



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE FIELD OFFICE - 531**

**George H. Fallon Federal Building
31 Hopkins Plaza, Suite 1432
Baltimore, Maryland 21201-2825
(410) 209-2782
TTY (410) 962-6065
FAX (410) 209-2777**

WILLIAM H. TSCHAPPAT Class Agent)	EEOC No. 531-2018-00316X
)	
vs.)	Agency No. 98-05-115
R. ALEXANDER ACOSTA, SECRETARY U.S. DEPARTMENT OF LABOR Agency)	Date: June 5, 2019
)	
)	
)	

MEMORANDUM AND ORDER

A prehearing conference was held in the above-captioned matter on May 24, 2019. Participating were: Counsel for Class, Bruce Elfvin; Agency Representatives, Rolando Valdez, Elizabeth Lopes Beason and Beth Heleman; and the undersigned Administrative Judge.

Issue

In 2006, the parties stipulated that the class should be defined as:

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 or GS-14 grade level from 1994 to the present.

At the conference, the parties agreed that the time for examining the harm to Agency employees should be limited to the period from 1994 to August 31, 2018. However, they were informed that if Counsel for Class does not obtain class agents that have suffered harm past 2009, the year that William Tschappat retired, the timeline for examining the harm to Agency employees will end in the year 2009.

Motion For Sanctions

In the Order of February 14, 2019, Counsel for Class was ordered to identify additional class agents to cover the period after which Tschappat retired and an agent who may represent the class of individuals not promoted to a GS-13 position. Counsel for Class was ordered to identify the class agents on or before March 15, 2019. Class Counsel failed to comply with the order.

On April 16, 2019, the Agency filed Agency's Motion For Sanctions seeking sanctions for Class Counsel's failure to identify class agents who had not been promoted to GS-13 or GS-14 GS-018 Occupational Safety and Health Specialist and Occupational Safety and Health Manager positions for the entire period from 1994 through the present. Class Agent filed his Response To the Agency's Motion for Sanctions on May 7, 2019. In his response, Class Agent complained that his failure to comply was as a result of a denial of his request for a 45-day delay in the proceedings, argued that the Agency has denied the class discovery, complained about the withdrawal of his co-counsel and posited that some remedy, short of a "draconian" sanction, should be appropriate to address this lapse.

After reviewing the Agency's Motion For Sanctions and the Class Agent's Response, the Agency's Motion is GRANTED IN PART AND DENIED IN PART. Counsel for Class has been aware of the need to secure an employee to represent class members who did not receive promotion to GS-13 GS-018 Occupational Safety and Health Specialist and Occupational Safety and Health Manager positions for the entire period, from 1994 through the present, from the onset of this litigation. I note that as late as the Joint Status Report of November 16, 2018, the parties set forth the date of December 31, 2018 as a deadline for Class Counsel to identify additional class agents. Thus, Class Counsel has been aware of this obligation for months since the assignment of the undersigned and during the years when Judge Porter presided over the case. Yet, he has not complied with the requirement.

Class Counsel has not demonstrated, with case or statutory support, the manner in which a Class Agent who was denied promotions to GS-14 GS-018 Occupational Safety and Health Specialist and Occupational Safety and Health Manager positions can represent the interests of employees denied promotions to GS-13 GS-018 Occupational Safety and Health Specialist and Occupational Safety and Health Manager positions. He has proffered no evidence to show that the claims of the employees not promoted to GS-14 positions are common to or typical of the claims of employees not promoted to the GS-13 level. Accordingly, since the class has no one to represent employees who did not receive promotion to GS-13 GS-018 positions, the class will be redefined as:

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-14 grade level from 1994 to August 31, 2018.

All other relief sought by the Agency regarding GS-14 promotions is DENIED.

Adequacy of Representation

On September 5, 2018, Class Counsel was ordered to affiliate with another law firm to assist him in litigating the case. The parties were informed that this step is essential to protect the interests of the class members who cannot opt out of the litigation. Class Counsel was ordered to identify the new law firm on October 12, 2018.

On October 23, 2018, Class Counsel secured the assistance of Gilbert Employment Law, P.C. On January 29, 2019, Gilbert Employment Law, P.C. withdrew its appearance. Thus, Class Counsel is without the necessary assistance to properly litigate this case and protect the interests of class members.

During conferences with the parties, the undersigned has questioned Class Counsel regarding his effort to locate a new law firm to assist him in the litigation. More than four months after the departure of Gilbert Employment Law, P.C., Counsel for Class has still not secured a new law firm. Accordingly, at the May 24, 2019 conference, Class Counsel was ordered to secure a new law firm, with which to affiliate, on or before **June 24, 2019** and include a statement regarding the adequacy of counsel. The parties were informed that should Class Counsel fail to secure a new law firm, on or before June 24, 2019, the undersigned will entertain motions to decertify the class based at least on adequacy of representation and other legal requirements on or before **July 19, 2019**.

Motion To Compel

On April 22, 2019, the Agency filed Agency's Motion To Compel Discovery. Class Agent responded to the Agency's Motion on May 3, 2019. The Agency replied to Class Agent's opposition on May 9, 2019. After reviewing the filings of the parties and hearing oral argument on the motion and opposition, the Agency's Motion is GRANTED IN PART AND DENIED IN PART.

The Class must supplement its response to interrogatories 5, 6, 8 and document requests 1, 2 and 3. Where the class has asserted a privilege in any of their responses, Counsel for Class must create and produce a privilege log. The supplemented discovery responses, along with the privilege logs, are due on June 14, 2019.

The parties were informed that the proceedings are bifurcated regarding liability and relief. Thus, they are permitted to do discovery regarding liability currently and if there is a finding of discrimination, they may engage in discovery at a later date in support of relief.

It is so ORDERED.

A handwritten signature in black ink, appearing to read "Enechi A. Modu", with a long horizontal flourish extending to the right.

For the Commission:

ENECHI A. MODU
ADMINISTRATIVE JUDGE

CERTIFICATE OF SERVICE

I certify that the foregoing **MEMORANDUM AND ORDER** was sent to the following:

William Tschappat SENT VIA USPS on 6/6/2019
1266 E. Washington Street #11
Des Plaines, IL 60016

Bruce B. Elfvin, Esq. SENT VIA EMAIL on 6/5/2019
Stuart Torch, Esq.
Elfvin, Klingshirn, Royer & Torch, LLC
4700 Rockside Road, Suite 530
Cleveland, OH 44131
T: 216-382-2500
Email: bruce@ekrtlaw.com
stuart@ekrtlaw.com

Rolando Valdez, Esq. UPLOADED/ISSUED VIA FEDSEP on 6/5/2019
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2428
Washington, DC 20210
T: (202) 693-5311
Email: valdez.rolando@dol.gov



Angelo Haskins
Legal Technician