

On March 27, 2009, after the parties engaged in extensive discovery, I issued an order clarifying my decision to modify the class definition, ruling that supervisory employees were no longer a part of the Class for the period of time that they served as supervisors. The parties then continued to engage in discovery and filed prehearing statements and dispositive motions.

The litigation of this case was hard-fought and contentious at nearly every stage. The parties engaged in extensive liability-related discovery, which included numerous depositions, including multiple expert witnesses, the disclosure of extensive amounts of documents, and the exchange of expert reports.

Throughout litigation, the Agency denied any wrongdoing or liability. The Class and the Agency disagreed as to liability and relief, including the amount recoverable and the scope of injunctive relief if the Class prevailed.

On February 2, 2010, the parties began the administrative hearing regarding class-wide liability. Class Member and Management witnesses were called to testify. On February 12, 2010, after nearly eight years of litigation and after two weeks of hearing testimony, the Agency and the Class Agents reached an agreement in principle. The agreement in principle was the basis for the negotiations that led to the Settlement Agreement, which was finally executed on April 22, 2010. Upon review of the Settlement Agreement, I granted preliminary approval on April 29, 2010. There were no objections filed by any Class Members to the Settlement Agreement.

II. Provisions of Proposed Settlement Agreement

As Class Members have been provided a copy of the proposed Settlement Agreement, I will merely outline here its major provisions. The Settlement Agreement resolves the Class Complaint in exchange for both non-monetary and monetary relief for Class Members.

A. Non-Monetary Relief

Under the Settlement Agreement, McGuire VA Medical Center employees who believe they should be recognized for high quality accomplishments or contributions, may nominate themselves for awards for which they qualify. Employees may nominate themselves by completing the "Employee Self-Nomination for Incentive Award, Richmond VA Medical Center" form. The Self-Nomination form will be made available electronically and in the Office of Human Resources at the McGuire VA Medical Center. When completing a Self-Nomination form, an employee will include a description of his/her accomplishments or contributions and an explanation of their significance, as well as his/her name and telephone number. The employee shall not include suggestions for the type of award or the amount of money to be granted.

An employee must return the completed Self-Nomination form to his/her first-line supervisor and place a copy of the Self-Nomination form in the designated depository in the Human Resources Office for it to be considered. First-line supervisors will consider the Self-Nomination form in making awards recommendations in accordance with VA awards policies and practices. The Human Resources Office will provide to the McGuire VA Medical Center's Awards Panel copies of all bargaining unit employees' Self-Nomination forms on a quarterly

basis for review.

The Self-Nomination for Incentive Award will be made available to all employees at the Richmond VA Medical Center.

B. Monetary Relief

The Settlement Agreement also provides for monetary relief for Class Members. The total amount of monetary relief provided under the agreement is \$5 million. Of this, \$2.5 million is allocated to payment of attorney fees and costs. The total amount of money to be divided among Class Members is \$2,500,000. The money (including interest that may be accrued thereon) will be distributed to Class Members pursuant to a formula which is appended to the Settlement Agreement. The formula provides money to Class Members for failure to receive awards as would be expected based on the years served at the Richmond VA Medical Center in a non-supervisor position. Undistributed funds, including interest on the settlement fund, will be allocated to the remaining Class Members to the extent practicable. Allocation to Class Members will be based on the percentage of distributed funds to each claimant.

No Class Member may opt out of the Settlement Agreement; however, any Class Member may elect not to receive the monetary relief afforded under this Settlement Agreement.

Undistributed Class Member funds, including any monetary relief that is unclaimed or rejected, will be reallocated to the extent feasible to the participating Class Members pursuant to the Distribution Formula; in this way all of the money will be distributed, without any residual amount.

Pursuant to the Settlement Agreement, the Class Agents and their heirs, executors, administrators, successors and assigns unconditionally, irrevocably, fully and finally release, and forever discharge the Agency from any and all claims and causes of action that have been or could have been asserted by any reason of, or with respect to, or in connection with, or that arise out of, any of the matters alleged in this matter, including claims or causes of action that pertain to or relate to, or that are based upon or challenge of, race (Black) discrimination with regard to awards at the Richmond VA Medical Center, and including award programs, policies, plan, and practices of any kind at the Richmond VA Medical Center.

The effective date of the Settlement Agreement is the date after Final Approval is granted for the Settlement Agreement and the time for appeal has run without an appeal being filed or, if an appeal is filed, the final resolution of that appeal.

III. Fairness of Proposed Settlement Agreement

A. Standard

The standard for approval of the settlement agreement is whether the Administrative Judge finds that the agreement is “fair, adequate and reasonable to the Class as a whole.” 29

C.F.R. § 1614.204(g)(4).¹ As the Commission has held, “the judge’s primary task is to evaluate the terms of the settlement in relation to the strength of the complainant’s case.” *Modlin v. Barnhart*, EEOC No. 01A24054 (2003)

B. No Objections to the Settlement Agreement

In accordance with EEOC regulations, the Notice of Settlement was issued to each known Class Member in May 2010. A copy of the Settlement Agreement was attached to the Notice. The Notice stated, among other matters, that any objections to the settlement must be submitted to the Administrative Judge, in writing, postmarked within 35 days of the date of notice. I received no written objections by any Class Members.

On June 23, 2010, I held a Fairness Hearing for the parties to present the case for approval of the agreement. Class Counsel and Agency Counsel made statements regarding the agreement. Even though the time for filing written objections had passed, no Class Members raised any objections at the Fairness Hearing.

In assessing the Settlement Agreement and the Distribution Formula, the focus must remain on whether the proposed settlement is fair, adequate and reasonable to the class as a whole. 29 C.F.R. §1614.204(g).² The distribution methodology employed by the litigants in the Settlement Agreement is sufficient if its terms, when applied to the entire group of individuals represented, appear reasonable. *EEOC v. McDonnell Douglas Corp.*, 894 F.Supp. 1329, 1335 (E.D. Mo. 1995); *see also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985), *cert denied*, 478 U.S. 1004 (1986) (“the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution after trial”).

C. Fairness of the settlement

1. *Procedural requirements have been satisfied.*

There were no Class Member objections received regarding the procedural fairness of the Settlement Agreement. Based on my review of the procedural history of the settlement negotiations between the parties, the drafting of the Settlement Agreement and its attachments, the terms of the Settlement Agreement, the provisions for administration of the settlement,

¹ The EEOC regulation is based on Rule 23 of the Federal Rules of Civil Procedure. Rule 23(e), Fed.R.Civ.P., states that no class action may be dismissed, settled or compromised without the approval of the court. Before giving its approval, the court must provide adequate notice to all members of the class, conduct a fairness hearing and find, after notice and hearing, that the “settlement is fair, adequate and reasonable and is not the product of collusion between the parties.” *Thomas v. Albright*, 139 F.3d 222, 231 (D.C. Cir. 1998).

² Neither the EEOC Regulations nor the Management Directive for 29 C.F.R. Part 1614 (EEOC-MD-110), as revised, November 9, 1999, set forth specific factors to be considered in determining whether the agreement is “fair, adequate and reasonable to the Class as a whole.” To the extent that factors enumerated in EEOC class action decisions (e.g., *Modlin v. Barnhart*, EEOC Appeal No. 01A24054 (2003)) are relevant to the determination of whether this settlement is fair, adequate and reasonable, I have considered those factors in this Decision.

issuance of the Settlement Agreement to Class Members, publication of the Settlement Agreement, and the approval process of the agreement, I find that the Settlement Agreement satisfies all procedural requirements, including the notice requirements set forth in 29 C.F.R. 1614.204(g)(4).

2. *The settlement fund represents an adequate sum in compromise for the Class Claims.*

In assessing the substantive fairness of the Settlement Agreement, I may consider the likely recovery of the Class had the case proceeded to a decision on the merits.³ If the case had proceeded to a decision on the merits, the Class would initially have been required to prove that the Agency was liable for discrimination against the Class as a whole. Success for the Class in this case is anything but certain. While the Class presented evidence that it believes supports an inference of discrimination, the Agency has countervailing evidence. The Agency disputes the Class's statistical evidence, and has designated experts to testify against the Class's view of the statistical evidence. Moreover, the Agency asserts that it acted appropriately, without discrimination. In sum, proceeding to a hearing on class-wide liability was potentially risky for the Class.

Even if liability were established, the government would almost certainly appeal, causing additional delay, even as long as several years. After the appeals were decided, and assuming a finding of liability would have been upheld, the case would have likely proceeded to Stage II hearings, in which individual relief hearings would be held for each Class Member. With hundreds of Class Members, the case would have extended for years. The cost of future litigation for the Class would likely eclipse the current amount of attorneys fees, expert costs, and expenses in the case. The benefit of recovery now as opposed to many years down the road—or not at all—is a significant consideration in opting to settle now.

Significantly, the parties vigorously dispute the likely range of monetary recovery in this case. Indeed, the Agency asserts that, even if class-wide liability is proven, monetary relief to class members might be limited to a fraction of the settlement amount. The record demonstrates that Class counsel vigorously negotiated for the greatest monetary recovery possible for the Class.

No objections were raised concerning the \$2,500,000 of the monetary relief allocated to Class Counsel for attorney fees and costs.⁴ In light of the fact that no objections were raised on this point, having heard the presentation by Class Counsel, and given the obvious effort and expense that has gone into resolving this case and the substantial risk on non-payment or delayed payment undertaken by Class Counsel, I find that the allocation of \$2,500,000 of the monetary

³ Some courts have stated this is the most important factor to consider. See, e.g., *Thomas v. Albright*, *supra*; *Isby v. Bayh*, 75 F.3d 1191 (7th Cir. 1996); and *Maywalt v. Parker and Parsley Petroleum Co.*, 67 F.3d 1072 (2nd Cir. 1995).

⁴ I am aware that other counsel participated in this case prior to my certification order of October 2005. However, Kator, Parks & Weiser was the only firm approved as Class Counsel in this case. No submission has been made before me by any other counsel related to attorneys fees. I find that the provision of attorneys fees and costs to Class Counsel in this settlement agreement is reasonable, and is the full and complete award of attorneys fees and costs in this matter.

award to Class Counsel for attorney fees and costs, including the costs of expert witnesses, is fair and reasonable. Moreover, I find that the \$2,500,000 remaining to be distributed to the Class is within the range of reasonableness and that it is fair to the Class as a whole.

I therefore find that the amount of the settlement fund is fair, adequate, and reasonable in compromise of the Class Claims.

3. *The non-monetary relief is fair and reasonable*

The non-monetary relief incorporated into the Settlement Agreement establishes a “self-nomination” process for employee awards. This new “self-nomination” process is open to all employees. One of the Class’s contentions is that supervisors with excessive discretion have a controlling influence over the employee awards process. The “self-nomination” process allows the employees at the Richmond VA Medical Center to bypass their direct supervisors in order to have an award nomination considered.

The settlement provides for substantial monetary relief to Class Members for past failures to receive employee awards. The non-monetary relief in the form of a “self-nomination” awards process, in addition to the existing awards process, provides for future relief to Class Members. I find that this is fair, adequate and reasonable under all of the circumstances, including the evidentiary dispute between the parties.

D. The proposed settlement was fairly and honestly negotiated

There is no indication of collusion between the parties in reaching this proposed Settlement Agreement. I have presided over this matter for several years, and I have personally observed both parties continuously, vigorously, and relentlessly advocate their respective positions throughout the proceedings. I presided over two weeks of hearing testimony before the parties reached a settlement in principle.

Both parties devoted substantial resources to the prosecution and defense of the case. Class Counsel expended substantial funds, attorney hours, and litigation support staff time in furtherance of the prosecution of the claim. The Agency also staffed the case with considerable resources.

The parties filed numerous motions, responses, and replies to assorted discovery and substantive issues. There were many in-person hearings and telephonic conferences wherein the parties argued their respective positions in relation to various issues and/or motions. The parties also engaged in voluminous discovery. The parties engaged in mediation prior to the start of the administrative hearing, and the mediation was conducted by a renowned private mediator.

I conclude that Class Counsel and Agency counsel engaged in zealous advocacy in support of their respective positions. For the foregoing reasons, I find that each party vigorously represented the interests of its respective constituency throughout the process and that the Settlement Agreement was fairly and honestly negotiated.

IV. Other issues

As to other possible factors: I find that Class Counsel is experienced in the area of employment discrimination class actions, and Class Counsel's strong recommendation in support of this proposed settlement merits favorable consideration. In addition, I find that Class Counsel had conducted sufficient discovery in the case in order to obtain a reasonable vantage point from which to assess the relative strengths and weaknesses of the parties' positions, and thus fairly assess the range of reasonable settlements.

V. Decision

For the foregoing reasons, I find that the Settlement Agreement is fair, adequate and reasonable to the Class as a whole. I find it significant that no Class Members voiced any objection to the settlement. The relief obtained for the Class is substantial and, in terms of non-monetary and monetary relief, is greater than what might have been obtained had the Class prevailed at a hearing.

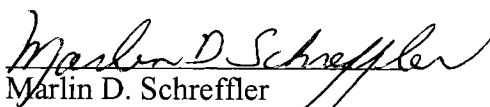
Accordingly, it is **ORDERED** that the Settlement Agreement is hereby **APPROVED AND SHALL PURSUANT TO 29 C.F.R. §1614.204(g)(4) BIND ALL MEMBERS OF THE CLASS.**

NOTICE

It is hereby **ORDERED** that all Class Member claims for relief must be submitted to the Claims Administrator **within 45 days** of the date of this Order.

This is an **ORDER** by an Equal Employment Opportunity Commission Administrative Judge pursuant to 29 C.F.R. §1614.204(g)(4). Pursuant to 29 C.F.R. §§1614.401(c) and 1614.402(a), if you filed a written objection to the Settlement Agreement (or a petition to vacate the Settlement Agreement), and if you wish to appeal my decision on your objection (or petition), you must file an appeal to the Equal Employment Opportunity Commission within 30 days of receipt of this Order. You should use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached. A copy of this Decision should be attached to the appeal. You must provide a copy of your appeal to Class Counsel and to counsel for the Agency at the same time that you file your appeal with the Commission, and you must certify in your appeal to the Commission the date and method by which you provided copies of your appeal to Class Counsel and counsel for the Agency. All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address: Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, Fax No. 202/663-7022. Facsimile transmissions over 10 pages will not be accepted. Additional information regarding EEOC appeal procedures may be found at 29 C.F.R. §§1614.401-405.

July 15, 2010
Date


Marlin D. Schreffler
Administrative Judge

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE

ANNIEMARIE HARRISON-GRAY
and BEVERLY HATCHER,
Class Agents,

v.

ERIC K. SHINSEKI, Secretary,
U.S. Department of Veterans Affairs,
Agency.

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) EEOC Hearing No. 120-2003-00508X
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) Agency Case No. 2004-0652-2002103851
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ORDER

The Agency is hereby ORDERED to serve a copy of the Decision Granting Final Approval of Settlement Agreement, including the Notice, EEOC Form 573 and EEOC appeal regulations, on each Class Member.

It is hereby ORDERED that all Class Member claims for relief must be submitted to the Claims Administrator **within 45 days** of the date of this Order.

It is so ORDERED.

July 15, 2010
Date

Marlin D. Schreffler
Marlin D. Schreffler
Administrative Judge