



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

William Tschappat, et al.,  
a/k/a Charley L.,<sup>1</sup>  
Class Agent,

v.

R. Alexander Acosta,  
Secretary,  
Department of Labor,  
Agency.

Request No. 0520170312  
Appeal No. 0120091988  
Hearing No. 100-98-8066X  
Agency No. 805115

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested reconsideration of the decision in EEOC Appeal No. 0120091988 (February 23, 2017). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the reasons stated below, the Agency's request for reconsideration is DENIED.

ISSUE PRESENTED

The issue presented is whether the appellate decision clearly erred in finding that the Equal Employment Opportunity Commission Administrative Judge (AJ) abused his discretion when he imposed a sanction that excluded 15 affidavits and the Class Agent's Expert's report, which resulted in a finding that the class did not satisfy the numerosity, typicality and commonality requirements.

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<sup>1</sup> 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.

### BACKGROUND

The Class Agent worked for the Agency as a GS-13 Occupational Safety and Health Specialist in Chicago, Illinois. The Class Agent filed a class complaint alleging the Agency had been engaged in ongoing age discrimination when it failed to promote employees over the age of 45 to Occupational Safety and Health Specialist positions, as well as Occupational Safety and Health Manager positions, at the 13 and 14 grade levels. The parties eventually stipulated to the following definition of the class:

Individuals over the age of 45 who applied for promotion to GS-018 Occupational Safety and Health Specialist and Occupational Safety and Health Manager positions at the GS-13 and GS-14 grade levels from 1994 to present.

This complaint has a lengthy procedural history, which will not be repeated here. Of relevance, however, is that the AJ authorized the parties to engage in discovery between February 2006 and July 2008. On August 18, 2008, the Agency filed its Motion to Dismiss Claims and to Decertify the Class, and a Motion for Summary Judgment. On September 3, 2008, the Class Agent, through his attorneys, filed his opposition to the Agency's motions. As part of his opposition to the Agency's motion for summary judgment, the Class Agent submitted evidence consisting of 15 affidavits from putative class members, as well as a report from the Class Expert.

By Decision and Order dated January 28, 2009, the AJ, as a sanction, excluded the 15 affidavits and the Class Expert report from consideration in deciding the Agency's dispositive motions. The AJ indicated that he imposed the sanction against the class after finding that the Class Agent had failed to "reasonably supplement his discovery responses" to the Agency with the documents at issue. After excluding that evidence, the AJ went on to determine that, following discovery, the evidence of record did not support a finding that the class satisfied the numerosity, typicality and commonality prerequisites, notwithstanding that the class had previously been certified. On February 3, 2009, the AJ entered a decision on the Agency's motions decertifying the class complaint and remanding four of the Class Agent's individual complaints, which had been subsumed into the class claim, to the Agency for processing. The Agency issued a final order that fully adopted the AJ's decision.

On February 23, 2017, the Commission issued a decision which found that the AJ erred in imposing an overly harsh sanction. The Agency argued that it was unfairly prejudiced when the Class Agent provided 15 affidavits and an expert report in response to its motion for summary judgment but failed to produce this information by the close of discovery. The Commission found that the Agency had not established that it suffered sufficient prejudice to justify the sanction imposed by the AJ. Any delay by the Class Agent was clearly mitigated by the fact that the Agency, unlike the Class Agent, always had complete access to all relevant personnel and merit promotion information and knew the identities of all of the individuals who met the class definition and, as their employer, had their personnel files. Moreover, all the data upon which the Class Expert based her report came from the Agency's own databases.

The Commission found that a more tailored approach would have been to reopen a limited discovery period to allow the Agency to better explore the evidence at issue.

Next, the Commission found that the Agency knew the identity of the Class Expert at least as early as January 2008, and could have deposed her. The record reflects that class counsel made numerous attempts, in motion after motion, to request that the Agency produce purported missing data or data in a usable/readable format. The record shows that the Class Expert's report was served on the Agency on the same day it was received by the Class Agent's counsel. Again, had the AJ chosen to reopen the discovery period at this time, the Agency could have deposed the Class Expert. The Commission concluded that the AJ abused his discretion by imposing a sanction which resulted in the dismissal of the class complaint. The Commission found that the exclusion of the evidence subject to the sanction had been critical to the AJ's decertification of the class.

Finally, the Commission found, with regard to the Agency's assertion that the class should be decertified for lack of commonality and typicality, that these arguments had already been fully considered and rejected in our decision certifying the class. EEOC Appeal No. 07A40074 (May 5, 2005), request for reconsideration denied, EEOC Request No. 05A50938 (Sept. 15, 2005). Accordingly, the Commission set aside the Agency's final order upon finding that the AJ erred in sanctioning the class as indicated above and decertifying the class. The class complaint remained certified and was remanded for continued adjudication on its merits.

#### CONTENTIONS ON RECONSIDERATION

The Agency requests reconsideration on the ground that the appellate decision contained clearly erroneous determinations of fact and law, and that the implementation of the decision after an eight-year delay would have a substantial impact on the policies, practices, and operations of the Agency. According to the Agency, the Commission failed to recognize that, even if the sanctions had not been imposed, the AJ still would have decertified the class based on his finding that the Class Agent failed to present a sufficient factual basis to show that two of the four necessary prerequisites were met.

Likewise, the Agency argues that the Class Agent did not establish typicality because he did not identify any specific agency-wide personnel management policy or practice that discriminated against current and former promotion candidates over the age of 45.

In response, the Class Agent asserts that the Commission should deny reconsideration. The Class Agent contends that the topics of commonality and typicality were fully discussed and addressed in the Commission's 2005 decisions.

Further, regarding the delay with which the case would take if it went forward, the Class Agent asserts that, while continued litigation will undoubtedly have an impact on the Agency, it is unclear from the Agency's request why implementing the Commission's decision would cause a *substantial* impact on the Agency. Thus, the Class Agent maintains that the

Commission should deny the Agency's request for reconsideration on the grounds of substantial impact because mere inconvenience to the Agency is not sufficient to justify reconsideration.

### ANALYSIS AND FINDINGS

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. We remind the Agency that a "request for reconsideration is not a second appeal to the Commission." Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (rev. Aug. 5, 2015), at 9-18; see, e.g., Lopez v. Dep't of Agriculture, EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the previous decision involved a clearly erroneous interpretation of material fact or law; or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here.

First and foremost, we find that the Agency simply reiterates arguments already raised on appeal that were previously and correctly addressed by the previous decision. Simply rearguing the facts or trying to explain the AJ's finding in a more favorable light does not demonstrate that an erroneous interpretation of material fact or law occurred. We also find unpersuasive the Agency's argument that the Commission disregarded the AJ's analysis regarding decertification of the class when it was based on two years of discovery. The February 23, 2017, decision clearly found that, even after two years of additionally discovery, the exclusion of the evidence that was subject to the sanction was critical to the AJ's decertification of the class.

Finally, with respect to the Agency's contention that the previous decision will have a substantial impact on its policies, practices and/or operations because of the burden of having to proceed on the merits, we find that the Agency has not established this criterion. Among other things, the Agency speculates that witnesses may have retired, or died. We note that the Class Agent faces the same possibility. The Agency's arguments are similar to those raised by any party having to face litigation of a matter that has been pending for a long time. Accordingly, the decision in EEOC Appeal No. 0120091988 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

### ORDER

The Agency is directed to submit the complaint file and a copy of this decision to the Hearings Unit of the EEOC's Cleveland, Ohio District Office within thirty (30) calendar days from the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall conduct appropriate proceedings to adjudicate the merits of this certified class claim in accordance with 29 C.F.R. § 1614.204.

### 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.

### 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 (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:



Carlton M. Hadden, Director  
Office of Federal Operations

MAY 12 2017

Date

