. To establish a prima facie case of disparate impact, a complainant 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) (the complainant must present "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the

exclusion"). Specifically, a complainant 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. The burden is on the complainant 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).

Regarding Complainant's disparate impact claim, AJ1 found that Complainant did not establish that the Agency's selection process had a disparate impact. AJ1 noted that there was at least one African-American candidate referred on each of the three certificates, that eight of the nine candidates referred on the GS-13 merit promotion certificate and eight of the ten candidates referred on the GS-14 merit promotion certificate were male, and that applicants age 40 and over were referred on all three of the certificates. We agree with Complainant's contention on appeal that the mere presence of members of Complainant's protected classes on the certificates does not mean that Complainant cannot establish a prima facie case of disparate impact. However, we agree with AJ1 that Complainant has not presented any evidence that the Agency's selection process caused a statistical disparity based on race, sex, and/or age. We find that substantial evidence supports AJ1's conclusion that Complainant has not established a prima facie case of disparate impact.

Finally, Complainant alleged that he was subjected to discriminatory harassment. To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

In addition to the non-selection, Complainant alleged that he was harassed when his first-line supervisor at the time of events giving rise to the instant complaint, the RCRA Programs Branch Chief (S1), gave Complainant a hard time about receiving official time and referred to Complainant as a "dumb assed bastard" to another employee. Hearing Transcript (HT) at 19-20. Complainant additionally asserted that S1, who is an African-American female, generally treated African-American male employees worse than other employees. Complainant also alleged that the former Acting Director of the Waste Management Division (S2) threatened to file a lawsuit against Complainant in 1997 or 1998. HT at 16-17, 31. AJ1 found that Complainant did not establish that he was subjected to a hostile work environment, noting that the alleged harassment consisted of isolated incidents that were insufficiently severe or pervasive.

Upon review, we find that AJ1's conclusion that Complainant did not establish by the preponderance of the evidence that he was subjected to harassment is supported by substantial evidence in the record.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order because AJ2 properly denied class certification and dismissed Complainant's class complaint and because substantial evidence supports AJ1's determination that Complainant did not establish that he was subjected to discrimination as alleged in his individual complaint.

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).

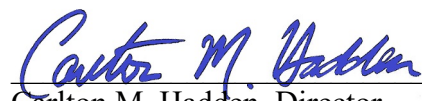
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

May 19, 2021
Date