



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Complainant,

v.

Eric H. Holder, Jr.,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 0720140032

Hearing No. 480-2012-00357X¹

Agency No. BOP-2012-0053

DECISION

Concurrent with its June 23, 2014, final order, the Agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) decision certifying Complainant's class complaint alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

The issue presented is whether the AJ properly certified the proposed class under the requirements of 29 C.F.R. § 1614.204(a)(2).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a _____ in the _____ Department at the Agency's Federal Correctional Complex (FCC) in Victorville, California.²

¹ Both the final agency decision and the AJ's decision had an incorrect EEOC Hearing Number on the decisions. Commission records reflect that this is the correct EEOC Hearing Number.

² We note that, in the proceedings below, _____, a _____ in the Unit Management Department, was also identified as a class agent.

On October 17, 2011, Complainant filed an EEO complaint on behalf of all current and former female employees at FCC Victorville, alleging that the Agency discriminated against them on the basis of sex (female) when:

1. female correctional officers at FCC Victorville have been subjected to a hostile work environment for several years and currently, as a result of extreme inmate harassment towards the female correctional officers;
2. the Agency denied equal opportunity in training, specifically denying "use of force" training from spring 2011 through July 2011; the Agency put in place a policy which precluded female officers from all aspects of "use of force" procedures, including being a team member, camera operator, and conducting confrontation avoidance.

Complainant's complaint was forwarded to the EEOC Los Angeles District Office for a decision on class certification, per 29 C.F.R. § 1614.204(d). The AJ assigned to the case issued an Acknowledgement and Order on February 9, 2012, directing Complainant and the Agency to submit specific information on whether the complaint was within the purview of 29 C.F.R. § 1614.204(a)(2). Complainant filed her response to the AJ's Acknowledgement and Order on April 17, 2012, arguing in favor of certification. The Agency filed its opposition to certification on April 27, 2012, in which it argued that Complainant did not meet the requirements for certification, and that the complaint should be dismissed for failure to state a claim and a lack of specificity and detail.

On September 24, 2012, the AJ issued a Notice and Order to the parties, requesting briefs responding to the opposing parties' original filings, and arguments specifically pertaining to the requirement of numerosity. Both parties filed timely responses in October 2012. On January 4, 2013, the AJ issued an Order to both parties to supplement the record as to which job classifications the class claimed were subject to the discriminatory policies in question. Complainant argued that thirteen job classifications at FCC Victorville should be included in the class, and not just Correctional Officers, as argued by the Agency. The thirteen job classifications identified by Complainant included positions in Correctional Services, Correctional Systems, Education, Facilities, Financial Management, Food Service, Health Service, Psychology, Recreation, Religious Services, Trust Fund, UNICOR, and Unit Management. The parties thereafter engaged in discovery, pursuant to the AJ's Order on April 10, 2013.

The AJ issued a decision on May 8, 2014, finding that the class should be certified. In her decision, the AJ first addressed the Agency's argument that the complaint failed to state a claim and lacked specificity. The Agency had argued that the claim that female Officers had been denied "use of force" training was overly broad. The AJ found that the claim identified a specific matter of training, during a specific time period, and was not overly broad. She noted that the claim could be further refined in discovery, if necessary.

The AJ also found that the class had submitted detailed information to support allegations of widespread, extreme harassment by inmates, and that the Agency had notice of the hostile work environment and had failed to take sufficient corrective action. Examples of harassment by inmates which were noted by the AJ included: being intentionally exposed to masturbation and ejaculation by male inmates; being subject to stalking and intimidation by male inmates; being ejaculated on by male inmates; being subjected to sexually derogatory comments such as "you are a fine ass bitch" and "I wish you were a little girl sitting on my lap" by male inmates; being subjected to threats of sexual assault, such as "I am going to fuck you bitch" or "I am going to put my big cock in your mouth" or "I am going to rape you" by male inmates; and being physically assaulted by male inmates. The AJ noted that many of the Agency's arguments in opposition to class certification spoke to the merits of the claim, and not to the issue of whether class certification was proper.

The AJ then found that Complainant had established all of the prerequisites for class certification pursuant to 29 C.F.R. § 1614.204(a)(2). As to the requirements of commonality and typicality, the AJ found that Complainant had alleged one common basis of discrimination, sex, and that the basis of the class agent was therefore typical of that of the claimed basis for the class as a whole. She found that the class had demonstrated commonality through its allegation that female employees at FCC Victorville had been subject to sexually explicit statements, actions (including masturbation), and assault at the hands of inmates housed at the facility. The AJ also found that there was a common allegation of denial of "use of force" training to correctional workers for a specific period of time.

Pertaining to the requirement of numerosity, the AJ concluded that Complainant had presented undisputed evidence that at least 87 current and former female employees of FCC Victorville during the relevant time period would be class members of the proposed class.

The AJ also found that Complainant satisfied the adequacy of representation requirement through the retainer of a legal representative with prior experience in class actions, employment discrimination cases, and federal employment issues.

The AJ certified a class consisting of: "all women employed by FCC Victorville from 45 days before August 5, 2011, as to the denial of training claim and 45 days before September 14, 2011, as to the sexual harassment claim (because EEO proceedings were initiated on different dates), to the present (or such date as the Agency may demonstrate that the allegedly unlawful practice concluded), who have been denied use of force training and/or subject to sexual harassment, as alleged in the complaint and clarified in this decision."

The Agency subsequently issued a final order on June 23, 2014, rejecting the AJ's certification of the class, and filing the instant appeal. Complainant filed a cross-appeal of the Agency's rejection of the AJ's decision.

CONTENTIONS ON APPEAL

The Agency filed a brief in support of its appeal of the AJ's certification of the proposed class in which it argued that Complainant failed to meet any of the requirements for class certification. It claimed that she failed to demonstrate numerosity because the class agent had alleged that the complaint pertained to Correctional Officers, and not the broader grouping of job classifications certified by the AJ, and that under Complainant's initial allegation the class would not be large enough. It posited that the different positions held by the class members, with different inmate experiences, and different responses to each allegation of hostile work environment by management, yielded more appropriate groupings of complainants which would each be far less than the potential 87 members, and therefore not large enough to constitute a class.

The Agency argued that Complainant failed to establish commonality, as to her claim of harassment. It argued that a claim of harassment by inmates requires a showing that the class agents were subjected to harassing conduct sufficiently severe to establish sexual harassment in the prison setting, and that management was on notice of the behavior and was liable because of management's legally insufficient response. The Agency claimed that Complainant's factual allegations failed to establish a claim of harassment by inmates in that the behavior she was subjected to was insufficiently severe or pervasive. It argued that the statements submitted by other prospective class agents also failed to establish a common harm. The Agency further asserted that Complainant had not satisfied the requirement of typicality, in that the female employees at FCC Victorville are in various job classifications with varying degrees of inmate interaction, with different security levels within the facility, and "potential differences in vulnerability," such that the harm suffered by Complainant would not be typical of each class member. The Agency argued that Complainant's claim of the denial of use of force training failed the commonality and typicality requirements because it did not sufficiently allege a harm or adverse action.

Complainant filed a brief in opposition to the Agency's appeal. She argued that the AJ properly found that the proposed class should be certified and urged the Commission to reverse the Agency's rejection of the AJ's class certification decision. Complainant responded to the Agency's arguments on numerosity by claiming that 87 class members have been identified at a minimum, and that with the benefit of discovery the class could include "well over one hundred individuals." As to commonality and typicality, Complainant argued that "the Agency's practice of allowing the severe and pervasive sexual harassment of female employees to continue adversely affected all former and current female employees at FCC Victorville," and that management of the facility is responsible for developing policies and practices which would ensure a work environment free of sexual harassment. She also argued that the Agency's policy of exempting female employees from "use of force" assignments and training affected all current and former female employees at the facility, by denying them the opportunity to engage in work assignments that would lead to additional training and increased opportunities for promotion.

ANALYSIS AND FINDINGS

The purpose of class action complaints is to economically address claims "common to [a] class as a whole . . . turn[ing] on questions of law applicable in the same manner to each member of the class." Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982) (citations omitted). Under EEOC regulations, a class complaint must allege that: (1) the class is so numerous that a consolidated complaint concerning the individual claims of its members is impractical; (2) there are questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class; and (4) 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). The AJ may reject a class complaint if any of the prerequisites are not met. 29 C.F.R. § 1614.204(d)(2). Further, a class complaint must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent. 29 C.F.R. § 1614.204(c)(1).

Commonality and Typicality

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. Fed. Energy Regulatory Comm'n., EEOC Request No. 05960233 (Apr. 8, 1997) (citing Harriss v. Pan Am. World Airways, 74 F.R.D. 24, 45 (N.D. Cal. 1977)). The purpose of the commonality and typicality requirements is to ensure that class agent possesses the same interests and suffered the same injury as the members of the proposed class. Falcon, 457 U.S. at 156-57. Often, the commonality and typicality prerequisites tend to merge and are very similar. Id. at 157. Commonality requires that there be questions of fact common to the class, that is, the same action or policy affected all members of the class. Generally, this can be accomplished through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony from other employees who were allegedly discriminated against in the same manner as the class agent, and evidence of specific adverse actions taken. Id.; Belser v. Dep't of the Army, EEOC Appeal No. 01A05565 (Dec. 6, 2001) (citing Mastren v. U.S. Postal Serv., EEOC Request No. 05930253 (Oct. 27, 1993)). Mere conclusory allegations, standing alone, do not show commonality. Garcia v. Dep't of the Interior, EEOC Appeal No. 07A10107 (May 8, 2003) (citing Mastren, EEOC Request No. 05930253). Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact. Id.

Typicality, on the other hand, requires that the claims or discriminatory bases alleged by the class agent be typical of the claims of the class, so that the interest of the putative class members are encompassed within the class agent's claims. Falcon at 156. A class agent must be part of the class she seeks to represent, and must "possess the same interest and suffer the same injuries" as class members. Id. at 160.

As noted above, the AJ indicated that the purported class met both of these prerequisites. As to commonality, the AJ found that the purported class is comprised of current and former female employees at FCC Victorville who have been subject to sexually explicit statements, actions (including masturbation), and assault at the hands of inmates housed at the facility. The AJ also found that there was a common allegation of denial of "use of force" training to correctional workers for a specific period of time. Complainant alleged that the "use of force" training policy was implemented on a local level by Agency officials at FCC Victorville. Further, the AJ held that the claims of Complainant, as class agent, are typical of the claims of the putative class as a whole.

After a review of the Agency's brief on appeal, we find that the Agency has not demonstrated that the AJ's findings on commonality and typicality are erroneous. Complainant has alleged a sufficiently tailored class comprised of current and former female employees at FCC Victorville, who were subjected to a hostile work environment and who were denied "use of force" training. Based on our independent review, we find no reversible error in the AJ's conclusion that the putative class meets these two prerequisites.

Numerosity

EEOC Regulation 29 C.F.R. § 1614.204(a)(2)(i) requires that a class be so numerous that a consolidated complaint of the members of the class is impractical. This regulation is patterned on Rule 23(a)(1) of the Federal Rules of Civil Procedure. The Supreme Court has indicated that the numerosity requirement of Rule 23 imposes no absolute limit for the size of a class complaint, but rather, requires an examination of the facts of each case. Gen. Telephone Co. 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. See Harriss v. Pan American World Airways, 74 F.R.D. 24 (N.D. Cal. 1977). In addition to number, other factors such as the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim, are relevant to the determination of whether the numerosity prerequisite of Rule 23 has been met. Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. 1981). Although the Commission's requirements for an administrative class complaint are patterned on the Rule 23 requirements, Commission decisions in administrative class certification cases should be guided by the fact that an administrative complainant has not had access to pre-certification discovery in the same manner and to the same extent as a Rule 23 plaintiff. See Moten, et al. v. Fed. Energy Regulatory Comm'n, EEOC Request No. 05910504 (Dec. 30, 1991). Moreover, the exact number of class members need not be shown prior to certification. Id. However, in the administrative process, as in the court process, the correct focus in determining whether a proposed class is sufficiently numerous for certification purposes is on the number of persons who possibly could have been affected by the agency's allegedly discriminatory practices and who, thus, may assert claims. Id. The AJ retains the authority to redefine a class, subdivide a class, or recommend dismissal of a class if it becomes apparent

that there is no longer a basis to proceed with the class complaint as initially defined. Hines, et al. v. Dep't of the Air Force, EEOC Request No. 05940917 (Jan. 29, 1996).

Upon review of the record, it is clear that the number of members of the purported class satisfies the requirement of numerosity and that the AJ's finding in this regard should be affirmed. The AJ found that potentially thirteen job classifications were covered, and that at least 87 class members had been identified at this early point in the proceedings, while Complainant asserted that "well over" one hundred class members were possible.

Adequacy of Representation

The final requirement is that the Class Agent, or his representative, adequately represent the class. To satisfy this criterion, the agent or representative must demonstrate that he or she has sufficient legal training and experience to pursue the claim as a class action, and will fairly and adequately protect the interests of the class. Belser, supra; Woods v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961033 (Feb. 13, 1998). In this regard, it is necessary for the class agent, or the representative, to demonstrate sufficient ability to protect the interests of the class so that the claims of the class members do not fail for reasons other than their merits. We affirm the AJ's finding that the legal representative of Complainant possesses the necessary experience with class actions, employment discrimination cases, and federal employee issues to satisfy the adequacy of representation requirement.

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 denying certification of the class complaint for failure to satisfy the requirements set forth in 29 C.F.R. § 1614.204(a)(2). The matter is REMANDED to the Agency for processing in accordance with the Order below.

ORDER

The Agency is ORDERED to perform the following:

1. Notify potential class members of the accepted class claim within fifteen (15) calendar days of the date this decision becomes final, 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 the Los Angeles District Office within thirty (30) calendar days of the date this decision becomes final. 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 (K0610)

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 77960, Washington, DC 20013. 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 (M0610)

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), at 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 77960, Washington, DC 20013. 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 (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 (Z0610)

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 from the Court that the Court appoint an attorney to represent you and that the Court also 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 with the Court 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

MAY 29 2015
Date

CERTIFICATE OF MAILING

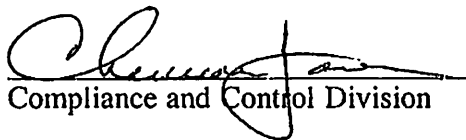
For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Joshua L. Klinger, Esq.
Minahan & Muther, PC
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Denver, CO 80212

Mina Raskin, Director, EEO Staff
Department of Justice (BOP)
320 First St., NW
HOLC Bldg., Room 1038
Washington, DC 20534

MAY 29 2015

Date


Compliance and Control Division