



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

[REDACTED]
David H.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2021001512

Hearing No. 480-2020-00693X

Agency No. HS-CIS-26214-2016

DECISION

On January 5, 2021, 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 December 10, 2020, 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 (AJ) properly determined that a class should not be certified pursuant to 29 C.F.R. §1614.204(a)(2).

BACKGROUND

The record reveals that on March 7, 2016, the California Service Center (CSC) Chief of Staff emailed all employees at the CSC soliciting two individuals to participate on an EEO Advisory Committee. Complaint File (CF) at 19-21. Complainant was a recipient of this email. The

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.

email noted within the job duties that the “Committee or its members shall not be involved in any individual EEO issues where a pre-complaint or complaint has been filed.” Id. at 20.

On April 21, 2016, Complainant contacted an EEO Counselor. On May 31, 2016, Complainant filed a formal EEO complaint alleging a hostile work environment when, on March 7, 2016, employees received an email soliciting participation on an EEO Advisory Committee, but the Agency restricted the participation of anyone involved in individual EEO issues where a pre-complaint or complaint had been filed.

In a letter dated July 28, 2016, the Agency informed the EEOC’s San Diego Local Office that Complainant had filed a purported class complaint and transmitted the complaint to the Equal Employment Opportunity Commission Administrative Judge (AJ) for a determination on certification.

On May 23, 2018, the AJ issued a Notice of Intent to Issue a Decision without a Hearing, to which Complainant responded in opposition on June 7, 2018. In his response, Complainant noted that he was alleging a class claim of discrimination in reprisal for prior EEO activity when on March 7, 2016, all employees at the CSC received a job announcement via email that stated that the EEO Committee and its members “shall not be involved in any individual EEO issues where a pre-complaint or complaint has been filed.” Complainant maintained that this announcement is reasonably likely to deter employees from engaging in EEO activity.

Additionally, Complainant submitted a Motion to Amend in which he alleged that he was subjected to several other acts of harassment, including: incidents wherein the Chief of Staff scrutinized his work schedule, duties, and emails; an Agency supervisor (Supervisor) accused Complainant of having a “mean face” at a May 18, 2017, training class; the Supervisor told Complainant that he could go to the union if he did not like it when discussing discrimination issues; the Supervisor requested that Complainant be removed off her team after he opposed discrimination; the Supervisor called Complainant “creepy and explosive” in February 2014; the Supervisor told an entire class that “no supervisor wants him” on their team; Supervisor taunted Complainant at the gym and scrutinized his whereabouts; the Supervisor accused Complainant of harassment in the gym and of not attending a picnic; and in 2014, the Supervisor did not approve Complainant for overtime, made unfounded allegations about his work that negatively impacted his rating, kept Complainant off emails, and did not respond to his emails. Complainant also sought to amend his complaint to include the additional bases of race (Asian), color (light brown complexion), and age (over 40 years old).

On June 12, 2018, the AJ granted Complainant’s Motion to Amend regarding additional bases of discrimination with respect to the EEO Advisory Committee announcement. However, the AJ denied Complainant’s Motion to Amend regarding his request to include additional incidents of harassing conduct in his complaint on the basis that the alleged actions were not like or related to the EEO Advisory Committee issue and that the additional matters could be better addressed in Complainant’s other pending EEO complaint that contained allegations of harassment by the same actors during the same period.

Regarding the EEO Advisory Committee issue, the AJ issued summary judgment in favor of the Agency. The AJ reasoned that the Agency provided a legitimate, nondiscriminatory reason for its actions when it stated that its announcement was based on a collective bargaining agreement (CBA) that required that individuals on the EEO Advisory Committee not be currently embroiled in individual EEO matters. Consequently, the AJ dismissed Complainant's individual and class claims. The AJ's decision became the final decision when the Agency failed to issue a final order within 40 days in accordance with 29 C.F.R. § 1614.109(i).

Complainant appealed the decision. On June 30, 2020, the Commission vacated the AJ's decision and remanded the individual and class complaints. David H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120182576 (June 30, 2020), req. for recon. denied, EEOC Request No. 2021002660 (July 13, 2021). The Commission in EEOC Appeal No. 0120182576 explained that the AJ prematurely addressed the merits of the complaint without initially addressing whether the class complaint should be certified. As such, the matter was remanded to the AJ for further processing of the class complaint.

On November 6, 2020, the AJ issued a decision dismissing the class complaint, pursuant to 29 C.F.R. § 1614.204(d)(2) and to 29 C.F.R. § 1614.106(d), amending Complainant's individual complaint in part. The AJ determined that the complaint was not appropriate for class adjudication, finding that the evidence did not support sufficient numerosity where there were no more than 28 potential class-members. The AJ explained that Complainant named no specific class members other than himself when asked to provide a list of individuals that would be appropriate class members. The AJ further determined that, even if one were to assume that the announcement excluded and/or dissuaded employees, the potential class would still be insufficient to warrant class-certification. In support, the AJ noted that only nine employees had pending EEO matters at the time of the announcement. In addition, the AJ found that Agency-submitted information revealed a low level of interest in the position when only eight employees applied for the position, which was less than one percent of the employees who received the announcement. Also, no other employees filed a complaint about the announcement and Complainant did not present evidence that anyone else felt that the announcement amounted to reprisal.

In granting in part and denying in part the Motion to Amend, the AJ allowed for the inclusion of Complainant's individual harassment claim and allegations against Chief of Staff but found that the claims against the remaining named individuals were not appropriate for amendment. The AJ stated that the claim was amended as follows:

Whether the Agency discriminated against Complainant based on race (Asian), color (brown), age (over 40), and/or reprisal (prior EEO-activity) when (1) on March 7, 2016, Complainant received an email from [the] Chief of Staff soliciting participation on an EEO Advisory Committee, but the Agency restricted the participation of anyone involved in individual EEO-issues where a pre-complaint or complaint had been filed; (2) on June 13, 2017, [the] Chief of

Staff ordered [the] Supervisor to discipline Complainant for gathering supportive testimonials for [the] Chief of Staff; (3) [the] Chief of Staff scrutinized Complainant's work schedule, duties, and emails; and (4) [the] Chief of Staff treated Complainant differently than other employees who were given at least 45 minutes per day for email matters in addition to official breaks.

On December 10, 2020, the Agency issued a Final Order fully implementing the AJ's decision. The Agency noted that the claims in Complainant's original and amended complaints would be processed as an individual complaint going forward.

CONTENTIONS ON APPEAL

Complainant argues that the AJ erred in denying class certification and denying in part the Motion to Amend. Complainant contends that there are issues of credibility and genuine disputes of material fact. According to Complainant, the evidence shows numerosity. Complainant adds that his efforts to obtain witnesses and other class members were met with adverse action. Additionally, Complainant contests the AJ's acceptance of the Agency's evidence and argues that the AJ failed to explain how Complainant submitted insufficient evidence. Complainant adds that the Federal Employee Viewpoint Survey (FEVS) indicates that employees fear reprisal from the Agency.

The Agency argues that the AJ properly found that Complainant failed to show numerosity. In support the Agency contends that Complainant did not produce evidence that the potential class was so numerous that a consolidated complaint would be impractical. The Agency adds that even if Complainant's proposed class membership could satisfy numerosity, it would fail the other prerequisites of commonality and typicality because individuals filed EEO complaints on various protected bases and none of the allegations were based on receiving a collateral-duty solicitation email.

ANALYSIS AND FINDINGS

Certification of Class Complaints

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 of the class are typical of the claims of the class; and (iv) 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). A class complaint may be dismissed if it does not meet each of these four requirements, or for any of the procedural grounds for dismissal set forth in 29 C.F.R. § 1614.107. See 29 C.F.R. § 1614.204(d)(2).

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); 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).

Numerosity

The numerosity prerequisite requires that the potential class must be sufficiently numerous so that a consolidated complaint by the members of the class, or separate complaints from each member of the class, is impractical. See 29 C.F.R. § 1614.204(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). The United States Supreme Court has held that the numerosity requirement of Federal Rule of Civil Procedure 23 does not impose a numerical minimum or cut-off point for the size of the class but, instead, requires an examination of the facts of each case. Gen. Tel. Co. of the Northwest Inc., v. Equal Emp't Opportunity Comm'n., 446 U.S. 318, 330 (1980).

Here, the AJ properly determined that Complainant failed to establish that the numerosity requirement has been met. We agree that, although Complainant need not provide the exact number of class members, he has failed to produce any evidence or support beyond speculation to establish that the proposed class meets the prerequisite of numerosity. Complainant argues that all of the more than 900 employees at the CSC were potential class members. However, Complainant did not present any evidence showing what portion of those employees were deterred from applying for the position because of the EEO restriction. Complainant has not challenged or provided any evidence to rebut the AJ's determination that there were no more than 28 potential class members. As noted above, Complainant bears the burden of proof in demonstrating that numerosity is established and this burden is not satisfied with mere speculation.

As a result, we find that the total number of the class cannot be approximated, and as such, Complainant has failed to establish numerosity. See Joel P. v. U.S. Postal Serv., EEOC Appeal No. 0120120181 (Oct. 13, 2017) (numerosity not established where Complainant asserted that thousands could be in proposed class but provided no evidence to support his assertion); Thompson v. Tenn. Valley Authority, EEOC Appeal No. 01A34535 (Sept. 23, 2004) (while class agent alleged 34 class members, no evidence showed that class members and class agent had similar bases and issues; putative class therefore could not be approximated and class agent failed to establish numerosity).

Further, the purported class fails to meet the numerosity requirement because the class is not so large or geographically dispersed that consolidated or separate complaints would be impractical. Specifically, as the AJ noted, Complainant has provided no evidence that the class would be more than 28 individuals. As a consequence, we find that the class complaint fails to meet the numerosity prerequisite for certification. See Harris v. U.S. Postal Serv., EEOC Appeal No. 01994220 (Mar. 15, 2002) (class of 30 members from the same facility, in addition to 15 more identified on appeal, insufficient to establish numerosity); Crazythunder v. Dep't of Health and Human Serv., EEOC Appeal No. 0120043485 (Aug. 23, 2007), req. for recon. denied, EEOC Request No. 0520080016 (Feb. 21, 2008) (28 identified members an insufficient number to satisfy the numerosity prerequisite). In summary, Complainant offered no evidence to establish that the potential class number is so numerous that it would make joinder of potential complaints impractical.

Commonality and Typicality

The purpose of the commonality and typicality 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). Both commonality and typicality serve as guideposts for determining whether, under the circumstances, maintenance of a class action is economical and whether a proposed class agent and the remaining potential class members' claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Id. 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. Garcia v. Dep't of the Interior, EEOC Appeal No. 07A10107 (May 8, 2003). 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. Falcon, 457 U.S. 147. Id. 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. Id.

Here, Complainant contends that the purported members of the class were subjected to reprisal by the same official when the solicitation was sent facility-wide including language that noted that EEO Advisory Committee members could not be involved in any individual EEO issues where a pre-complaint or complaint has been filed. As such, this class complaint concerns the same Agency action, i.e., an email solicitation for EEO Advisory Committee members sent by the same Agency official. Therefore, we find that Complainant established commonality. While the class complaint presented common questions and issues, thus showing commonality, we find that Complaint's claims are not typical of the class. Complainant raises a claim of race, color, and age, and a claim on these bases is not applicable to all purported class members. Although the initial claim of reprisal was typical of the class, Complainant's additional bases are not. Accordingly, we are not persuaded that Complainant has established

typicality when he alleges that the email impacted *all* employees at the CSC with respect to the additional bases.

Adequacy of Representation

“Adequacy of representation” means 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. 19, 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, et al. v. Dep't of Def., EEOC Appeal No. 01A41492 (Oct. 18, 2005) (class certification denied where Class Agent did not possess the necessary experience, knowledge, or skills to represent the class, and she did not obtain experienced counsel to represent the class).

In this case, Complainant, the putative class agent, is not an attorney and has not retained counsel. Given the complex nature of EEO class litigation, it does not appear that the class agent possesses the skills, experience, time, and resources necessary to represent the interests of the class, nor has he identified an attorney who might do so. Accordingly, we find that the class agent cannot adequately represent the class. In summary, the putative class does not satisfy the prerequisites to certify a class complaint.

The Individual Complaint

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 continued to process the claims as an individual complaint. The individual claim should be processed with the additional bases of race (Asian), color (light brown complexion), and age (over 40 years old).

Motion to Amend

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which raises a matter that has not been brought to the attention of an EEO Counselor, and is not like or related to a matter on which the complainant has received counseling. A later claim or complaint is “like or related” to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. See Scher v. U.S. Postal Serv., EEOC Request No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Serv., EEOC Request No. 05891068 (Mar. 8, 1990).

The events regarding the Supervisor, many occurring in 2014, could not have reasonably been expected to grow out of the original complaint concerning a facility-wide email in 2016. Therefore, we find that the AJ correctly decided not to grant Complainant's Motion to Amend with respect to those matters.²

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 adopting the AJ's decision that Class Agent did not meet the requirements of class certification. The individual complaint is REMANDED for further processing in accordance with the Order below.

ORDER

To the extent it has not already done so, the Agency is directed to process Complainant's individual complaint in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision is issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant 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) calendar days of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment 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 (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

² Moreover, the AJ held that those claims are more appropriate for addition to Complainant's other EEO complaint, which contained allegations of harassment by the same actors during the same period. As such, the Agency should consolidate these events with Complainant's other EEO complaint or request the claims be consolidated if the other EEO complaint is pending before an EEOC AJ.

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:

/s/Shelley E. Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

March 16, 2022

Date