

Carol A. Clopton, et al. v. Environmental Protection Agency  
01A24278  
September 14, 2004

Carol A. Clopton, et al.  
Complainant,

v.

Michael Leavitt,  
Administrator,  
Environmental Protection Agency,  
Agency.

Appeal No. 01A24278

Agency No. 2000-0096-R7

Hearing No. 280-A0-4324X

#### DECISION

Complainant, the putative class agent, timely initiated an appeal from the agency's July 1, 2002 final order dismissing both her class complaint and her individual complaint, which allege unlawful employment discrimination on the basis of age (over 40 years old), in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

On July 20, 2000, complainant and a co-worker, both GS-13 Grant Specialists in the agency's Region VII Planning and Management Division, located in Kansas City, Kansas, jointly filed a complaint claiming discrimination on the basis of age. Specifically, complainant claimed that the agency offered certain developmental and career enhancing opportunities to a group of 52 predominately younger employees hired in Region VII in 1998, but that it failed to offer these career enhancing opportunities to its predominately older senior level Region VII employees (over 40 years of age).<1> In particular, complainant claimed that the agency failed to afford senior staff with the opportunity to participate in rotation assignments to other divisions in Region VII, whereas participation in a rotation assignment program is an integral part of the training program for the employees hired in 1998.<2>

Furthermore, complainant claimed that the detrimental effect of this practice is compounded by an unwritten policy that requires a senior level employee to identify a co-worker or co-workers to take over his/her work when requesting a rotation assignment. Complainant argued that because of the nature of the work performed by "specialists," such as herself and the co-complainant, this is essentially impossible. Complainant claimed that this same unwritten policy encourages the career enhancement of the 52 newer employees, to include a fast track for promotion; however, the unwritten policy does not take a similar interest or action on behalf of its older senior employees. Complainant claimed that as many as 400 Region VII employees are adversely affected by the agency's practice, consisting of the unwritten rotation assignment policy and preferential treatment of the 52 newer employees, warranting a class action complaint.

The agency forwarded the complaint to the EEOC's St. Louis District Office for a determination regarding class certification. On June 1, 2002, the Administrative Judge (AJ) issued a decision recommending that the class complaint be dismissed on the grounds that it did not meet the requirements for class certification. Specifically, the AJ found that while the complaint satisfied the commonality requirement, it failed to satisfy the remaining three criteria of numerosity, typicality, and adequacy of representation as set forth at 29 C.F.R. § 1614.204.

First, the AJ determined that "commonality" was satisfied because a readily identifiable employment practice had been identified, i.e., the disparate impact of the "unwritten policy" described by complainant, which effectively prevented senior staff from participating in rotation assignments. However, the AJ next determined that complainant did not satisfy the typicality requirement because she failed to present any evidence that she had ever requested a rotation assignment that the agency denied. The AJ indicated that a class agent who suffered no injury cannot satisfy the typicality requirement.

Regarding numerosity, the AJ defined the class as those Region VII employees over the age of 40 who are in positions so specialized that no other employee is available to assume his or her duties while the specialized employee rotates to a different assignment. The AJ further found that this number must be further limited to those Region VII

employees over the age of 40 who requested a rotation assignment which the agency denied. The AJ indicated that as evidence of numerosity, complainant declared that the agency's "Rotational Opportunity Assignment Program," covers an indeterminable number of employees, and that the class, though still being developed, should consist of significant numbers, potentially up to 400 employees. However, the AJ found that despite ample time (since April 2000), complainant submitted no names of additional class members, exclusive of herself and the co-complainant. Furthermore, the AJ determined that to the extent that other complainants existed, joinder would not be difficult. The AJ found that these individuals could be easily identified from employment records and that they worked in a defined geographical area. Accordingly, the AJ concluded that complainant failed to satisfy the numerosity requirement.

Regarding adequacy of representation, the AJ noted that prosecution of a class action complaint is both complex and expensive. The AJ found that the record failed to establish that the class agent either appreciated this complexity or had access to adequate resources to pursue the matter. Additionally, the AJ questioned whether complainant had the ability to represent the class as reflected by her cursory response describing her abilities to do so, and found that the record failed to reflect that the class would be represented by legal counsel.<3> Accordingly, the AJ concluded that complainant failed to satisfy this fourth requirement as well.

Finally, in addition to dismissing the class complaint for failing to satisfy typicality, numerosity, and adequacy of representation, the AJ indicated that the agency must notify the class agent regarding the processing of the individual complaint.

In its final order, the agency implemented the AJ's decision rejecting the class complaint pursuant to 29 C.F.R. § 1614.204. Additionally, the agency determined that based upon the AJ's finding that complainant had not been "injured," it dismissed her individual EEO complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

On appeal, complainant argues that the AJ erred in finding that she did not satisfy the typicality requirement. Complainant argues, in pertinent part, that the agency previously denied her request for a rotation assignment in 1997, and that she is part of the class adversely impacted by the preferential treatment of the younger newly hired employees. Regarding numerosity, complainant argues that the AJ erred in limiting the class to those senior staff members who could not find a replacement to assume their duties, and that further discovery would have allowed her to gather additional evidence of numerosity. As to adequacy of representation, complainant avers that the AJ had not informed her of the need for an attorney, but that she was now in the process of obtaining legal counsel. Complainant additionally argues that the AJ inappropriately assumed that she did not have the financial status to cover the expenses to pursue the complaint. Complainant further argues that the AJ's findings and conclusions reflect bias in favor of the agency, and requests that the class complaint be reinstated.

In response, the agency argues with regard to numerosity that notwithstanding the AJ's definition of the class, complainant could only identify two potential class members (herself and the co-complainant), which is insufficient to establish numerosity. Regarding typicality, the agency avers that complainant submits evidence of a rotation assignment request denied in 1997, for the first time on appeal. The agency argues that this information was previously available, and should not now be considered. Moreover, the agency notes that because the denial occurred in 1997, it must be deemed untimely because of her April 2000 initial EEO Counselor contact. Finally, the agency asserts that complainant failed to present evidence that she has, in fact, retained competent counsel to represent the class, such that the adequacy of representation requirement is not satisfied.

#### Class Complaint

##### Commonality and Typicality

An individual seeking to maintain a class action is required to meet the "prerequisites of numerosity, commonality, typicality, and adequacy of representation" set forth at 29 C.F.R. § 1614.204(a)(2). This section, which is an adoption of Rule 23(a) of the Federal Rules of Civil Procedure, provides that the agency may reject a class complaint if any one of these prerequisites is not met. See 29 C.F.R. § 1614.204(d)(2). In addressing a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to "determine the appropriate parameters and the size of the membership of the resulting class." See *Moten v. Federal Energy Regulatory Commission*, EEOC Request No. 05960233 (April 8, 1997) (citing *Harris v. Pan American World Airways*, 74 F.R.D. 25, 45 (N.D. Cal. 1977)).

The purpose of the commonality and typicality requirements is to ensure

that class agents possess the same interests and suffer the same injury as the members of the proposed class. See *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). In application, the commonality and typicality prerequisites tend to merge and are often indistinguishable. Id. Commonality requires that there be questions of fact common to the class. The class agent must, therefore, establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. This can be done through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony from other employees against whom an employer allegedly discriminated in the same manner as the class agents, and evidence of specific adverse actions taken. See *Mastren v. United States Postal Service*, EEOC Request No. 05930253 (October 27, 1993).

As an initial matter, we find that neither the AJ nor the agency properly framed complainant's claim. Specifically, we find that the practice at issue, as identified by the AJ, is not limited to the agency's alleged unwritten policy requiring senior specialists to backfill their positions while serving in a rotation assignment. Instead, we determine that the "practice" at issue is the agency's failure to offer its career (and typically older) Region VII employees the same opportunity to participate in the six-week rotational assignment program provided as training to the 52 newly hired, predominately younger, employees, who do not have to "backfill" their positions while on assignment.<4> Complainant contends, in essence, that she, and all "career" employees, especially specialists, in Region VII are adversely impacted by this practice because rotational assignments, particularly the rotation assignment program offered to the 52 new employees, is significantly career enhancing, regardless of position or career tract. Complainant avers that this experience gives these 52 predominately younger employees a critical unfair advantage over older employees, especially regarding promotions.

Therefore, in framing the claim in this manner, we find that the requisite harm arises because of the agency's purported failure to offer the same rotational assignment opportunity to its predominately older "career" employees in Region VII, as provided to the 52 newly hired employees. Contrary to the AJ's determination, we find that complainant need not additionally show that she requested, and was denied a rotation assignment, in order to demonstrate an actionable harm in this case, either for the purpose of establishing typicality as to the class complaint, or "stating a claim," as to her individual complaint. See *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).

Moreover, in considering the claim as now framed, we find that the AJ improperly defined the class as those employees over the age of 40 who are in positions so specialized that no other employee is available to assume their duties. Instead, we find that the "practice" at issue concerns the agency's rotation assignment program for the 52 newly hired, predominately younger employees, which does not have a requirement to "backfill" positions. Because the agency purportedly did not afford this same opportunity to its Region VII predominately older senior employees, we determine that the class should be defined as all Region VII employees over the age of 40. In this regard, we note that the record reflects that the 52 new employees were slated to eventually fill a variety of positions, not only specialists positions, so that the class may not be properly limited to only Region VII specialists over the age of 40.

Furthermore, we also find that the class should not be limited to those members who could show that they requested a rotation assignment which the agency denied. Specifically, we find that because the practice at issue concerns only the rotation assignment program offered exclusively to the 52 new employees, and not any and all requests for rotation assignments made by senior staff. Therefore, we find that the class in this case should not be limited to only those older career employees who requested and were denied rotation assignments, and this should not be a requirement for class membership.

Finally, based on the above re-framing of the claim, and the re-stated definition of the class, we find that complainant has not only established commonality with the other older senior employees over the age of 40 in Region VII, but typicality as well. Specifically, we find that these certification requirements are established because the entire class, consisting of all senior employees in Region VII over the age of 40, are adversely impacted by the same "practice" (thereby establishing commonality); and, these class members all suffer the same harm, i.e., loss of a significant career enhancing opportunity, to the undue advantage of the 52 younger newly hired employees (thereby establishing typicality).

Accordingly, for the above stated reasons, we find that the AJ and agency erred in framing the claim, and defining the class, and also erred in concluding that complainant failed to establish the typicality requirement. Based on our re-framing of the claim, and identification of the class, we find that complainant establishes both commonality

and typicality.

#### Numerosity

Numerosity requires that the putative class be so large as to make joinder impractical. See 29 C.F.R. § 1614.204(a)(2)(i). No set number is required, and each case is evaluated on its own circumstances. See *General Telephone Company v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330 (1980). Considerations include the number of class members, the location and dispersion of class members, the ease of identifying class members and any other factors which would indicate a substantial hardship in the class members participation in the complaint. See *Martin v. U.S. Postal Service*, EEOC Request No. 05920003 (December 19, 1991). The exact number of class members need not be shown prior to certification, but some showing must be made of the number of individuals affected by the alleged discriminatory practices who therefore may assert a claim. See *Moten*, supra.

Regarding numerosity, we note that the AJ and agency ultimately find that complainant fails to establish numerosity because she can identify, by name, only two potential complainants, herself and her co-complainant. However, in her decision, the AJ acknowledges that Region VII consists of 566 employees, and that 425 of these are over the age of 40. Accordingly, with reference to the above cited legal standard, and based on the re-framed claim, and re-defined class, as described above, we find that complainant establishes the element of numerosity.

#### Adequacy of Representation

Adequacy of representation "is perhaps the most crucial requirement because the judgment will determine the rights of the absent class members." See *Bailey, et al. v. Department of Veterans Affairs*, EEOC Request No. 05930156 (July 30, 1993). EEOC Regulation 29 C.F.R. § 1614.204(a)(2)(iv) requires that the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

In this case, the AJ determined that complainant could not financially pursue a class action complaint, and that she is otherwise not able to fairly and adequately represent the class, especially in that she lacks the necessary legal expertise to do so. However, on appeal, complainant disputes the AJ's finding that she cannot procure adequate financing, and avers that she is in the process of obtaining expert legal counsel.

The Commission has held that where the other certification requirements have been met, the AJ may conditionally certify the class for a reasonable period of time so that the class agent may secure adequate representation. See *Hines v. Department of the Air Force*, EEOC Request No. 05940917 (January 29, 1996). Therefore, based on our determination herein that complainant established the elements of commonality, typicality, and numerosity, we find that this case should be remanded, with instructions to the agency to forward the case to the St. Louis District Office, where the AJ should conditionally certify the class for a reasonable period of time so that the class agent may secure adequate representation.

#### Conclusion

In conclusion, we find that the AJ improperly dismissed the captioned class action complaint for failing to satisfy the requisite certification criteria, and we VACATE the agency's final order implementing that determination. The class complaint is REMANDED to the agency for further processing, as set forth in the ORDER below.

#### Individual Complaint

Because of our determination herein, ordering that the class complaint be conditionally certified by the AJ, we find that a determination on complainant's individual complaint must be held in abeyance pending the outcome of the class complaint. Therefore, we VACATE the agency final order dismissing the individual complaint, and we REMAND the individual complaint to the agency, and ORDER the agency to hold the individual in abeyance pending the outcome of the certification determination on the class complaint.

#### ORDER

The agency is ORDERED to take the following action:

1. Within thirty (30) calendar days of the date that this decision becomes final, the agency is ORDERED to transfer this case to the St. Louis District Office, and to request an assignment to an AJ. The AJ must conditionally certify the class complaint, for a reasonable time, sufficient to allow the class agent to furnish evidence to establish that she satisfied the adequacy of representation requirement, as set

forth in 29 C.F.R. § 1614.204(a)(2)(iv).

2. Upon the expiration of the time period established by the AJ, the AJ must render a decision on the issue of class certification, either certifying or dismissing the class complaint, for failing to satisfy the adequacy of representation requirement.

3. The agency shall hold the individual complaint in abeyance pending the outcome of the class action complaint, and timely send complainant a written notice regarding this action.

Copies of all pertinent documentation verifying compliance with the above actions must be sent to the Compliance Officer as referenced below.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

#### STATEMENT OF RIGHTS - ON APPEAL

##### RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0900)

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 (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

\_\_\_\_\_  
Carlton M. Hadden, Director  
Office of Federal Operations

September 14, 2004

\_\_\_\_\_  
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Equal Opportunity Assistant

1The record variously shows the number of the newly hired group to consist of either 48 or 52 employees. We find that the exact number is not significant to our determination herein, and we will use the number of 52, as claimed by complainant.

2According to the record, the 52 newly hired employees were to perform a rotation assignment for a six-week duration in each of Region VII's six divisions to familiarize them fully with the work and personnel of Region VII.

3In his decision, the AJ indicated that complainant provided only a "cursory" response to his inquiry asking her how she met the adequacy of representation requirement, using the following reply from complainant as an example: "I will fairly and adequately protect the interest of the class during the processing of the complaint."

4We note that complainant contends that because the newly hired employees are not required to backfill their positions while on assignment, this results in an additional hardship to the career employees who must perform their duties in their absence.

