



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Felix Z. et al.,¹
Complainant,

v.

Alejandro Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2020005328

Hearing No. 510-2018-00247X

Agency Nos. CBP-01471-2018
CBP-00154-2018

DECISION

Following its September 21, 2020 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a) concerning Class Agent's 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. On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's decision to certify the class complaint. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

The issue is whether the Administrative Judge properly determined that the complaint at issue in this case met the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification.

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 a Border Patrol Agent (BPA) at the Agency's Las Cruces Station, El Paso Sector in Las Cruces, New Mexico. In October 2017, Class Agent received an email soliciting interest from BPAs to deploy to Ramey Sector to conduct Border Patrol law enforcement operations and assist with ongoing humanitarian efforts. The notice stated that the Agency "requests that volunteer agents DO NOT have family ties to Puerto Rico." On October 12, 2017, Complainant emailed his interest in the opportunity, stating that he had family ties in Puerto Rico but did not think it would affect his ability to complete the Agency's mission in Puerto Rico. Report of Investigation (ROI) at 8-9.

On February 7, 2018, Class Agent filed an individual and class complaint alleging that the Agency discriminated against him and other agents with family ties to Puerto Rico when, on various dates in late 2017, the Agency excluded and/or discouraged them from applying and/or denied them the opportunity to participate for details and/or assignments to Ramey Sector to assist Puerto Rico with relief efforts based on their own, and their association with others of, Hispanic/Puerto Rican race and/or national origin.

On April 6, 2018, the Agency forwarded the class complaint to the EEOC's Miami District Office and informed Class Agent that it would hold his individual complaint in abeyance due to the class complaint involving a similar, if not identical, claim. On July 19, 2019, the class complaint was transferred to the EEOC's Washington Field Office.

On August 13, 2020, the Administrative Judge (AJ) issued her Decision Certifying Class, after finding that none of the criteria for dismissal of an individual complaint were met and the request for class certification was timely. The AJ found that this class complaint challenged an Agency policy that affirmatively discouraged and/or excluded employees with family in Puerto Rico from applying for opportunities to assist with disaster relief on the island. The AJ noted that the written notices of opportunities to participate in the disaster relief efforts specifically provided that employees interested in these opportunities should not have family ties to Puerto Rico. The AJ determined that the record showed that this provision resulted in the rejection of a number of employees' applications or expressions of interest in the positions, and it discouraged others from applying.

The AJ found that the number of potential class members was sufficiently numerous to satisfy the criteria for numerosity because Class Agent identified at least 46 employees who were directly impacted by the policy, and he provided analysis indicating that the figure could be much higher. The AJ noted that the Agency argued that Class Agent's claims were not typical of those of the class members insofar as he applied and was rejected for a detail to Puerto Rico, while some class members did not apply. However, the AJ found that this did not negate the typicality of Class Agent's claims because the fact that some class members applied for the assignments, notwithstanding the clear statement that employees with family ties to Puerto Rico were not welcome while others interpreted the policy as precluding their applications, the fact

remained that the class members faced a common policy and their disparate responses to that policy did not negate typicality.

Regarding adequacy of representation, the AJ found that Class Agent's representative provided her biography and a description of her practice experience, which demonstrated familiarity with the practice of class action litigation. The AJ noted that the Agency did not challenge certification on grounds relating to adequacy of representation. The AJ concluded that the complaint fulfilled the requirements for class certification and granted Class Agent's request for class certification.

On August 21, 2020, the Agency submitted a Motion for Clarification and Stay, noting that the AJ's Decision on Class Certification found that the requirements for class certification were met, but the AJ did not define the class. The Agency stated that it was unable to notify the class members until the identity of the class is clear and requested that the AJ clarify the identified class. The AJ responded that the complaint had been "closed" once she granted certification of the class, and that the case must be re-filed for adjudication on the merits. The AJ added that she was granting the Agency's request for a stay of the deadline to notify class members.

The Agency issued a final order to not implement the AJ's class certification decision and filed the instant appeal. Class Agent opposed the Agency's appeal.

CONTENTIONS ON APPEAL

Agency's Contentions

As an initial matter, the Agency argues that the complaint fails to state a claim because an individual's residency does not equate with a protected class and family ties to a particular region do not necessarily implicate race or national origin, as people of all races and national origins may be connected to a geographic location. The Agency asserts that familial ties to Puerto Rico do not establish disparate treatment on the basis of race or national origin, and the complaint should be dismissed.

The Agency also argues that the complaint fails to meet regulatory requirements for class certification. The Agency asserts that the class lacks commonality because Class Agent, who applied to the solicitation and was rejected, seeks to include within the purported class both BPAs who affirmatively applied to the solicitation and BPAs who were discouraged or deterred from applying. The Agency asserts that highly individualistic inquiries that would be required to evaluate the claims of the purportedly deterred applicants defeats commonality because the focus of the class action would shift from defendants' conduct to the factual circumstance of individual plaintiffs. The Agency notes that deterred applicants would need to show, for example, that they qualified for the detail; they were subjectively interested in the detail; they were deterred from applying; and they would have been rejected if they had applied.

The Agency contends that while deterred and rejected applicants both complain of the solicitation's "family ties" language, the predominately individualized questions of fact undermine commonality and the purported class should not be certified.

The Agency also argues that Class Agent's claims of applying and being rejected are not typical of a purported class that also includes those who allegedly were deterred from applying. In addition, the Agency asserts that only five, out of 20, Sectors received the solicitation, but that Class Agent seeks to expand the class further by suggesting that potentially all Hispanic BPAs throughout the Agency should be included within the class, estimating that approximately 6,410 BPAs could have been affected by the solicitation.

The Agency notes that while Class Agent attempts to inflate the number of class members by including the approximately 6,410 Hispanic BPAs at the time of the solicitation, including those who worked outside of the five Sectors that received the solicitation, he has not shown that these BPAs were Puerto Rican; had family ties to Puerto Rico; and/or were eligible for or interested in the solicitation, and this number is purely speculative and does not establish numerosity. The Agency notes that of these 6,410 purported class members, Class Agent identified by name only 47 members; however, the Agency estimates that the total number of class members is no more than 20, which would not be sufficiently numerous, nor would the number of identified members who allegedly were deterred from applying be sufficiently numerous.

The Agency also argues that the AJ erred in not defining the class and that the Commission should either remand the matter back to the AJ for a class definition or define the class. In sum, the Agency argues that Class Agent fails to state a claim and thus the complaint should be dismissed; and that Class Agent does not satisfy the requirements under 29 C.F.R. § 1614.204(a)(2) and the class should be decertified. The Agency asserts that if the Commission determines that certification of the complaint is appropriate, it should either define the class or remand the case to the AJ to do so.

Class Agent's Contentions

Class Agent counters that the Agency's request for dismissal for failure to state a claim at the class certification stage is not appropriate because 29 C.F.R. § 1614.107 provides only that the AJ may dismiss on the listed procedural grounds listed in § 1614.107, which does not include the substantive grounds asserted by the Agency. In addition, Class Agent asserts that neither § 1614.103 nor § 1614.106(a) specifically permit the Agency to move for failure to state a claim on the merits of a key substantive issue while still in the certification stage. Class Agent states that the need to focus on class certification, rather than the merits, is particularly important because complainants do not have to prove the merits of their claims at the class certification stage.

Class Agent also argues that the Agency's effort to twist "family ties to Puerto Rico" into an unprotected issue of residence is unavailing because the Agency's solicitation did not state that agents were excluded if they had family residing in Puerto Rico at the time, rather, it said that agents were excluded if they had "family ties" to Puerto Rico, with no mention of residency.

Class Agent notes that the Agency admittedly and explicitly treated agents with “family ties” to Puerto Rico differently, less favorably, than agents without “family ties” to Puerto Rico. Further, Class Agent notes that the Agency did not impose a similar restriction on those volunteering to assist with similar efforts in Houston, Texas after Hurricane Harvey, and here, agents were excluded from a paid career enhancing detail improperly simply because of their race and/or national origin.

Class Agent asserts that he has met the requirements for class certification. Class Agent notes that on various dates in late 2017, the Agency announced the same detail solicitation, to go to Ramey Sector in Puerto Rico to assist with hurricane relief efforts, with the same restriction, that the agent applicant have no “family ties” to Puerto Rico, and caused the same injury to all agents who were not able to participate, either because they did apply and were not selected, or they would have applied for the detail but did not because of the no “family ties” to Puerto Rico restriction. Class Agent states that, according to the Agency, the decision to solicit volunteers for the Ramey Sector detail and the decision to exclude agents with “family ties” to Puerto Rico was a centralized decision made by the Agency’s Headquarters, Law Enforcement Operations Directorate.

Class Agent notes that the Agency attempts to distinguish class members who applied from class members who were deterred from applying, but in Complainant v. Dep’t of Def., EEOC Appeal No. 0120103592 (Sept. 9, 2015), the Commission found that the fact that some individuals chose to complete the reasonable accommodation form and provide the information while others did not, and/or the fact that some individuals were accommodated and others were not, did not destroy commonality or typicality because there was a common policy or practice at issue. Class Agent asserts that, similarly here, the Agency’s common policy or practice was the detail solicitation excluding agents with “family ties” to Puerto Rico.

Class Agent also asserts that the Agency’s conclusion as to whether an agent applied or not is based on the counselor’s reports, which are incomplete and factually incorrect. For example, Class Agent notes that a supervisor provided a chart reflecting names of agents who applied but were excluded because of “family ties” to Puerto Rico, which contradicts the Agency’s assertion that some of these agents did not apply. Class Agent argues that the cursory conclusions presented in the often-erroneous counselor’s reports cannot be relied upon regarding whether any particular known class member should not be included within the class.

Regarding numerosity, Class Agent notes that he identified 45 affected agents who filed a formal EEO complaint as an individual and member of the class. In response to the Agency claims that the detail solicitation was only sent to five of the 20 Sectors, Class Agent asserts that even if true, this would result in approximately 2,633 potential class members.

Class Agent notes that the AJ concluded that his named representative satisfied the Adequacy of Representation Requirement and the Agency has not challenged this requirement on appeal. Class Agent asserts that the class was defined in the same manner in each complaint filed, and that the AJ’s Certification Order approved, and did not alter, the definition of the class.

Class Agent notes that the Agency defined the claim at issue in its Final Order and that there is no actual uncertainty.

Class Agent requests the Commission deny the Agency's appeal; order the Agency to comply with the AJ's Class Certification Order; and permit Class Agent to proceed with discovery. In the event that the Agency's appeal is granted, and class certification is overturned in whole or in part or the Commission finds a failure to state a claim, Class Agent asserts that he must be permitted an opportunity to address any deficiencies, and to date, no discovery has been conducted.

ANALYSIS AND FINDINGS

Definition of class

Regarding the Agency's argument that the AJ failed to specify the class in her certification order, we note that the Agency identified the claim in its final order as:

Whether [the Agency] discriminated against the class members based on race/national origin (Hispanic/Puerto Rican) and association with others of Hispanic/Puerto Rican descent, when Border Patrol Agents were excluded and/or discouraged from applying and/or denied the opportunity to participate in a temporary duty assignment to Ramey Sector to conduct Border Patrol law enforcement operations, and to assist with ongoing humanitarian efforts due to Hurricane Maria.

We note that while the AJ did not specify the definition of the class in her decision, the Agency's final order recognized the class members as those who "were excluded and/or discouraged from applying and/or denied the opportunity to participate in a temporary duty assignment to Ramey Sector to conduct Border Patrol law enforcement operations, and to assist with ongoing humanitarian efforts due to Hurricane Maria."

While the Agency argued that Class Agent improperly attempts to include employees in Sectors that did not receive the detail solicitation, we note that Class Agent properly noted that there may be members of the purported class who are currently outside of the five Sectors but worked within one of the five Sectors that was sent the detail solicitation in or around October 2017. As such, we find that the class includes those who: (1) worked within one of the five Sectors that was sent the solicitation for a detail assignment in Ramey Sector in or around October 2017; and (2) were excluded and/or discouraged from applying and/or denied the opportunity to participate in a temporary duty assignment to Ramey Sector to conduct Border Patrol law enforcement operations, and to assist with ongoing humanitarian efforts due to Hurricane Maria based on race/national origin (Hispanic/Puerto Rican) and association with others of Hispanic/Puerto Rican descent.

Failure to state a claim

EEOC regulation 29 C.F.R. § 1614.204(d)(2) states that an administrative judge may dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2). EEOC regulation 29 C.F.R. § 1614.107(a) provides that a complaint may be dismissed if it fails to state a claim under § 1614.103 or § 1614.106(a). An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission has long defined an “aggrieved employee” as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

On appeal, the Agency argued that the class complaint should be dismissed for failure to state a claim because an individual’s residency does not equate with a protected class and family ties to a particular region do not necessarily implicate race or national origin. In response, Class Agent asserted that the Agency’s solicitation did not state that agents were excluded if they had family residing in Puerto Rico at the time, rather, it said that agents were excluded if they had “family ties” to Puerto Rico, with no mention of residency. We agree with Class Agent because the Agency’s solicitation clearly makes no mention of residency of these “family ties.” We further note that when Class Agent expressed interest in the detail opportunity, he stated that he had “family ties” in Puerto Rico, but he did not specify that his family ties were currently residing in Puerto Rico. ROI at 9. As such, we find that the class complaint should not be dismissed for failure to state a claim because the allegations are based on race and national origin of the class members and their association with others of Hispanic/Puerto Rican race and/or national origin, and the claims are not based on residency.

Class Certification

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); Mastren, et al. v. U.S. Postal Serv., EEOC Request No. 05930253 (Oct. 27, 1993).

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 Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982). 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 is, that the same agency action or policy affected all members of the class. The Class Agents 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 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 find that the commonality requirement was met because Class Agent identified an Agency policy or practice, announced in October 2017, that employees with "family ties" to Puerto Rico would be excluded from participating in a temporary duty assignment to Ramey Sector to conduct Border Patrol law enforcement operations and to assist with ongoing humanitarian efforts due to Hurricane Maria. The record shows that the decision to exclude those with "family ties" to Puerto Rico was made by officials in the Law Enforcement Operations Directorate at Headquarters. ROI at 1246-7. Members of the class were affected by the same agency action or policy because they were either not selected after expressing interest, or they were deterred from expressing interest because the Agency explicitly informed employees that those with family ties to Puerto Rico would not be considered for this opportunity.

The Agency argued that while deterred and rejected applicants both complain of the solicitation's "family ties" language, the predominately individualized questions of fact undermine commonality because the focus of the class action would shift from defendants' conduct to the factual circumstance of individual plaintiffs. However, we find that the Agency's assertion is incorrect because the ultimate question of this class complaint is whether the Agency's actions were discriminatory when it specifically excluded employees with "family ties" to Puerto Rico for a temporary detail assignment to Ramey Sector. To the extent that the Agency stated that deterred applicants would need to show that they qualified for the detail; they were subjectively interested in the detail; they were deterred from applying; and they would have been rejected if they had applied, we note that this would be related to an individual claim for relief submitted by a class member, which would only be submitted if there is a finding of discrimination due to the Agency's actions and not at the certification stage.

We also find that Class Agent's claim was typical of the class because he alleges discrimination based on his race and national origin, and his association with others of Hispanic/Puerto Rican descent, when the Agency excluded employees with family ties to Puerto Rico for the detail opportunity in Ramey Sector in October 2017. In sum, regarding commonality and typicality, we find that the interests of the putative class members are fairly encompassed within Class Agent's claim.

The numerosity prerequisite states that the potential class must be sufficiently numerous so that a consolidated complaint by the members of the class, or individual, separate complaints from members of the class is impractical. See 29 C.F.R. § 1614.2014(a) (2)(i). The focus in determining whether the class is sufficiently numerous for certification is the number of persons affected by the Agency's alleged discriminatory practice(s). See White, et. al. v. Dep't of the Air Force, EEOC Appeal No. 01A42449 (Sept. 1, 2005). The Commission has held that the relevant factors to determine whether the numerosity requirement has been met are the size of the class, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action at issue, and the size of each member's claim. Carter, et. al. v. U.S. Postal Serv., EEOC Appeal No. 01A24926 (Nov. 14, 2003). In determining whether the class is sufficiently numerous, the AJ needs to consider the number of persons who possibly could have been affected by the agency's discriminatory practices and who, thus, may assert claims. Simon V., et al. v. Dep't of Justice, EEOC Appeal No. 0720110008 (Sept. 15, 2015), request for recon. denied, EEOC Request No. 0520160037 (Feb. 11, 2016).

The Agency argued that the class does not meet the numerosity requirement because it estimates that only 20 employees comprise the class. However, the record shows that over 40 additional employees filed EEO complaints alleging discrimination based on race and national origin when they were rejected from the detail opportunity in Ramey Sector, or they were deterred from applying, based on the language explicitly excluding those with family ties to Puerto Rico. ROI at 65-595. We note that while there are no specific numerical cut-off points, most courts are generally reluctant to certify a class with thirty or fewer members, and the Commission has previously found that a class of 40 members satisfied the numerosity requirement. Tessa L., et al. v. Dep't of Agric., EEOC Appeal No. 0720170021 (Nov. 9, 2017). As such, we find that the class has met the numerosity requirement.

We note that the AJ determined that Class Agent's attorney met the qualifications to represent the class and that the Agency did not challenge this determination; as such, we find no reason to disturb the AJ's determination regarding the adequacy of representation.

We find that the class complaint met the regulatory requirements for class certification; as such, we REVERSE the Agency's final order rejecting the AJ's Decision on Class Certification and we REMAND the complaint to the Agency for further action, in accordance with the ORDER below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order and REMAND the complaint for further processing, in accordance with the ORDER below.

ORDER

The Agency is ORDERED to perform the following:

1. Notify class members of the accepted class claim within fifteen (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 Washington Field Office within thirty (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).

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit 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, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files 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

April 29, 2021
Date