



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

[REDACTED]
Trevor S.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2020003984

Hearing No. 430-2018-00322X

Agency No. DON-18-32205-00003

DECISION

On June 30, 2020, Complainant, class agent without representation filed an appeal per 29 C.F.R. § 1614.403(a) with the Equal Employment Opportunity Commission (EEOC or Commission) from a March 24, 2020 EEOC Administrative Judge (AJ) decision denying class certification of his class complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.² For the reasons that follow, the denial of class certification is AFFIRMED.

ISSUE PRESENTED

Whether Complainant's class claim meets the criteria for class certification detailed in 29 C.F.R. § 1614.204(a)(2).

BACKGROUND

At the time of events giving rise to this class complaint, Complainant was employed by the Agency as an EEO Specialist, GS-260-12, at the Military Sealift Command in Norfolk, Virginia. On March 29, 2018, Complainant filed a class complaint with the Agency alleging the Military Sealift Command had a discriminatory policy or practice against its employees with disabilities

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.

² Because the Agency did not issue a final order, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

in the reasonable accommodation process by barring full-time telework and refusing to depart from the requirement that maximum telework can be no more than four days a pay period. Complainant also alleged the Military Sealift Command did not allow “situational” telework as an accommodation for temporary disabilities such as a broken leg or back spasms.

Per 29 C.F.R. § 1614.204(d)(1), the Agency forwarded the class complaint to an EEOC Hearings Unit for determination by an EEOC AJ on whether it met the regulatory prerequisites for acceptance and certification.

By order, the AJ explained the requirements to certify a class complaint per 29 C.F.R. § 1614.204(a)(2) and directed Complainant to submit a brief with supporting documentation on certification. The AJ later granted Complainant’s motion for an extension to allow discovery, set a discovery period of 90 days, and gave him additional time to prepare the brief.

In his subsequent brief in favor of class certification, Complainant asserted he was denied full-time telework as an accommodation to his disability (back: degenerative disc disease, sciatica, and herniated disc) from June 23, 2017 forward as a result of the policy. He also claimed his supervisor required him to use leave when he was unable to work due to back spasms because of the policy prohibiting situational telework and not accommodating temporary disabilities. He submitted emails showing he requested sick leave on different days he had back pain. He argued that this policy or practice was adverse in that employees were forced to use leave resulting in their termination for not getting work done.³

The AJ issued a decision denying class certification of the complaint because it did not meet the requirement of 29 C.F.R. § 1614.204(a)(2)(i) that the proposed class be so numerous that a consolidated complaint of the members of the class is impractical. The AJ found Complainant did not include any employee, other than himself, as a potential class member.

When the Agency failed to issue a final order, the AJ’s decision became final. The instant appeal from Complainant followed.

³ The Agency terminated Complainant’s employment effective March 31, 2019, for: (1) improper use of records covered by the Privacy Act; (2) misuse (non-monetary) of his position; and (3) failure to follow proper procedures in performing his job. He appealed to the Merit Systems Protection Board (MSPB) alleging his removal violated the Whistleblower Protection Act. The MSPB dismissed the appeal for lack of jurisdiction because his EEO and other activity were outside the scope of protected whistleblowing. Complainant also filed an EEO complaint alleging his removal was retaliation for his EEO activity. In EEOC Appeal No. 2020005352 (Jan. 25, 2021), request to reconsider denied, EEOC Request No. 2021002260 (May 25, 2021), the Commission affirmed the Agency’s decision dismissing the complaint for failure to timely initiate EEO counseling.

CONTENTIONS ON APPEAL

On appeal, Complainant argues, as he did before the AJ, that the Agency's across-the-board policy or practice of prohibiting full-time telework days, without exception, to accommodate individuals with either permanent or temporary disabilities, affects all of Military Sealift Command's thousands of civilian employees. In support, Complainant submits an Agency 2017 chart, as he did before the AJ, showing the Agency employs 1,219 civilian employees ashore and 5,598 civilian mariners (who serve on ships), and a June 30, 2018 chart showing 375 of them have disabilities. He argues that civilian mariners could conceivably be assigned full-time telework as an accommodation if they returned to shore.

Complainant also argues that the Agency prevented him from gathering more information relevant to numerosity when his first-line supervisor interfered with him meeting with the union, his second-line supervisor forbade him from talking to the attorney of a potential class member, and later when the Agency refused to respond to relevant discovery requests.

Complainant further argues that he filed a motion for sanctions because the Agency did not complete EEO counseling within the 30 days of his initial contact with the EEO office, and the AJ erred by not ruling on the motion.

In reply, the Agency argues that, while Complainant asserts the entire civilian Military Sealift Command are class members, this is not so. Instead, the Agency asserts that only those impacted by its purported telework policy or practice are at issue. The Agency identifies those potential class members as the number of individuals with disabilities who: (1) have positions eligible for telework, (2) have a condition that would require telework as an accommodation, (3) have a condition that would require full-time telework, and (4) made requests for full-time telework as an accommodation but were denied. The Agency argues Complainant submitted no information on any of these factors. By incorporation of a brief it filed at the hearing stage, the Agency also disputes it has a policy or practice to not provide telework, including full-time, as an accommodation for individuals with disabilities. The Agency argues, as it did before, that Complainant also did not meet the other criteria for certification: commonality, typicality, and adequate representation.

The Agency further argues that its responses to Complainant's discovery requests were appropriate, and the AJ correctly observed he never filed a motion to compel discovery. It argues Complainant submitted no supporting evidence that he was prevented from talking to union officials, and that the AJ did not err by not ruling on his motion for sanctions because there is no record of him filing it and, in any event, sanctions were not warranted.

ANALYSIS AND FINDINGS

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 will be dismissed if it does not meet each of these four requirements. 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 their obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. William G. v. USPS, EEOC Appeal No. 2019001459 (May 23, 2019).

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. 29 C.F.R. § 1614.204(a)(2)(i). 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. United States Postal Service, EEOC Appeal No. 01A24926 (Nov. 14, 2003). The numerosity requirement 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. EEOC, 446 U.S. 318, 330 (1980). Thus, although courts are reluctant to certify classes with 30 or fewer members, there are no specific numerical cut-off points. Carter, et al., EEOC Appeal No. 01A24926.

We find that the AJ correctly determined that Complainant did not prove the numerosity requirement was met. While we do not need to have the exact number of class members, Complainant submits no evidence or support beyond speculation to prove the proposed class meets the numerosity requirement. He argues that all of the more than 6,800 civilian Military Sealift Command employees are potential class members. However, as correctly argued by the Agency, Complainant submits no evidence on what portion of them are individuals with disabilities who: (1) have positions eligible for telework (meaning the essential function of the position could be performed with additional and/or full-time telework); (2) have a condition that would require telework as an accommodation; (3) have a condition that would require full-time or situational telework; and (4) made requests for telework as an accommodation but were denied.

As already noted, Complainant bears the burden of proof in demonstrating that numerosity is established. This burden is not satisfied with mere speculation. Complainant stated in his appellate brief that the number of class members could be in the thousands but gave no evidence to support his assertion. As a result, we find that the total number of proposed class members has not been approximated and, as such, Complainant has failed to establish numerosity. Joel P. v. United States Postal Service, 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). As the class complaint fails to meet the class certification criterion of numerosity, we need not analyze the remaining criteria for class certification.⁴

⁴ We note, in any event, that the proposed class is made up of Military Sealift Command civilian employees who, during the reasonable accommodation process were denied full-time and/or

Because Complainant did not file a motion to compel discovery responses by the Agency with the AJ, he waived objections to this matter on appeal. But we note that, while the Agency objected to many of Complainant's discovery requests, it still was responsive to a number of them. For example, it identified by year, from January 2016 through January 2019, the names of employees with disabilities who requested telework as a reasonable accommodation (a total of 12 employees). Complainant did not ask how many of these requests were approved or denied and therefore this information was not provided.

In support of his argument that the Agency interfered with his ability to gather information relevant to numerosity from union officials, Complainant submits two emails he sent minutes apart on May 9, 2018; one to his first and second-line supervisors, and the other to an official in Human Resources, notifying them that he was coming onto the Naval Station to attend an EEO-related meeting. At the time, he was on administrative leave for possible misuse of his position and protected information accessible to him as an EEO Specialist and had been instructed not to enter Military Sealift Command premises without authorization from his first-line supervisor or designee. Complainant did not indicate in the emails with whom he planned to meet nor indicate what information he intended to gather. Significantly, he does not indicate on appeal whether either official replied to his emails.

In support of his argument that the Agency forbade him from voluntarily "talking" to the attorney of a potential class member, Complainant submits a November 15, 2018 email from his second-line supervisor to him relaying that Agency legal counsel advised that because Complainant was the EEO Specialist who had processed another employee's EEO complaint, he was not authorized to speak to the employee's counsel, via deposition or otherwise, regarding anything pertaining to his role as the EEO counselor processing that case, which is what counsel sought. Complainant does not indicate what information he wished to obtain from the employee's attorney that was relevant to class certification. In sum, Complainant has not shown that the Agency improperly interfered with his efforts to obtain information needed to support his class certification request.

On the claim that the AJ erred by not ruling on Complainant's motion for sanctions, we concur that there is no evidence in the hearing records for Complainant's individual and class complaints that he had filed such a motion.

situational telework as a reasonable accommodation. As a class agent, Complainant is not typical of this class because he is no longer an employee of the Command. He contended before the MSPB and in another EEO complaint that his termination was based on reprisal for EEO activity, not that it arose from the denial of the reasonable accommodation of telework.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision, which became the Agency's final action, to not certify Complainant's class complaint.⁵

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.

⁵ Complainant's individual complaint was processed and is currently pending under EEOC Appeal No. 2021000919.

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:

/s/Shelley E. Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

June 15, 2022
Date