

**BEFORE THE
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAINT LOUIS DISTRICT OFFICE**

CAROL A. CLOPTON, <i>et al</i>)	
Class Agent,)	
)	
v.)	EEOC Case No. 280-AO-4324X
)	
STEPHEN L. JOHNSON,)	Agency No. 2000-0096-R7
Administrator,)	
Environmental Protection Agency,)	
Respondent.)	
_____)	

REPLY IN SUPPORT OF MOTION TO MODIFY ORDER ON CLASS NOTICE

The Class Complainants, by counsel, respectfully submit this Reply in Support of their Motion to Modify the July 17, 2008 Order on the Class Notice and state the following:

Introduction

On July 22, 2008, the Class submitted its Motion to modify three aspects of the July 17, 2008 Order on the Class Notice - 1) the statement of the issues, 2) the email address contact information, and 3) the website address contact information. As reported, the Class had first conferred with the Agency which agreed with Complainants' substantive positions on the first and second matter, though not the third. And as reported, the Agency had no substantive reason to oppose providing the class members with the contact information for the class web site. The Opposition since filed did nothing to change that situation. Accordingly, the Class therefore requests that the current order be modified for the reasons requested.

Argument

1. Description of the Class and Issues

Essentially there is no argument on the first two points of modifying the issue language

and providing the correct email address for class counsel. The subject Motion merely requested that the issue language in the Notice be corrected as ordered by the AJ on March 10, 2008, paragraph 1 (CX 40) to track the language used in the February 11, 2008 Order (CX 39).

2. Email Contact Information for Class Counsel

Likewise, the Motion requested that the correct email address - sspiegel@spiegellaw.com be used as directly ordered in paragraph 4 (CX 40). To clarify, the Agency's earlier proposed notice misspelled this email address, while the April and July 2008 Orders contain a completely different email address than the one previously ordered to be provided. See Motion, section 2.

Respondent's consent was requested several days prior to filing the Motion, but was refused. Respondent's Opposition now attempts to make the distinction that it would have consented to a proposed order to make the modifications requested in the Motion to which Respondent was requested to consent.

3. Website Contact Information for Class Counsel

As presented in the Motion to Modify, the Class properly responded on May 1st to the proposed class notice in accordance with the terms of the April 15, 2008 Order. The May 1st Response requested that the "Class web site address spiegellaw.com should also be included in the contact information." And as correctly stated in the Motion, the "April 15th Order did not rule on the request to include the web site address.

And contrary to its contentions, the Opposition's arguments support that this issue had not yet been properly ruled upon. The Agency concedes that AJ Niehoff's March 10, 2008 Order contains no reason for not including the website address in the contact information as requested. Likewise, the Opposition concedes the AJ had questioned whether she had the authority to grant

the request. That is hardly a distinction in contending that was not the basis of her decision. As no reason was provided, it is a simple and correct position to maintain that the ruling was not properly made as it was not supported by any reason and the only orally stated reason was not legally correct. The Commission's Handbook for Administrative Judges requires that rulings be issued in writing and further requires that "Administrative Judges must follow Commission policy and precedent in adjudicating their cases."¹ AJ Vasquez has already ruled that administrative judges have the authority to include terms in the notice beyond those specifically required by the Commission's appellate decisions in this case. The Commission's guidance on Class Action Notices requiring that the "**agency must use all reasonable means to notify all class members**" essentially mandates that the Class web site address be used as part of the contact information when provided by the Complainants. The March 10, 2008 Order did not contain any reason for denying the inclusion of the requested contact information, and such ruling was directly inconsistent with the Commission's policy on class action notices, which administrative judges are directly required to follow. It was therefore entirely appropriate for the Class to move for a corrected notice on March 18, 2008, and to request a ruling in compliance with Commission policy and direction since that time.

The Opposition's contention that providing the website address as part of the contact information is without support is itself a naked assertion contradicted by the Commission's policy, changes to federal law on class action notices at the time the Commission's policy was issued, and even the Agency's own evidence.

¹ Chapter Two - Official Documents Issued by an Administrative Judge, Sections I - III. U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges (July 1, 2002) <http://eeoc.gov/federal/ajhandbook.html>

The reason the Congress, the President and the Supreme Court require providing more informative notices to class members is so the notices will be more effective. The inclusion of the class web site address is emblazoned on every page of the model civil rights class notice from the Federal Judicial Center for implementing these requirements for more effective notice. The Commission's guidance requiring an agency to use all available reasonable means was issued contemporaneous with these changes to the federal rule which the Commission directly incorporated into its regulations.

As addressed in the May 1, 2008 Class Response to the proposed notice at 5-6, providing the website contact information is in the same vein as providing the other contact information for class counsel, only the web site address is a more effective and reasonable means for providing that information, including the class notice. The notice is for the benefit of the Class who are represented by the Class Agents and the Class Counsel. If the Respondent were to have its way, none of the contact information would be provided in the notice. The contact information not only goes to increasing the effectiveness of the notice, but also the ability to represent the class, and without a compelling reason, the request to include that contact information should not be denied. The class web site at spiegellaw.com has been up and running for several months and there can be no question that the information provided such as the orders and decisions in this case are appropriately there for the benefit of the Class.

Nor does the Agency contradict the evidence that other EEOC federal sector class actions have used web sites to communicate with the class members, including issuing the first notice to the class. The May 21, 2003 USGS notice to the class is plainly posted on that agency's web site (as requested herein as well) with the web site address at the end of the notice. That this

additional evidence of utilizing web sites was submitted in April 2008, is further basis for reconsideration and modification of the March 10th Order. See April 11, 2008 Sur-Reply in Support of Motion for Corrected Notice. It remains uncontested that the Commission approves of using web sites to communicate with class members and that even the initial class notice has been so posted.

The failure to order the inclusion of the Class website address in the contact information is plainly contrary to the above cited controlling law and further constitutes an abuse of discretion as there is no reason not to comply with the law and the Commission's own guidance to include it. The Class accordingly and respectfully requests that the Order be modified in accordance with the law and the facts.

Respectfully submitted,

/s/

STEVEN M. SPIEGEL, D.C. Bar # 386709
3917 Keller Avenue
Alexandria, VA 22302-1817
Phone 703-998-6780; Fax 703-998-7612
E-mail SSpiegelEsq@verizon.net
Counsel for the Class Complainants

August 5, 2008

