



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

Clarence M. Hill, *et al.*
Complainant,

v.

John E. Potter,
Postmaster General,
United States Postal Service
(Southeast Area),
Agency.

Appeal No. 0720080004
Agency No. 4H310009104

DECISION

Following its October 18, 2007 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 modification of the EEOC Administrative Judge's (AJ) decision granting class certification of this case under Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* For the following reasons, the Commission VACATES the agency's final order.

ISSUES PRESENTED

The agency does not contest the certification of the class. Instead, on appeal it raises the question of whether the AJ erred in accepting complainant's arguments regarding the temporal and geographic scope of the class.

BACKGROUND

We reiterate the facts as we presented them in our decision below:

[I]n early 2004, complainant, who had applied for a position at the agency claiming veterans' preference, was on the agency's hiring register and received a call-in notice informing him that a position had become available. If he was interested, he was to report to an interview bringing a sealed envelope containing his veterans disability rating decision, a copy of his medical records for the past twenty-four months, and/or a signed statement listing any medical treatments or ailments experienced in the past twenty-four months. The record

contains agency documents that state these requirements. The record also contains an agency letter addressed to complainant explaining that if he did not comply with these requirements, he would not be considered for the position and his name would be removed from the hiring register for thirty days. *See* Letter from Human Resources Specialist to complainant of March 10, 2004.

The agency declined to hire him because of his driving record, and subsequently complainant filed a class complaint alleging that the agency discriminated against him and all disabled veteran applicants by making improper pre-employment medical inquiries. In his complaint, complainant states that the policy of requiring only disabled veterans to bring medical records to an interview is unlawful. *See* Notice of Formal Class Complaint, at 1. He further alleges that the agency's policy of retaining the medical records of disabled veterans who are not selected is similarly unlawful. Complainant states that the discriminatory practice has adversely impacted all non-selected disabled veterans since 1992, and that the number of members in the potential class is 40,000 in the Southeast area alone, and possibly "hundreds of thousands" nationwide. *See id.* at 2. He further asserts that he was specifically told at the interview that the human resources department would examine his medical records to aid in making a final determination about hiring him. *See* Information for Pre-Complaint Counseling - Additional Statements, at 2 (stating that he was told by the Postmaster that the records would be examined "to see if there [was] anything in them ... [indicating] that he could not ... do the job....").

The agency referred the complaint to an EEOC Administrative Judge (AJ) to determine whether it satisfied the requirements of 29 C.F.R. § 1614.204(a)(2) and was not otherwise subject to dismissal pursuant to 29 C.F.R. § 1614.107. After reviewing the record, the AJ issued a decision denying class certification. The AJ concluded that although the complainant met the numerosity, typicality and commonality requirements, he failed to meet the adequacy of representation requirement.

Hill v. United States Postal Serv., EEOC Appeal No. 01A45646 at 1-2 (Apr. 28, 2006). In this appellate decision, we vacated and remanded the AJ's decision, ordering the AJ to conditionally certify the decision pending complainant's retention of adequate representation. We also stated that we expected the AJ to make a determination as to the "temporal scope of the policy at issue and the geographic scope of the class." *Id.* at 3 n.2.

Upon remand, on April 28, 2006, the AJ conditionally certified the class and ordered discovery relating to the temporal and geographic scope issues. Complainant maintained that the class should be nationwide and that claims should date back to March 19, 2004 through the

present.¹ The agency, on the other hand, argued that the class should not be nationwide and instead should pertain to only 50 of the 83 USPS districts that admittedly engaged in the alleged practice. As for the temporal scope, the agency argued that class claims should date back to April 13, 2004 and end on the date that the particular districts discontinued the alleged practice. On September 20, 2007, the AJ certified a nationwide class covering the period of March 19, 2004 through the present. On October 18, 2006, the agency rejected the AJ's decision.

CONTENTIONS ON APPEAL

The agency maintains that the class claims can date back no earlier than April 13, 2004, as complainant stipulated during discovery that this was the start date for his claim. The agency argues that complainant cannot revoke his stipulation five months after the fact, as the agency reasonably relied on the stipulation and conducted extensive national discovery pursuant to that date. Agency's Brief in Support of Agency's Appeal. With regard to the geographic scope of the class, the agency argues that the class cannot be nationwide because discovery has revealed that the alleged practice occurred in only 50 out of 83 USPS districts. Given this fact, allowing a nationwide class to stand fails "to comport with the spirit of" OFO's instruction to make a factual determination as to the geographic scope of the class. The agency further argues that if complainant had problems with the evidence that the agency presented on this issue, counsel should have requested further discovery. According to the agency, complainant's "eleventh hour" challenge to its evidence is baseless and should be rejected. Agency's Reply to Class Agent's Brief in Opposition to the Agency's Appeal at 4-5.

In response, complainant insists that the AJ was correct in finding that the class claim should start on March 19, 2004, as that date was 45 days from that date that complainant contacted an EEO Counselor. Complainant explains that the April date that the agency insists upon is in error because it arose out of a misreading of the facts by the agency's own counsel. *See* Class Agency's Brief in Opposition to Agency's Appeal at 5. Although complainant concedes that this misreading of the date became "common lingo between the parties," complainant maintains that the only thing he stipulated to was a start date for the class of "45 days prior to" the counselor contact date, and that he was the one who later relied on agency counsel's miscalculation of that date in completing some of the initial discovery. *Id.* at 6. Complainant indicates that his March 19, 2004 start date must stand because the regulations establish a 45-day period between the alleged discriminatory act and the date of EEO Counselor contact. Complainant further argues that there should be no end date to the class claims and that it

¹ It is noted that complainant initially argued that the class should include individuals who faced the alleged practice beginning on March 25, 2004. *See* Complainant's Mot. For Certification of Class at 4. Complainant, however, amended his argument to say that the temporal scope of the class should begin on March 19, 2004. *See* Amendment to Mot. For Certification of Class at 1.

should extend to the present because the agency has presented no basis for limiting the temporal scope of the class.

ANALYSIS AND FINDINGS

As mentioned above, the parties do not dispute the certification of the class. Therefore, the AJ's decision granting certification stands. In our previous decision, we defined the class as follows:

The class consists of disabled veteran applicants, seeking disabled veteran's preference, who have been asked by the agency to bring medical documentation, in excess of that required to verify their entitlement to the preference, to an interview before an offer of employment is made.

We further defined the claim as follows:

Whether the agency violates the Rehabilitation Act when it asks all disabled veteran applicants seeking disabled veteran's preference, to bring medical documentation, in excess of that required to verify their entitlement to the preference, to an interview before an offer of employment is made.

The agency's appeal centers only on the geographic and temporal scope of the class claim. Upon review of the record and the arguments on appeal, we find no error in the AJ's conclusions.

Geographic Scope

We are not persuaded by the agency's argument that the class should only include those 50 USPS districts that have self-identified themselves as having engaged in the alleged discriminatory practice. The agency maintains that it conducted an "exhaustive investigation" into the practices of each of its 83 districts to determine where the alleged improper inquiry took place. Although the agency outlines the steps it took in conducting its investigation, the evidence it presented documenting its findings are inadequate. As complainant points out, the agency produced pre-printed forms claiming that the alleged practice ceased that were signed by individuals who provided no evidence of their competence. There are however many problems with these certifications, which to us, raise questions as to their trustworthiness. For instance, apart from failing to identify the declarants' competence and knowledge as to the subject matter, some of the certifications fail to identify the districts they are supposed to cover. *See Ex. L/M*. Also, as complainant points out, some declarations are signed by more than one person, and one declaration is not even signed by the declarant, but rather by someone "acting for" the declarant. *See id.* Such documents cannot be deemed "evidence" without withstanding greater scrutiny.

Moreover, we are not persuaded by the agency's counter-argument, that complainant should have requested additional discovery if he suspected that the agency's evidence was faulty. We find that the information submitted was sufficient for the AJ to make his determinations as to the scope of the class, and we find no error in his conclusions.²

Temporal Scope

Similarly, we find no error in the AJ's conclusions as to the temporal scope of the class claim. Our regulations make clear that an aggrieved individual must make contact with an EEO Counselor within 45 days of the alleged discriminatory act. *See* 29 C.F.R. § 1614.105(a)(1). Therefore, as complainant contacted the EEO Counselor on May 3, 2004, we presume he faced the alleged discriminatory act 45 days prior – on March 19, 2004. As such, the start date for the class claims is March 19, 2004. With regard to an end date, we are not persuaded by the agency's arguments that the above-mentioned certifications detail the dates of when the alleged practice ended in particular districts. As we reject the certifications and accompanying declarations as appropriate evidence, we cannot accept the proffered end dates.

CONCLUSION

Accordingly, we affirm the AJ's conclusions and vacate the agency's final order, remanding the class complaint for further processing in accordance with the Order below. We further re-define the class claim as follows:

The class consists of disabled veteran applicants nationwide, seeking disabled veteran's preference, who, between March 19, 2004 and the present, have been asked by the agency to bring medical documentation, in excess of that required to verify their entitlement to the preference, to an interview before an offer of employment is made.

² The agency appears to imply that because the AJ did not specifically address all of the agency's evidence that his decision is in error. We disagree. Although it would have been helpful to have greater analysis as to the rationale of the AJ's decision, we find that it is sufficiently clear and based on the evidence in the record.

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 Savannah Local 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).
3. Send a copy of all notices and letters ordered in provisions (1) and (2) of this Order, as provided in the statement entitled "Implementation of the Commission's Decision."

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

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 (M0408)

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 (R0408)

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 (Z0408)

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

MAY 23 2008

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:

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MAY 23 2008
Date



Equal Opportunity Assistant