

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE FIELD OFFICE**

William H. Tschappat,)	
)	EEOC Case No.: 531-2018-00316X
Class Agent,)	
)	Agency Case No. 98-05-115
v.)	
)	Enechi A. Modu
R. Alexander Acosta, Secretary,)	Administrative Judge
U.S. Department of Labor,)	
)	DATE: April 16, 2019
Agency.)	

AGENCY’S MOTION FOR SANCTIONS

The U.S. Department of Labor (Agency or DOL), by and through undersigned counsel, files this motion for sanctions because Class Counsel has failed to comply with the Administrative Judge’s February 14, 2019, Order that he identify appropriate GS-13 and GS-14 class agents on or before March 15, 2019. As described more fully below, Agency Counsel has made numerous good faith follow-up requests to Class Counsel asking when he would provide the identity of class agents, and provided reasonable deadlines for response. Despite ample time being afforded to him, Class Counsel has not responded to the Administrative Judge’s Order and he has either ignored or not responded to Agency Counsel’s requests for this critical information. Accordingly, the Agency requests that sanctions be imposed pursuant to 29 C.F.R. § 1614.103(f)(3).

Because the Class Agent failed to comply with the Administrative Judge’s Order to identify proper class agents, the Agency requests that the Administrative Judge impose an appropriate sanction, such as preventing the Class from presenting witnesses and evidence, including expert witness testimony and expert reports, for the periods of time where there are no class agents for the GS-13 and GS-14 promotions at issue in this Class complaint. Specifically,

the Class should be redefined and limited henceforward to the period of time for which a class agent has been identified – namely, GS-14 promotions from November 8, 1994 to May 30, 2009.

BACKGROUND FACTS

1. In the October 11, 2018, Joint Statement of Class and Agency for Prehearing Status Conference of October 23, 2018, the Agency raised for discussion the issue of whether Class Agent Tschappat had standing to represent the Class of GS-12 individuals who sought GS-13 promotions inasmuch as Mr. Tschappat had been promoted to GS-13 in 1988, six years prior to the filing of the November 8, 1994, formal Class complaint. *See* Joint Statement of Class and Agency for Prehearing Status Conference of October 23, 2018, p. 8.
2. On October 23, 2018, at the Prehearing Status Conference, counsel for the parties and the Administrative Judge discussed the issue of whether Class Agent Tschappat had standing to represent both grades contained in the Class definition. The parties subsequently continued discussions about the issue of standing.
3. On November 16, 2018, counsel for the parties filed a Joint Status Report that contained a draft Scheduling Order, which, *inter alia*, set December 31, 2018, as the deadline for Class Counsel to identify additional class agents and to provide as much specificity as possible regarding the promotion opportunities that those class agents applied for and when they applied. *See* Joint Status Report, p. 5 (Nov. 16, 2018).
4. On December 20, 2018, Class Counsel requested an extension of 30 days to identify the class agents and Agency Counsel approved an extension of time, through January 18, 2019. *See* Exhibit A (E-mail message from Shannon Leary to Rolando Valdez, Dec. 20, 2018).

5. Despite this agreement, Class Counsel did not provide Agency Counsel with the names of additional class agents on or before the January 18, 2019 mutually-agreed upon deadline.
6. At the February 14, 2019, prehearing conference, the parties again discussed not only the deficiency of GS-13 class agents, but also the lack of GS-14 class agents for the period of time following GS-14 Class Agent Tschappat's May 30, 2009 retirement from DOL. That day the Administrative Judge issued an Order directing Class Counsel to "identify proper class agents" on or before March 15, 2019. *See* Order # 2 (Feb. 14, 2019).
7. On March 8, 2019, Agency Counsel wrote to Class Counsel inquiring when he would be identifying any new class agents because the identification of new class agents, or lack thereof, would meaningfully impact DOL's supplemental discovery responses. The lack of any additional class agent(s) also bears a significant impact on DOL's production of some, most, or all of the 720,000 pages of documents, primarily promotion files, which the Agency collected in response to the Class Agent's discovery requests. *See* Exhibit B (E-mail message from Rolando Valdez to Bruce Elfvin, March 8, 2019). Class Counsel did not respond to Agency Counsel's e-mail message.
8. On March 12, 2019, Class Counsel filed a motion to stay the Class case for 45 days. In the motion, Class Counsel reported to the Administrative Judge that:

Class Counsel has discussed with about 8 to 10 class members whether or not they would be willing to become class agents under the present circumstances. In these discussions, Class Counsel has attempted to identify promotions sought by the class member. In many instances, the information provided by a class member could not be matched with spreadsheets from the Agency purporting to be all applicants from October 1, 2004 to the present. With these discrepancies, potential class agents were advised that Class Counsel was determining whether these persons would be viable class agents in light of the DOL's interest in pressing each new class agent on their promotion application history. Class Counsel also provided information related to the continued pursuit of these claims

in the event there was no other counsel joining this case with or on behalf of a new class agent.

See Motion of Class for Stay of Further Proceedings to Allow Class Members to Appear and Proceed, p. 2 (March 12, 2019).

9. In an exhibit to the motion to stay, Class Counsel provided the Administrative Judge with a March 12, 2019, letter that he had sent to Class members who had registered on Class Counsel's Web site. In the letter to the registered Class members, Class Counsel reported on the lack of success in finding new class agents, as follows:

I have spoken with several class members, and it is apparent that there are very few class members that were GS-12s seeking promotion to GS-13 positions in OSHA, to become Class Agents to cover all parts of the class certification from November of 1994 through the present. There is a need to have Class Agents for GS-13s seeking GS-14 positions in OSHA for the period 2009 to the present. We have spoken with some individuals and many do not fit the right periods or have no record of seeking promotions. As class counsel I am concerned that the AJ may cut the class back if we do not have Class Agents step forward and appear in the class case.

In addition, I have been hesitant to bring new Class Agents into the case that do not have easily discernible claims or may not be able to bear the expenses that might be entailed. I have not heard from any class member that they are represented by counsel and willing to become active in this case.

The AJ has made it clear that she expects to have Class Agents to cover not only the 2009 and beyond period for GS-14 applicants, but also Class Agents to cover the GS-13 applicant group from 1994 to the present. A new Class Agent could be retired or still employed.

Id. at pp. 6-7.

10. Agency Counsel sent e-mail messages to Class Counsel on April 3, April 10, and April 11, 2019, inquiring about when and/or whether Class Counsel intended to identify Class Agents. *See* Exhibit C. To date, Class Counsel has not responded to or answered any of Agency Counsel's messages requesting information about the new class agents.

11. As of today, April 16, 2019, Class Counsel's failure to identify class agents per Administrative Judge Modu's Order is 32 days past due. Despite reporting to registered Class members on March 12, 2019 that he had spoken to 8-10 potential class agents Class Counsel has not answered Agency Counsel's multiple follow-up inquiries about the status of this issue, nor has he identified an alternate date by which he will provide DOL with the class agent information.

ARGUMENT

On June 4, 2018, the Administrative Judge issued an order that expressly informed the parties that "[f]ailure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. § 1614.109(f)(3). *See* Order Scheduling Status Conference, p. 3 (June 4, 2018). This order also placed the parties on notice that 29 C.F.R. § 1614.109(f)(3) authorized the Administrative Judge to impose the following range of sanctions, if appropriate:

(A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(C) Exclude other evidence offered by the party failing to produce the requested information or witness;

(D) Issue a decision fully or partially in favor of the opposing party;
or

(E) Take such other actions as appropriate.

An Administrative Judge may also dismiss a complaint pursuant to 29 C.F.R. § 1614.109(b) for any of the reasons set forth in 29 C.F.R. § 1614.107(a). The Administrative Judge may dismiss complaints on his/her own initiative, or upon the Agency's motion to dismiss a complaint.

Id. See also *Victor S. v. Dep't of the Army*, EEOC Appeal No. 0120180831, 2019 WL 1397882, at *2 (March 20, 2019) (identifying the following factors to be considered when tailoring a sanction and determining if a sanction is warranted: (1) the extent and nature of non-compliance and the justification by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process), citing *Gray v. Dep't of Defense*, EEOC Appeal No. 07A50030 (March 1, 2007)). The purpose of imposing sanctions is to deter a non-complying party from similar conduct in the future and to provide for an equitable remedy to the opposing party, if warranted. *Syreeta P. v. Dep't of State*, EEOC Appeal Nos. 012017424 & 012016508, 2017 WL 5107186, at *4 (Oct. 25, 2017), citing *Hale v. Dep't. of Justice*, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

The Background Facts, *supra*, as well as the Exhibits attached hereto, unequivocally demonstrate that Class Counsel has failed to comply with the Administrative Judge's Order that he identify class agents on or before March 15, 2019. Cognizant of judicial economy, Agency Counsel refrained from immediately presenting Class Counsel's deficiency to the Administrative Judge; instead, Agency Counsel diligently attempted to obtain this information from Class Counsel. Agency Counsel's efforts have not yielded any successful results.

It is significant to note that Agency Counsel is pursuing information that is critical to defining the coverage parameters of the Class, as well as the discovery requests and responses of both parties. For example, at present there are no class agents representing the class of GS-12 employees who applied for GS-13 promotions for the entire 24 year period of the Class. There are also no class agents for the ten-year period following Class Agent Tschappat's May 30, 2009 retirement. Class Counsel's March 12, 2019 letter to the registered Class members show that he

is fully aware of the consequences of his shortcomings in finding new Class agents and he knows that the Class could be redefined as a result. Class Counsel could have informed the Administrative Judge and Agency Counsel that his efforts to find new Class agents yielded no results; but, he did not do that. Because there are no GS-13 or GS-14 class agents for these aforementioned time periods, the Class does not have standing to sue DOL or obtain information, promotion files, and other documents for these time periods. In fact, it begs the question how the Class can continue under the February 1, 2006, stipulated definition if the only Class agent is Mr. Tschappat, who retired ten years ago.

Because of Class Counsel's failure to abide by the Administrative Judge's Order, the Agency has not had the opportunity to depose any new Class agents; to discover whether the claims of the newly-identified Class agents are actually representative of other class members; and, in turn, to depose the other non-representative class members about their claims of age discrimination. As of the present date, the parties are more than six months through an eight-month fact discovery schedule. The July 1, 2019 close of fact discovery deadline is quickly approaching and Class Counsel does not appear to be in any hurry to identify this basic, yet essential, information that is critical to defining the Class and its members, and it is absolutely necessary to further progress by both parties in fact and expert discovery. Class Counsel has had numerous opportunities to identify new GS-13 and GS-14 Class Agents, yet he has failed to do so. Accordingly, the Class should be sanctioned.

In summary, the Agency requests that the Administrative Judge issue an appropriate sanction based on Class Counsel's continuing failure to follow her Order that he identify class agents on or before March 15, 2019. More specifically, the Agency respectfully requests that the Administrative Judge impose a sanction that will (1) redefine the Class as limited to GS-13

employees, who sought GS-14 promotions from November 8, 1998, to May 30, 2009; and (2) at the hearing, the Class will be precluded from introducing witnesses and evidence, including expert witness testimony and expert witness reports, for (1) all GS-13 promotions for the period of November 8, 1994 to the present, and (2) all GS-14 promotions for the period of May 31, 2009 to the present.

Respectfully Submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

ROSE MARIE L. AUDETTE,
Associate Solicitor for Management and
Administrative Legal Services

ELIZABETH LOPES BEASON
Counsel for Employment Law

/s/ *Rolando N. Valdez*
ROLANDO N. VALDEZ, ESQ.
BETH S. HELEMAN, ESQ.
Senior Trial Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

From: [Valdez, Rolando - SOL](#)
To: [Shannon Leary](#)
Cc: [Gary-efile](#); [LKincaid-efile](#); [SLeary-efile](#); [JSpoerl-efile](#); [Bruce B. Elfvin](#); [Beason, Elizabeth L - SOL](#); [Heleman, Beth S - SOL](#); [George, Alyssa C - SOL](#); [Valdez, Rolando - SOL](#)
Subject: RE: Tschappat v. Department of Labor; EEOC No.: 531-2018-00316X, Agency No: 98-05-115; Class Agent's First Set of Discovery Requests - Request for Clarification
Date: Friday, December 21, 2018 2:50:00 PM

Dear Shannon:

We understand some of the difficulties in producing information during the holiday season; however, we do not agree to a 30-day extension to produce this basic information without extending the fact discovery period.

First off, at the October 23, 2018 status conference, we put the Class of our position that Class Agent Tschappat did not have standing to represent GS-13 promotions in the Class Action and that new Class Agent(s) would have to be identified. That was two months ago so it's hard to understand why "the holidays" are suddenly the reason why Class Counsel can't meet the deadline. Moreover, the parties briefed this standing issue back in 2008 as part of the summary judgment dispositive motions such that Mr. Elfvin has been on notice of this issue for more than a decade. It stands to reason that by now, more than 24 years after the filing of the formal complaint, the Class should have multiple readily identifiable Class Members who could serve as Class Agent(s) for the GS-12 employees who were allegedly the victims the victims of age discrimination in job series 018 promotions.

It's important to note that right now we are 1/3 of the way through the fact discovery period and by the time we get something as basic as the identity of the GS-13 Class Agent(s), it will be halfway through the existing fact discovery period. Any extension that we afford you cuts into our own time to depose the Class Agent(s) and Class Members, not to mention that we are undertaking a massive information and document production going back to the beginning without even knowing the date(s) when the GS-13 Class Agent(s) first allegedly experienced harm and if it goes back as far as Mr. Tschappat's formal complaint.

As of now, we will give you more time, through January 18, 2019, to identify the GS-13 Class Agent(s), provided you agree to extend fact discovery 18 days. **Please let me know your response.**

I will be back in the office December 26, 2018 and will be sending you a letter regarding the Class's responses to discovery and you, Beth, and I (and anyone else) can discuss this issue as well, if needed.

Sincerely,

Rolando Valdez

From: Shannon Leary <sleary@gelawyer.com>
Sent: Thursday, December 20, 2018 5:17 PM
To: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>

Cc: Gary-efile <gary-efile@gelawyer.com>; LKincaid-efile <lkincaid-efile@gelawyer.com>; SLeary-efile <sleary-efile@gelawyer.com>; JSpoerl-efile <jspoerl-efile@gelawyer.com>; Bruce B. Elfvin <bruce@ekrtlaw.com>; Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>; Heleman, Beth S - SOL <Hелеman.Beth.S@dol.gov>; George, Alyssa C - SOL <George.Alyssa.C@dol.gov>

Subject: Re: Tschappat v. Department of Labor; EEOC No.: 531-2018-00316X, Agency No: 98-05-115; Class Agent's First Set of Discovery Requests - Request for Clarification

Rolando,

We're working our way through the names and attempting to speak with people to identify the appropriate Class Agents, but the task is going to be nearly impossible given the holidays. So we're unfortunately going to need some additional time beyond the December 31st deadline. Would the Agency be comfortable with an additional 30 days for the class to identify Agents? This will give us sufficient time to gather all the information needed to ensure we're identifying appropriate class agents. Thank you for your understanding and consideration.

Regards,

Shannon

Sent from my iPhone

On Dec 17, 2018, at 7:57 AM, Shannon Leary <sleary@gelawyer.com> wrote:

Rolando,

Thank you for the update. Six weeks for the production you noted is not a problem. And yes, we are requesting the applications of all individuals, not just those who made the cert and/or BQ.

Regards,

Shannon

Sent from my iPhone

On Dec 15, 2018, at 12:19 PM, Valdez, Rolando - SOL <Valdez.Rolando@dol.gov> wrote:

Request for Clarification

As it stands, we have been given an estimate of approximately six weeks to produce the documents requested in Requests 2, 3, 4, 5, 6, and 7. The extended time frame is due to the fact that documents must be downloaded manually from the system. Also, this estimate is before they documents come to SOL for review and redaction of PII, which will take additional time. Of course, we will endeavor to produce in batches and not to wait until a final production of all redacted

documents.

With this in mind, the Class's Request for Production of Documents # 5 has requested a copy of all applications submitted for the vacancies at issue in this matter. Document Requests 6 and 7 are requesting documents for BQ and people on certificates. **So the clarification is to confirm that the Class is requesting the applications for all individuals who did not make the certificates of eligible candidates and/or BQ.** From what I have been told, if there were 40 applicants for a position and only 5 made a certificate of eligible candidates, then it is obviously going to be much more labor intensive to download the 35 application packages for people not on the Certs/BQ. You will be receiving hundreds of application packages for people who were not considered by the selecting officials.

Please confirm so that we can inform the persons performing the work on this project. If there is further delay, we will inform you. And by the way, this project is being performed nationwide by up to a dozen individuals. We want you to know that DOL is devoting significant resources to this project to complete it as timely as possible.

Sincerely,

Rolando Valdez

From: Jordan Washington <jwashington@gelawyer.com>

Sent: Friday, November 30, 2018 5:11 PM

To: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>; Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>; Heleman, Beth S - SOL <Heleman.Beth.S@dol.gov>; George, Alyssa C - SOL <George.Alyssa.C@dol.gov>

Cc: Gary-efile <gary-efile@gelawyer.com>; LKincaid-efile <kincaid-efile@gelawyer.com>; SLeary-efile <sleary-efile@gelawyer.com>; JSpoerl-efile <jspoerl-efile@gelawyer.com>; KTaubenblatt-efile <ktaubenblatt-efile@gelawyer.com>; Bruce B. Elfvn <bruce@ekrtlaw.com>

Subject: Tschappat v. Department of Labor; EEOC No.: 531-2018-00316X, Agency No: 98-05-115; Class Agent's First Set of Discovery Requests

Good afternoon Mr. Valdez,

Attached please find the following document:

Class Agent's First Set of Discovery Requests

Please do not hesitate to contact me if you are unable to open the attachment. A hard copy has also been sent to you by first-class mail this afternoon.

From: [Valdez, Rolando - SOL](#)
To: [Bruce Elfvin](#)
Cc: [Beason, Elizabeth L - SOL](#); [George, Alyssa C - SOL](#); [Heleman, Beth S - SOL](#); [Valdez, Rolando - SOL](#)
Subject: RE: Tschappat v. Acosta (EEOC) - Going Forward
Date: Friday, March 8, 2019 9:45:36 AM

Dear Bruce:

I'm writing about a couple of things.

First, as you know, we have a Joint Status Report due next Friday. I will be working on writing DOL's portion of the JSR this time around. Taking my other deadlines into account, I'm wondering when you might have some information about class agents, class members, discovery, and partnering up/the direction of the case. Can you provide any estimate about when we can begin working on the JSR?

Also, in your February 20th message below, you indicated that you'd be supplementing the list of class members that you identified on February 18. Is there any update to that list as of now that you can share with us?

On our end, we have begun our massive redaction project. But we need the new Class Agents identified before we can determine what GS-13 and GS-14 promotion files are part of the case. We will continue redacting and reviewing, with a rolling production to begin when the Class has identified the Class Agents and we agree on the time range for the 13s and 14s.

Please let me know if you have any questions or a need to discuss these items further. I will be in today and all next week as we prepare the March 15 JSR.

Thank you.

Sincerely,

Rolando Valdez

From: Bruce Elfvin <bruce@ekrtlaw.com>
Sent: Wednesday, February 20, 2019 3:05 PM
To: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>
Cc: Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>; George, Alyssa C - SOL <George.Alyssa.C@dol.gov>; Heleman, Beth S - SOL <Heleman.Beth.S@dol.gov>
Subject: RE: Tschappat v. Acosta (EEOC) - Postponement of Class Agent Deposition

Rolando,

I personally believed initially that all of the persons that DOL listed on the Notice Listing were class members. I did learn that the notice list had more than class members on the list. This has started the process of reducing the total numbers in the class with each pass. I assume that each person checking in on the webpage was a member of the class and beyond that I continue to refine the data and will send a new supplement on Friday. I do not wish to fence over who is listed as what at this point. I was nonetheless careful during the February 14, 2019 discussion with the AJ to describe the

names as those names gathered through the webpage.

Regards,

Bruce B. Elfvin

Elfvin, Klingshirn, Royer & Torch, LLC
4700 Rockside Road, Ste 530
Cleveland, OH 44131
Phone: 216.382.2500
Fax: 216.381.0250
Email: bruce@ekrtlaw.com

From: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>
Sent: Wednesday, February 20, 2019 2:47 PM
To: Bruce Elfvin <bruce@ekrtlaw.com>
Cc: Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>; George, Alyssa C - SOL <George.Alyssa.C@dol.gov>; Heleman, Beth S - SOL <Heleman.Beth.S@dol.gov>; Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>
Subject: Re: Tschappat v. Acosta (EEOC) - Postponement of Class Agent Deposition

Dear Bruce:

Thank you for informing Mr. Tschappat about the postponement of his deposition. I just remembered that his birthday is April 9 so perhaps he won't choose to be deposed on his 86th birthday.

The deficiency letter referenced below is the Agency's description of what was deficient about the Class Agent's December 11, 2018 responses. I am not sure what you mean by hoping that the letter will need great revision.

Finally, regarding the list of names you sent us on Monday, I looked back at the Joint Status Report that was filed on February 8. On page 7, you said this: **On January 29, 2019 Class Co-Counsel, with the Gilbert Employment Law group, filed a notice of withdrawal from representing the Class. Whether this is the way to accomplish withdrawal as Class Counsel, the remaining Class Counsel on February 4, 2019 has notified all class members that have checked in through the web page, 152 individual class members,** that co-Counsel has filed a Notice of Withdrawal and that may have an impact on the case.

From: [Valdez, Rolando - SOL](#)
To: [Bruce Elfvin](#)
Cc: [Heleman, Beth S - SOL](#); [Beason, Elizabeth L - SOL](#)
Subject: RE: Reply to Deficiency Letter
Date: Wednesday, April 3, 2019 5:06:00 PM
Importance: High

Dear Bruce:

Admittedly, I haven't given a close review to the letter that you sent to me a few moments ago, but I'm immediately struck by your "hope" to provide additional responses by Friday.

Based on the telephonic status conference that we had with the Administrative Judge on Monday, March 25, 2019, Judge Modu directed the Class to answer DOL's discovery by April 4, 2019, which is tomorrow. I'm not clear whether the letter you sent today is supposed to qualify as your objections and responses to DOL's November 11, 2018, discovery requests. Please clarify whether today's letter is the Class Agent's responses to DOL's discovery or whether you will provide other answers by tomorrow's deadline.

On another matter, as you may recall, Order No. 2 that was issued by Judge Modu on February 14, 2019, required you to identify class agents by March 15, 2019. You have failed to do so and you are now 19 days overdue. Rather than raise this issue again with Judge Modu, we ask that you provide this information no later than Monday, April 8, 2019. As we have told you several times before, DOL's document production and supplemental discovery responses depend on whether there are GS-13 class agents for the entire time period in the Class definition, as well as GS-14 class agents to cover May 31, 2009 to August 31, 2018, the period after Mr. Tschappat's retirement. As of right now, Mr. Tschappat is the only GS-14 class agent and he covers the period of 11/8/94 to 5/30/09.

I think both parties can make progress in discovery when you identify any new class agents. We will certainly want to depose them and we eagerly await your responses.

Sincerely,

Rolando Valdez

From: Bruce Elfvin <bruce@ekrtlaw.com>
Sent: Wednesday, April 3, 2019 4:31 PM
To: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>
Cc: Heleman, Beth S - SOL <Heleman.Beth.S@dol.gov>; Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>
Subject: Reply to Deficiency Letter

Rolando,

See the attached. It is my hope that some significant additional information as supplemental responses by Friday.

From: [Valdez, Rolando - SOL](#)
To: [Bruce Elfvin](#)
Cc: [Beason, Elizabeth L - SOL](#); [Heleman, Beth S - SOL](#); [Valdez, Rolando - SOL](#)
Subject: RE: Tschappat v. Acosta (EEOC) - Discovery
Date: Wednesday, April 10, 2019 4:26:00 PM

Dear Bruce:

A few things as follows. Please respond today regarding # 1

1 Last Wednesday, April 3, I sent you an e-mail asking about the class agents that have yet to be identified for all the GS-13 time period and for the 9+ years following Mr. Tschappat's retirement. I asked that you respond by Monday, April 8, 2019. You did not respond.

- At the February 14 prehearing conference, Judge Modu ordered you to "identify proper class agents" by March 15, 2019. That deadline passed 26 days ago.
- In the Motion to Stay that you filed on March 12, 2019, you stated that you talked with 8 to 10 class members about whether they would become class agents and that you were determining whether they would be class agents.
- In the letter to registered class members dated March 12, 2019, (Exhibit to the Motion to Stay), you stated that you've been hesitant to bring in class agents because they do not have easily discernible claims or may not be able to bear the expenses that might be entailed. Elsewhere in the letter you acknowledged the time periods for which there need to be class agents identified; that any conversations would be "attorney-client communications"; and "no one appear[ed] willing to come forward and joint the fight for this case."

So where does this issue stand? Will there be any additional class agents identified? If so, when will you provide DOL with that name/those names? This essential information impacts a lot about this case and it is disappointing that you have not responded to the AJ's order or to my follow-up queries.

2 Regarding deposition of the Class Agent, there is an e-mail chain dated February 20, 2019, when I asked you about three possible dates including April 16, but we did not decide on a specific date and we did not serve you with an Amended Notice of Deposition for Mr. Tschappat. So, no, there is no deposition scheduled for April 16. But, it is timely that you mention this because we are looking at our schedules to come up with a plan for deposing Mr. Tschappat, identified class members, and possible class agents. We will serve you with the appropriate notices when we decide our schedules.

3 I'm also not in the office on Friday, April 12, 2019. Although Judge Modu set the meet and confer deadline for April 12, of course we will discuss with you next week, before deciding if a motion to compel is even necessary before the April 22, 2019, deadline. I might have a window of time tomorrow afternoon for a discussion but Beth is taking a deposition tomorrow. I will see if Liz has any time open.

4 When we have our discussion, this is a list of the information that I'm interested in knowing. As I write this, I am looking at my February 21, 2019, letter to you and your April 3, 2019, letter to me. I know you have sent two "supplemental responses" to DOL but they appear to have attempted to address Interrogatory No. 1 only.

- Interrogatory No. 1. My February 21, 2019 letter did not challenge the January 25, 2019, response to Interrogatory No. 1 by the Class Agent.
- Interrogatory No. 2. This interrogatory asked for six items of information about each class member. **Does Class Counsel have this information to provide to the Agency? If not, when will it be ready for production?**
- Interrogatory No. 3. This interrogatory asked that if a class member believed she or he was more qualified for the promotion than the selected person, please explain the basis for such belief. You responded with something about your experience in these cases; it was doubtful that Class Counsel would do narrative interviews; and that any supplemental information would have to wait. **Does Class Counsel have this information, or any portion thereof, for production?**
- Interrogatory No. 4. This interrogatory is probably the most simple and straightforward and I'm not sure why you wrote all that you did and why this was difficult to understand or answer. **Interrogatory No. 4 asked if each class member was a member of the class of GS-12 employees who did not get GS-13 promotions; the class of GS-13 employees who did not get GS-14 promotions; or the class member is part of both GS-13 and GS-14 classes.**
- Interrogatory No. 5. This interrogatory simply asks for factual information about how and when a person came to be considered a class member. **Your letter response does not answer this question for any person with any specificity. The interrogatory specifically references contacts made via your Web site or e-mail or phone calls. This discovery was served on November 11, 2018. More than three months later, on February 19, 2019, you sent DOL a list of class members who registered through your Web site. I'm not saying that your response to this interrogatory No. 5 should be limited to that list of people because I am using this as an example to make a point. It seems that you should, at a minimum, be able to provide a narrative response with factual information about how those registered class members came to be considered class members. Notably, on page 5 of your letter, you stated "...there is very little which does not replicate or overlap the information from DOL on those individuals." I don't think you get to make that judgment without sharing your information or documents with DOL – or, at the very least, you need to provide a privilege log if you're asserting privileges. Judge Modu said this to you at our Feb 14, 2019, status conference.**
- Interrogatory No. 6. This interrogatory asked for information about each class member's belief about whether OSHA has a policy or practice of intentionally discriminating against promotion candidates older than 45, and if so to identify that policy or practice. **Again, Interrogatory 6 is pretty straightforward. It did not ask what theory of discrimination Class Counsel is advancing in this litigation; rather, the interrogatory is asking for information from and about the class members, and this response, like other responses, seems to deflect and raise red herrings as a substitute for responses or to stall this process.**
- Interrogatory No. 7. Again, very straightforward question. For the to-be-named GS-13 class agents, identify the vacancy announcement to which he/she applied and his/her age at time of the non-promotion. **Your response is simply not responsive. The interrogatory didn't ask what has Class Counsel done to determine if there are other class agents. In your March 12, 2015, motion to stay, you stated that you'd talk to 8-10 class members about being class agents. Either there or there aren't more class agents. I also question your raising the work product doctrine, but I don't have enough information about that. Needless to say, if you're withholding**

materials related to a privilege, a privilege log should be provided to DOL.

- Interrogatory 8. This interrogatory is asking what is the common employment practice affecting this class. This is pretty straightforward. What employment practice(s) binds this class together?
- Interrogatory 9. Again, very straightforward question. Each class member who has heard certain management officials make statements of bias or animus about age, should provide that information. **I cannot possibly know what you're referring to about Mr. Tschappat having made some statements "during the earlier period of this class case."** Also interesting that you will provide DOL with information from class member interviews
- Document Requests 1, 2, and 3. Self explanatory.
 - **Document Request 1: If you don't have documents, then amend your answers to state such. I don't know what to do with your statement that you do not have an independent repository of documents for this period nor do I know what period you're referencing. Is it September of 2018 to [sic] January 30, 2018 or are you referring to Instruction For Use # 1?the interrogatory**

We both know that it's not my place to tell anyone how to answer discovery requests. But, if you/your team don't have information, answers, or documents then please amend your discovery responses (using the actual requests and your prior answers) so that we have one document to present to the Judge, if necessary. I don't want to mischaracterize something in your six-page April 3, 2019, letter. Thank you.

Sincerely,

Rolando Valdez

From: Bruce Elfvin <bruce@ekrtlaw.com>

Sent: Wednesday, April 10, 2019 1:29 PM

To: Valdez, Rolando - SOL <Valdez.Rolando@dol.gov>

Cc: Beason, Elizabeth L - SOL <Beason.Elizabeth.L@DOL.GOV>; George, Alyssa C - SOL <George.Alyssa.C@dol.gov>; Heleman, Beth S - SOL <Heleman.Beth.S@dol.gov>

Subject: RE: Tschappat v. Acosta (EEOC) - Discovery

Rolando,

I am available by telephone to discuss discovery issues on Friday. Use 216.798.3806 as I will not be in Cleveland on Friday.

If you pick a time I will make myself available. I have been looking at the calendar and want to confirm that you wish to go forward with deposing Mr. Tschappat on April 16th in Lansing. If not we can pick dates on Friday.

We continue to work through the data and will send new updates sometime on Friday.

Regards,

From: [Valdez, Rolando - SOL](#)
To: [Bruce Elfvin](#)
Cc: [Beason, Elizabeth L - SOL](#); [Heleman, Beth S - SOL](#); [Valdez, Rolando - SOL](#)
Subject: Re: Discussion About Class Responses to Agency Discovery
Date: Thursday, April 11, 2019 8:28:11 AM

Dear Bruce:

When you say "I might not be available", are you saying you are not available? Do you want me to cancel the call for this afternoon at 3:30? In my message last Friday I asked you to identify a few dates when you're available. Please give me a few dates for next week because we all have busy schedules and though I try, I can't always change plans to meet your request with little advance notice.

Also, in my message I asked that you respond to my query about the **class agents**. As of now, the entire **GS-13 class lacks any representatives and GS-14 class lacks representatives for the last 9+ years**. Fact discovery ends July 1 and we have been asking for this information since last October. **What is the status of this?**

Sincerely,

Rolando Valdez

From: Bruce Elfvin <bruce@ekrtlaw.com>
Sent: Wednesday, April 10, 2019 9:00 PM
To: Valdez, Rolando - SOL
Subject: RE: Discussion About Class Responses to Agency Discovery

I looked at this again and I will be in transit on the 11th. I thought you were responding to my request for an April 12, 2019 call. I may not be available at this time for any extended discussion on April 11th.

Regards,

Bruce B. Elfvin

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