



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

Gilbert M. Jefferson,
Ken A. Burden,
Harry M. Dunbar, et al.,
Complainants,

v.

Michael J. Astrue,
Commissioner,
Social Security Administration,
Agency.

Appeal Nos. 0120081816, 0120081817, 0120081818

Hearing No. 120-99-6378X¹

DECISION

Complainants filed appeals with this Commission concerning their claim that the Agency failed to comply with the terms of the April 7, 2003 class settlement agreement into which the parties entered. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405. For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

Complainants, acting as class agents, filed a class complaint dated November 9, 1995, alleging that the Agency discriminated against African-American males employed at the Agency's Headquarters Office in Baltimore, Maryland in regard to promotions, awards, bonuses, performance appraisals, and disciplinary actions. The class complaint was forwarded to an EEOC Administrative Judge (AJ) to issue a decision on certification.

On April 8, 1997, the AJ issued a decision recommending certification of the class complaint. On May 8, 1997, the Agency issued a final decision rejecting the AJ's recommendation and dismissing the class complaint for failure to meet the regulatory requirements for certification.

¹ Originally this class complaint was given three EEOC Hearing Numbers 120-99-6378X, 120-99-6379X, and 120-99-6380X; however, the cases were consolidated under Hearing No. 120-99-6378X.

Complainants appealed the Agency's final decision to the Commission. In EEOC Appeal Nos. 01975435, 01975436, 01975437 (July 8, 1998) the Commission found Complainants satisfied the prerequisites for class certification and found dismissal of the class complaint was not proper. The certified class was defined as all African-American male employees employed at the Agency's Headquarters Office, who on or after June 23, 1995, were not selected or promoted, or who were otherwise subjected to disparate treatment in regard to performance appraisals, awards, bonuses, and disciplinary actions.

Thereafter, the Agency filed a request for reconsideration asking the Commission to reconsider its decision granting certification. In EEOC Request Nos. 05981075, 05981076, 05981077 (January 22, 1999) the Commission determined the Agency's request for reconsideration was untimely filed and denied the request. The case was remanded for further processing.

After remand, the parties engaged in discovery. On November 28, 2000, the AJ clarified that Headquarters employees included those in the Woodlawn Complex, Security West, and Metro West and excluded employees in the Office of Hearings and Appeals and employees in field offices in the Baltimore facility. The class was expanded to include those who worked at Agency Headquarters on or after January 1987.

On January 11, 2002, the parties signed a class settlement agreement. The AJ granted preliminary approval of the agreement on February 22, 2002. On March 1, 2002 Notice of Settlement of Class Action, Hearing on Proposed Settlement, and Right to Share in Settlement Fund (Notice of Settlement) was issued to class members. The Notice of Settlement advised that any objections to the settlement must be submitted to the AJ in writing, postmarked by April 5, 2002. Comments, objections, and evidence were received by the AJ. On May 3, 2002, a hearing was held on the fairness of the settlement agreement. On June 11, 2002, the AJ found the settlement agreement was fair, adequate and reasonable to the class as a whole. The AJ noted the class comprised approximately 2,200 class members. The date of final approval of the settlement agreement was April 7, 2003.

The settlement agreement provided, in pertinent part, that:

I. Definitions

D. Class Member(s), Class

As defined by the Administrative Judge, the Class consists of all African American males employed at [Agency's] Headquarters Office in Baltimore, Maryland, who, on or after January 1, 1987, were not selected or promoted, or were otherwise subjected to disparate treatment in regard to performance appraisals, awards and bonuses, and disciplinary action.

II. Scope of the Settlement Agreement

C. The Administrative Judge shall retain jurisdiction over this matter for a period of 4 years after the Effective Date of the Settlement Agreement for purposes of monitoring and ensuring compliance with the Settlement Agreement.

III. Non-Monetary Relief

A. The parties will establish an Oversight Committee comprised of seven members. . . . The Oversight Committee shall remain in existence during the 4 years that the Administrative Judge retains jurisdiction over this complaint. . . . The duties of the Oversight Committee will be to provide oversight and monitoring of the implementation of this Settlement Agreement. In carrying out its duties, the Oversight Committee may, among other things, review data provided by the Agency to monitor trends in the Agency's personnel policies and practices.

.....

D. The Agency agrees that its policies and practices for granting performance awards and Quality Step Increases will be fair and equitable and are consistent with merit principles. The Agency agrees that it will correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles. At the Agency's discretion, an expert may be retained to recommend ways to assess these policies and practices and to ensure compliance with relevant statutes, regulations, EEO principles, and applicable collective bargaining agreements in the Agency's award process. Any corrections the Agency implements will be made after providing a 30-day notice and comment period to the Oversight Committee. The Agency will provide a report to the Administrative Judge within 6 months of the Effective Date of this agreement of the actions it has taken to comply with this paragraph. The Agency may submit a supplemental report every 6 months, as needed.

.....

- H. The Agency will collect data and compile such reports as the Oversight Committee might reasonably require to fulfill its role of monitoring the Agency's compliance with the Settlement Agreement. These reports will include, but not necessarily be limited to, the following:

.....

2. quarterly reports of monetary awards, including Quality Step Increases, given to [Agency] Headquarters employees, broken down by component and the demographic characteristics of the employees receiving such awards.
- I. The Oversight Committee may request the services of an expert to analyze or interpret the data or reports. To the extent possible, the Agency will provide in-house statistical and economical analyses for this purpose. The Administrative Judge may direct the Agency to retain an expert or experts in the event the Agency is unable to provide the required expert analysis or does not do so within a reasonable time. The Agency will appoint and pay for the expert. Generally, the Agency will have the discretion to appoint an expert of its choice. Any dispute concerning the selection of the expert will be submitted to the Administrative Judge for resolution.

IV. Monetary Relief

- A. The Agency will pay to the Class the total sum of six million, three hundred and fifty thousand dollars (\$6,350,000), in full, complete and final satisfaction of all claims, including interest, arising out of the Class Agents' allegations of discrimination in employment practices as described in the Settlement Agreement, but excluding attorney fees, expenses and costs.
- B. Class Counsel has devised a formula for distributing the proceeds of this settlement. Six million, three hundred and fifty thousand dollars (\$6,350,000) will be paid by the Agency in accordance with the Formula attached as Appendix A.²

² The Formula for Distribution of the settlement funds shows \$2,300,000 will be paid to class members for awards and Quality Step Increases.

V. Compliance

Either party may bring an application before the Administrative Judge if it believes that the other party has not complied with its or their obligations under the Settlement Agreement pursuant to 29 C.F.R. § 1614.504. As contemplated in the regulatory section cited above, prior to bringing any non-compliance matter to the Administrative Judge, the complaining party must notify the other party and meet and confer in a good faith effort to resolve the conflict. The Agency shall be responsible for payment of any attorney's fees and expenses, as proven by current documentation, incurred by Class Counsel in the event the Administrative Judge concludes that the Agency has failed to comply with the terms of the Settlement Agreement.

The record reveals that the Agency provided quarterly reports to the Oversight Committee from April 2003, through September 2004, in accordance with the terms of the settlement agreement. On November 10, 2004, the Oversight Committee requested that the Agency designate an expert to conduct an analysis of the data collected, with special focus on four Deputy Commissioner Components, including: (1) Deputy Commissioner, Disability and Income Security Programs (DCDISP); (2) Deputy Commissioner, Finance, Assessment and Management (DCFAM); (3) Deputy Commissioner, Systems (DCS); and (4) Deputy Commissioner, Operations (DCO). Class Brief In Support Of Appeal (Class Brief), Exhibit 4, November 10, 2004 electronic mail message. The Oversight Committee requested an analysis of whether there are statistically significant conclusions that can be drawn with respect to promotions, temporary promotions, awards, performance appraisals, Quality Step Increases (QSIs), disciplinary actions, and training of Black males as compared to other employees in these four components. The Oversight Committee requested the Agency inform it within 10 days of its choice of expert, including the availability and qualifications of the expert. *Id.* On November 22, 2004, the Oversight Committee renewed its request for an expert analysis.

The record contains Oversight Committee Meeting Minutes noting that the Chairman of the Oversight Committee stated that when the Deputy Commissioner for Human Resources met with the Oversight Committee on December 10, 2004, the Deputy Commissioner for Human Resources stated he is considering Expert 1 to conduct the requisite statistical analysis. Class Brief, Exhibit 6.

On December 13, 2004, the Agency responded to the Oversight Committee's request for a statistician, noting the Agency is working to ensure that the best person is recommended. Class Brief, Exhibit 7, December 13, 2004 electronic mail message.

On December 21, 2004, the Oversight Committee forwarded suggestions regarding the Agency's efforts to identify a statistician to provide analysis of the relevant data. Class Brief, Exhibit 8, December 21, 2004 electronic mail message. Specifically, the Committee

recommended that whoever is chosen should be able to understand and possibly recreate the statistical models that were used by the Agency and class complainants when presentations were made leading to settlement of this issue. Id.

In January 2005, the class moved for enforcement of the settlement agreement requirement that the Agency retain an expert to conduct the analysis. On January 28, 2005, the Agency informed the Oversight Committee that it had selected Expert 1 as statistician for the project. The Agency shared a brief summary of Expert 1's educational credentials and work history with the Committee. Agency's Response To Class' Brief On Appeal (Agency Brief), Exhibit B, January 28, 2005 electronic mail message; Affidavit of Person X (Associate Commissioner for the Office of Civil Rights and Equal Opportunity) at 2. Thereafter, the parties discussed dates to meet with the statistician and the Agency arranged for the Oversight Committee to meet with Expert 1 on February 16, 2005. Agency Brief, Exhibit B, Affidavit Person X at 3.

On June 13, 2005, Complainants filed a renewed class motion for compliance with the settlement agreement. The Agency objected to the class motion.

On June 29, 2005, Person X advised the Oversight Committee that it was discovered during Expert 1's June 24, 2005 presentation on data provided to the Oversight Committee that Expert 1 did not include data on the Associate Commissioner (AC) level for certain Deputy Commissioners (DC). Agency Brief, Exhibit B, June 29, 2005 electronic mail message. In response to the Committee's request that the analysis include the data at the AC level, Person X noted that the AC data is being converted for Expert 1 to use and that the report should be completed by the end of July. Id.

On August 1, 2005, the Oversight Committee complained that Expert 1 had not satisfied the Committee's requirements for a statistical analysis. Agency Brief, Exhibit B, August 1, 2005 electronic mail message. The Oversight Committee requested that an analysis be performed by an economic and/or statistical expert. Id.

On August 3, 2005, the Agency provided Expert 1's report and analysis to the Oversight Committee. Agency Brief, Exhibit B, August 3, 2005 electronic mail message. The Agency advised that Expert 1 is prepared to meet with the Oversight Committee and discuss the report on August 5, 2005.

Thereafter on August 5, 2005, the Chair of the Oversight Committee acknowledged meeting with Expert 1 and receiving his report on August 5, 2005. Agency Brief, Exhibit B, August 5, 2005 electronic mail message. The Chair of the Oversight Committee stated the expert was asked a few follow-up questions, which he agreed to answer. The Chair of the Oversight Committee noted that assuming the expert can answer the questions in a timely basis, they would hold in abeyance the request for an outside contractor, pending the results. Id.

On August 20, 2005, the Agency provided additional information to the Oversight Committee in response to their request to Expert 1. Agency Brief, Exhibit B, August 20, 2005 electronic mail message. This additional information included a chart entitled Actual and Expected Tabulations for Trigger Areas. Id.

On August 26, 2005, the class informed the Agency that it would like to meet concerning “the Agency’s failure to ensure that its policies and practices for granting performance awards and Quality Step Increases are fair and equitable and consistent with merit principles.” Agency Brief, Exhibit B, August 26, 2005 electronic mail message. Moreover, the class stated it was “concerned that the Agency has not met its obligation to correct any misapplications of its policies for granting performance awards and Quality Step Increases.” Id.

In September 2005, the Agency advised Complainants that Expert 1’s analysis appeared to have excluded from consideration several significant factors, including the fact that wage grade employees are ineligible for QSIs. Affidavit Person X at 3. The Agency agreed to hire another expert to perform a more thorough analysis. Specifically, the Agency stated that it contacted Expert 2, the expert used during the litigation phase of the case. Agency Brief, Exhibit B, September 23, 2005 electronic mail message.

In October 2005, the Agency advised it was reviewing the report data and performing further analysis in the areas of QSIs and honor awards. Agency Brief, Exhibit B, October 26, 2005 electronic mail message. The Agency invited the Oversight Committee to share its thoughts regarding the report. The Agency also noted that it was working with the Office of the General Counsel and the Office of Acquisition Grants to secure the services of an outside statistical expert. Id.

Thereafter, the Agency hired Expert 2 in January 2006 to perform a statistical analysis of its human resources to analyze trends in these areas. On January 24, 2006, the Agency sent Expert 2’s Employee Study Assumptions and the Justification and Statement of Work to the Oversight Committee. Agency Brief, Exhibit B, January 24, 2006 electronic mail message. The Agency invited the Oversight Committee to provide feedback.

On February 10, 2006, the Oversight Committee informed the Agency of its concerns with Expert 2’s list of assumptions. Agency Brief, Exhibit B, February 10, 2006 electronic mail message. The Oversight Committee objected to the contractor’s use of “step group” in the definition of cohorts. Id. On February 17, 2006, the Agency advised that it was considering the Committee’s response to the list of assumptions. Agency Brief, Exhibit B, February 17, 2006 electronic mail message.

On March 3, 2006, the Agency responded to the Oversight Committee’s comments concerning the parameters of the statistical study. The Agency noted that the use of cohorts when analyzing large amounts of personnel data is a statistically-viable mechanism. Agency Brief, Exhibit B, March 3, 2006 electronic mail message. The Agency agreed that step would not be

used as a factor to create cohorts. Id. The Agency also responded to the Oversight Committee's request that it provide specific data concerning complaints filed by class members since the date of the settlement agreement. The Agency noted that on December 16, 2005, the Oversight Committee was provided a chart with the total complaints filed by class members for fiscal years 2003 through 2005, showing the total complaints by fiscal year and the nature of the complaints. The Agency stated it does not have ability to generate reports on complaints filed by components and also stated that it would not provide the names of individuals who have filed complaints of discrimination. Id.

On March 29, 2006, the Oversight Committee informed the Agency that it still did not agree with the use of cohorts; however, it suggested the Agency move forward and release the contractor to begin work. Agency Brief, Exhibit B, March 29, 2006 electronic mail message.

On April 17, 2006, the Chairman of the Oversight Committee sent the Commissioner a memorandum requesting her "assistance in fulfilling [the Committee's] role of monitoring the Agency's compliance with the Settlement Agreement." Agency Brief, Exhibit B, Chairman's Memorandum. The Oversight Committee referenced the Agency's delay in providing a statistical analysis of the Agency's employment data from April 2003 through September 2004 and October 2004 through December 2005. The Oversight Committee also noted that the Agency had not provided requested data on complaints of discrimination filed by class members since the date of the settlement. Id.

On May 10, 2006, the Agency sent the Oversight Committee files containing the statistical findings for promotions, temporary promotions, QSIs, demotions, suspensions, and removals for the period of April 2003 - September 2005. Agency Brief, Exhibit B, May 10, 2006 electronic mail message. The Agency noted that a written report analyzing all of the findings would be prepared by the statistical contractor next week.

On June 9, 2006, Complainants filed with the AJ a Class Response to Oversight Committee Request for Compliance with Settlement Agreement and Class Motion for Enforcement (Motion for Enforcement), alleging that the Agency failed to complete a statistical analysis as provided for in the Settlement Agreement in Section III(I). Agency Brief, Exhibit A. Complainants noted that the Agency did not designate an "expert" until after their January 2005 motion for compliance. Complainants noted that Expert 1 did not provide his analysis to the Oversight Committee until August 2005, which was nearly a year after the Committee's request. Complainants stated that after they reviewed the initial report, they requested clarification of the report. They stated that Expert 1 then provided a revised report showing some statistically significant problems in the Agency's personnel practices relating to African-American males. Complainants stated that at that point the Oversight Committee requested the Agency submit a corrective action plan which they state has not been done. Instead, Complainants noted that in January 2006, the Agency retained an outside expert to perform additional analysis of the data. Complainants noted that despite the Agency providing several charts of data purportedly reflecting the results of the outside expert's analysis, the Agency has

not provided a written report analyzing the findings. Complainants requested the Agency be ordered to complete the analysis within ten days. Additionally, Complainants requested an extension of the monitoring period by the AJ for an additional 18 months as a sanction against the Agency due to its failure to timely provide the statistical analysis. Id.

On June 26, 2006, the Agency submitted its Agency's Motion to Dismiss or, in the alternative, Agency's Opposition to Class Motion for Enforcement of Settlement Agreement (Agency's Opposition). Agency Brief, Exhibit B. The Agency argued that Complainants did not comply with the settlement agreement's requirements that they contact the Agency before filing a compliance action and thus, requested the Motion be dismissed. Specifically, the Agency states it was deprived of the 35-day time period established by 29 C.F.R. § 1614.504(b) to resolve the settlement implementation issues identified in the Motion. Id.

Alternatively, the Agency stated it has acted in good faith to satisfy its obligations under the settlement agreement. Specifically, the Agency noted that on May 10, 2006, it released the contract statistician's findings to the Oversight Committee and class counsel. Id. The Agency noted it invited the Oversight Committee to request a meeting with the statistician after it analyzed the findings and further advised that the statistician was working to complete the report to accompany his findings. The Agency noted that release of the redacted files has been delayed due to the statistician's failure to eliminate consideration of the Wage Grade and step 10 employees from his analysis of awards and to separate QSI data from other cash awards. The Agency stated that it intends to release the contractor's report on his statistical analysis to the Oversight Committee no later than July 24, 2006. The Agency stated that with the exception of the period from March 2005, through May 2005, when the Oversight Committee was considering whether to "approve" the Agency's selection of Expert 1, it continually made efforts to satisfy the Committee's demands for statistical analyses and reports. Finally, the Agency argues assuming arguendo there is a breach, the Commission lacks authority to extend its jurisdiction over the settlement agreement. Rather, the Agency notes that the AJ's authority to monitor the settlement does not expire until April 3, 2007, and claims that if the statistical analysis is provided by July 24, 2006, there is ample time for the AJ to monitor compliance.

Complainants filed their Class Reply to Agency's Opposition to Class Motion for Enforcement of Settlement Agreement and Opposition to Motion to Dismiss on July 6, 2006. Agency Brief, Exhibit C. In response to the Agency's claim that the class deprived it of the 35-day time frame to correct its actions prior to filing a motion for enforcement, the class stated that the Agency had more than ample notice of the class' dissatisfaction with the Agency's delays in completing the expert analysis. Specifically, Complainants noted they filed two prior motions on June 13, 2005, and January 13, 2005, with respect to the Agency's failure to comply with the statistical analysis requirements. Additionally, Complainants stated that they have had multiple discussions during Oversight Committee meetings, teleconferences, meetings with the Agency's Commissioner, and electronic mail correspondence regarding the Agency's delay in completing the analysis. Moreover, Complainants stated the Agency has had nearly 35 days since the class filed its June 9, 2006 motion and it still has not cured its breach.

Additionally, Complainants argued the Agency has offered no legitimate explanation for its 18 month delay in completing the expert analysis. With regard to the Agency's attempt to blame the delay on the Oversight Committee, Complainants claimed that the Agency was responsible for wasting Expert 1's time and efforts by not supplying him with the proper data. With regard to the Agency's statement that in September 2005 it realized additional expert analysis was needed, Complainants noted it took the Agency more than three months to provide the new expert's study assumptions to the Oversight Committee. Moreover, Complainants stated that although the new expert was assigned in January 2006, a report had still not been provided. Furthermore, Complainants stated that Expert 2 failed to eliminate consideration of wage grade and step 10 employees from the analysis of awards and thus, committed the same error that Expert 1 committed. Finally, Complainants renewed their requests for the Agency to provide EEO data to the Oversight Committee regarding race and sex discrimination complaints.

The record reveals that on July 13, 2006, the Agency provided a statistical analysis, entitled "A Study of the Treatment of African American Males Since 2003 At the Social Security Administration Headquarters in Baltimore, Maryland," (hereinafter July 2006 Analysis) which was the subject of the class' June 9, 2006 Motion.

In July 2006, the Commissioner met with class counsel and members of the Oversight Committee regarding the implementation of the settlement agreement. The Commissioner agreed to give her reaction to the report of Expert 2 by September 8, 2006. At this time, the class requested its June 9, 2006 Motion for Enforcement be held in abeyance until September 8, 2006. See Agency Brief, Exhibit B, July 15, 2006 electronic mail message.

On September 8, 2006, the Commissioner commented on the results of the statistical analysis performed by Expert 2. The Commissioner identified that in most Deputy Commissioner (DC)-level components, no statistically significant imbalances existed for African-American males relative to promotions, training, incentive awards, and disciplinary actions. Class Brief, Exhibit 3. The Commissioner claimed these results confirm that the Agency's efforts to provide equal opportunities for all employees are being realized. Id.

However, the Commissioner acknowledged some of the findings showed underrepresentation of class members in a few categories. Specifically, the Commissioner characterized the study as noting that three of the 15 DC-level components showed that African-American males were underrepresented when compared to their peers: QSIs in the Office of Budget, Finance and Management (OBFM); cash awards in the Office of Communications; and QSIs, cash awards, and honor awards in the Office of Operations. Class Brief, Exhibit 3.

The Commissioner detailed the Agency's plan to take actions to address the areas of concern identified in the study, including holding meetings with the appropriate DCs (Deputy Commissioners) and ACs (Associate Commissioners) regarding the areas of concern, the October 2006 implementation of a new performance management system, and the

implementation of a new employee awards program to clarify performance expectations and provide a better assessment tool for making determinations about performance awards, honor awards, and QSIs.

On March 27, 2007, Complainants requested the AJ rule on their motion for compliance with the settlement agreement. Class Brief, Exhibit 16. Complainants noted they had requested the motion be held in abeyance pending their discussions with the Agency and had hoped that the Agency would submit a corrective action plan to remediate the disparities noted in the expert's analysis of the statistical data. While Complainants acknowledged the Agency responded on September 8, 2006, and proposed a plan aimed to prevent future disparities, they claimed the Agency had not resolved all of the concerns they raised regarding the Agency's compliance with the settlement agreement. Specifically, Complainants stated that although the Agency's expert has found disparate distribution of QSIs by race and sex since the implementation of the agreement, the Agency has not proposed a plan to remediate this disparity.

The Agency Response to Class Motion for Enforcement was filed on April 3, 2007. In its Response, the Agency noted it has provided the Oversight Committee with the statistical data and report requested in July 2006, and argued that the class motion is thus moot. Agency Brief, Exhibit D. The Agency noted that on July 31, 2006, class counsel requested the class motion be held in abeyance until September 8, 2006, and class counsel stated she would notify the AJ on September 11, 2006, if the class intended to proceed with this action. The Agency states that due to the class's failure to serve such notice, the class motion should be deemed waived. Moreover, the Agency recognizes the class' failure to act in the time from the Commissioner's September 8, 2006 letter until the class' March 27, 2007 letter. Id.

Meanwhile, on July 23, 2007, Complainant 1, Complainant 2, and Complainant 3 (not the Complainants listed in the caption of this instant appeal) requested their individual complaints of discrimination be converted into a class complaint and that they be listed as class agents. Specifically, they alleged that the Agency has discriminated on the bases of race and sex against a class of African-American males, excluding those in the Senior Executive Service, at the Agency's headquarters since April 7, 2003, until the present with respect to promotions and the distribution of monetary and non-monetary awards. Class Brief, Exhibit 10.

On September 6, 2007, the Agency forwarded the consolidated complaint files of the class complaint filed by Complainant 1 (OCO-07-0377-SSA), Complainant 2 (HQ-07-0333-SSA), and Complainant 3 (HQ-07-2105-SSA) to the EEOC's Baltimore District Office. Class Brief, Exhibit 11.

An EEOC AJ issued an Acknowledgment and Order for Class Certification on November 9, 2007, for Agency Nos. OCO-07-0377-SSA, HQ-7-0333-SSA, HQ-07-2105-SSA (Hearing No. 551-2008-00034X). Class Brief, Exhibit 12. Subsequently, on March 11, 2008, the AJ issued an Order to Stay Certification Proceedings In the Certification of Esset Tate, Kirk Wilkerson, Maceo Nesmith v. Social Security Administration, Hearing No. 551-2008-00034X, until the

Office of Federal Operations decides the appeal in Burden, et al. v. Social Security Administration, EEOC Hearing No. 120-99-6378X. Class Brief, Exhibit 14.

Regarding the instant class settlement agreement, on February 5, 2008, the AJ issued an Order Denying Class Motion for Enforcement of Settlement Agreement denying the class June 9, 2006 Motion. The AJ determined based on the fact that the Agency provided the statistical analysis requested, the class Motion for Enforcement of the settlement agreement was moot. With regard to the request for an extension of monitoring period, the AJ found there was “no showing of prejudice to the Class that would warrant such an extension (even assuming that the Commission has the jurisdiction to levy such a sanction).” The AJ noted that the analysis was provided to the class in July 2006, which was over eight months prior to the expiration of the monitoring period provided for in the settlement agreement. Additionally, the AJ noted that the Commissioner’s letter, which set forth the Agency’s plan to address the areas of concern in the report, was provided in September 2006. The AJ found the class did not show that it did not have sufficient time to address any concerns it had regarding either the analysis itself or the Commissioner’s response thereto.

Complainants filed the instant appeal with the Commission on March 6, 2008. In their Class Brief in Support of Appeal, Complainants state that the Agency delayed over two years in providing an adequate statistical analysis. Complainants state that the statistical analysis revealed continuing statistically significant disparities with respect to distribution of awards and QSIs. Complainants state that the Agency failed to comply with the settlement agreement when it failed to ensure that its policies and practices for granting awards since April 2003, were fair and equitable and consistent with merit principles. Additionally, Complainants state that the plan proposed by the Agency on September 8, 2006, did not resolve all of the concerns the class raised. Specifically, Complainants state that the plan did not remediate the disparity with respect to awards and QSIs that should have been but were not distributed to Black males.

Additionally, Complainants argue that the AJ erred in finding that the class did not timely address its concerns prior to the expiration of the monitoring period provided under the settlement agreement. Complainants state that under the settlement agreement the Agency has a continuing obligation to ensure that it fairly and equitably distributed awards. Complainants note there was no time limit under which the class could request compliance with this provision of the agreement. Complainants state their motion had been held in abeyance until September 8, 2006, and argue there was no deadline for the class to renew its motion.

With regard to the Agency’s obligation to ensure equitable distribution of awards, Complainants request specific enforcement of this provision. Complainants request the Agency provide retroactive awards and QSIs to those class members who were unfairly denied such benefits since April 2003. Complainants contend that individual damages hearings would provide class members with the opportunity to file a claim that a person is a class member who was affected by the Agency’s failure to correct the application of its policies regarding awards

and QSIs, and that this discriminatory action occurred within the relevant time period of April 7, 2003, and September 8, 2006.

In response to Complainants' appeal, the Agency notes it provided the relevant statistical analysis on July 13, 2006, and argues that the AJ properly dismissed Complainant's motion as moot. The Agency also argues that the AJ properly denied Complainant's request to extend the AJ's four-year monitoring period.

Moreover, the Agency notes that neither the settlement agreement nor the Commission's regulations authorize prospective relief for alleged violations of the class agreement. The Agency concedes that it agreed to ensure that its policies and practices for granting performance awards and QSIs would be fair and equitable and consistent with merit principles. The Agency also notes it agreed to correct any misapplications of its policies for granting performance awards and QSIs. However, the Agency states that nothing in the settlement agreement provided for mathematically exact award distributions among employees of different races, and nothing authorized Complainants to seek prospective relief in the event that the class decides that the number and/or amount of awards was not to their satisfaction. The Agency states that nothing in the plain language of the agreement either established numeric requirements for the Agency's future awards of QSIs to class members or promised prospective relief in the event the class decided that the Agency had not satisfied the class' expectations of future performance or conduct. The Agency states that if a breach is found the only available remedy is specific enforcement or reinstatement of the complaint.

The Agency states that assuming, *arguendo*, that Complainants are alleging that the Agency discriminated against Black males with respect to the distribution of QSIs between 2003 and 2006, that allegation is not susceptible to resolution in this proceeding. Rather, the Agency states that 29 C.F.R. §1614.504(c) requires separate processing under §1614.106 or §1614.204 of any subsequent acts which allegedly violate the settlement agreement.

Finally, the Agency states that the appeal should be dismissed as untimely raised since Complainants did not raise their dissatisfaction with the Commissioner's September 8, 2006 letter within 35 days of their receipt of the letter, as required under 29 C.F.R. § 1614.504(b). The Agency notes that Complainants did nothing until March 27, 2007, six months after September 8, 2006, and one week before the AJ's oversight authority ended on April 7, 2007. The Agency also notes that the Complainants' March 27, 2007 correspondence took an entirely new direction from its June 2006 Class Motion for Enforcement, with the former raising for the first time a claim for prospective relief not mentioned in the settlement agreement while the latter focused on production of a statistical analysis and extension of the four-year monitoring period.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep't of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. Eggleston v. Dep't of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

At the outset, we address the Agency's contention that Complainants failed to timely raise their breach allegations in accordance with the terms of the settlement agreement. According to the agreement, "[e]ither party may bring an application before the Administrative Judge if it believes that the other party has not complied with its or their obligations under the Settlement Agreement pursuant to 29 C.F.R. § 1614.504." Section V of the Settlement Agreement approved April 7, 2003. The agreement also states that prior to bringing any non-compliance matter to the AJ, the complaining party must notify the other party and meet and confer in a good faith effort to resolve the conflict. Id.

The record reveals that following the Oversight Committee's November 10, 2004 request for the appointment of an expert to conduct a statistical analysis, the Agency and the class members communicated on several occasions concerning the Agency's efforts in hiring an expert. Then in January 2005, the class moved for enforcement of the settlement agreement requirement that the Agency retain an expert to conduct the requisite analysis. Thereafter, the parties discussed the credentials and work history of Expert 1 and dates for the Oversight Committee to meet Expert 1. On June 13, 2005, the class renewed its motion for compliance with the settlement agreement. We find the class properly notified the Agency that it believed the delay in providing the requisite statistical analysis was a breach of the settlement agreement under Section III(I), prior to filing their motion with the AJ.

Moreover, the record reveals that following their receipt of Expert 1's report on August 3, 2005, the class notified the Agency of concerns regarding "the Agency's failure to ensure that its policies and practices for granting performance awards and Quality Step Increases are fair and equitable and consistent with merit principles." Agency Brief, August 26, 2005 electronic mail message. The class also expressed concern "that the Agency has not met its obligation to correct any misapplications of its policies for granting performance awards and Quality Step

Increases.” Id. By issuing this notice, we find the class informed the Agency of their belief that the Agency has not complied with its obligations under the Settlement Agreement under Section III(D).

The record reveals that the parties conferred extensively on class concerns with the report provided by Expert 1. As a result of these concerns, the Agency eventually agreed to hire a second expert to conduct another analysis in September 2005. Again the parties conferred in detail on selecting another expert and in January 2006, the Agency hired Expert 2 to perform the statistical analysis. Thereafter, on June 9, 2006, the class filed a Motion for Enforcement alleging the Agency failed to complete a statistical analysis as provided for in Section III(I). Moreover, in this Motion for Enforcement the class noted that the Agency failed to respond with a corrective action plan in accordance with Expert 1’s findings of some statistically significant problems related to African-American males.

The Agency eventually provided the statistical analysis to the class on July 13, 2006. In July 2006, the Commissioner met with class counsel and members of the Oversight Committee regarding the implementation of the settlement agreement. The Commissioner agreed to give her reaction to the report of Expert 2 by September 8, 2006. At this time, the class requested its June 9, 2006 Motion for Enforcement be held in abeyance until September 8, 2006, pending the reaction of the Commissioner. Agency Brief, Exhibit B, July 15, 2006 electronic mail message. The Commissioner commented on the results of the statistical analysis on September 8, 2006. Then in March 2007, the class requested the AJ rule on their motion for compliance with the settlement agreement.

In the present case, we note that Complainants repeatedly raised their concerns with the Agency regarding its delay in providing the statistical analysis required under the settlement agreement. Complainants also raised their concerns that the Agency had failed to ensure that its policies and practices for granting performance awards and QSIs are fair and equitable and consistent with merit principles and their belief that the Agency had not submitted any plans to correct this failure. The record reveals that prior to bringing their concerns of non-compliance to the AJ, Complainants notified the Agency and met and conferred in a good faith effort to resolve the conflict. Specifically, we note that the class agreed to hold its June 9, 2006 Motion for Enforcement in abeyance to await the Commissioner’s comment on the statistical analysis. Agency Brief, Exhibit B, July 15, 2006 electronic mail message. Based on the repeated efforts of the class in trying to obtain compliance, we find the class was not required to file another notice of compliance after receipt of the Commissioner’s September 8, 2006 letter.

According to the terms of the settlement agreement, the Agency was required to collect data and compile such reports as the Oversight Committee might reasonably require to fulfill its role of monitoring the Agency’s compliance with the agreement, including quarterly reports of monetary awards and QSIs. Section III(H) of the Settlement Agreement approved April 7, 2003. The record reveals that the Agency provided such quarterly reports to the Oversight Committee in accordance with the terms of the agreement.

The settlement agreement also provided that the "Oversight Committee may request the services of an expert to analyze or interpret the data or reports. To the extent possible, the Agency will provide in-house statistical and economic analyses for this purpose." Section III(I) of the Settlement Agreement approved April 7, 2003. The record reveals that following the Oversight Committee's request for an expert analysis in November 2004, the Agency permitted the Oversight Committee to have input into the hiring of the expert, and the Agency hired Expert 1 in January 2005. The record reveals that Expert 1 provided data to the Oversight Committee on June 24, 2005, and at this time the Agency realized that Expert 1 did not include some relevant data in his analysis which resulted in a delay in the release of Expert 1's report. The record reveals that Expert 1's report was released to the Oversight Committee during the first week of August 2005.

The Agency agreed in September 2005, that it was necessary to hire another expert to perform a more thorough analysis. Again the record reveals that the Agency permitted the Oversight Committee to give its input on the hiring of the second expert. Expert 2 was hired in January 2006. While there was a dispute regarding the parameters of Expert 2's analysis, the record reveals that on March 29, 2006, the Oversight Committee suggested the Agency release Expert 2 to begin his work. On May 10, 2006, the Agency sent the Oversight Committee files containing Expert 2's statistical findings for the period of April 2003 - September 2005. The report by Expert 2 was ultimately released to the Oversight Committee on July 24, 2006.

Upon review of the record, we find that the Agency substantially complied with the provisions of the settlement agreement requiring it to provide statistical and economic analyses to interpret the relevant data and reports it gathered. Specifically, we note the statistical analysis undertaken by the Agency's experts was complex and involved consideration of a large amount of data over a two-year period. The record reveals extensive communication between the Agency and Complainants concerning the parameters of the required analysis and the selection of experts prior to the Agency retaining Expert 1 and Expert 2. The record contains no evidence that any possible deficiencies in the reports by Experts 1 and 2 were intentional. Moreover, there is no indication that the Agency acted in bad faith to delay implementation of the settlement agreement. Finally, we note that other than the delay in receiving the statistical report, Complainants do not claim that the report was in any way deficient. While we recognize that unintentional errors or delays in compliance, even when not made in bad faith, could result in a finding of non-compliance, in the present case we agree with the finding of the AJ who monitored compliance of the settlement agreement during the relevant four-year period and did not find that the delay in providing the requisite complex statistical analysis constituted a breach of the class settlement agreement.

Next, we address Complainants' contention that the Agency failed to comply with provision III(D) of the settlement agreement. According to the terms of the settlement agreement, the Agency agreed that "its policies and practices for granting performance awards and Quality Step Increases will be fair and equitable and consistent with merit principles." Section III(D)

of the Settlement Agreement approved April 7, 2003. Additionally, the Agency agreed that “it will correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles.” Id.

At the outset, we note that while the Commissioner stated in her September 8, 2006 letter that the July 2006 study showed that only three of the 15 DC-level components showed that African-American males were underrepresented when compared to their peers in regards to honor awards, monetary awards and QSIs, a review of the July 2006 Analysis and the tables attached to the study does not distinguish between components, but rather, refers to the Headquarters Office as a single entity. The July 2006 Analysis determined that African-American males employed at the Agency’s Headquarters Office in Baltimore, Maryland received a lower number of incentive awards than their peers. Specifically, the analysis stated that with regard to honor awards, “aggregating across all cohorts yields an overall number of standard deviations of -3.16, which is statistically significant, indicating that something other than chance plays a role in the granting of awards to [B]lack males and their organizational cohorts.” Id., p. 12. With regard to the distribution of monetary awards, the analysis noted that across all quarters, the number of standard deviations is -6.10 which is “so large that something other than chance is at work in the assignment of monetary awards.” Id., p.13. With regard to distribution of QSIs, the analysis noted that across all fiscal quarters, the number of standard deviations is -3.65, “which means that something other than chance plays a role in determining the receipt of QSIs.” Id., p.14.

On appeal neither the Agency nor the class contest the accuracy of the analysis used in the July 2006 Analysis. Moreover, we note that even if the Agency had challenged the results of the July 2006 Analysis, the burden would be on the Agency to show how the study was flawed and to correct any alleged errors in the study. For example, in her September 8, 2006 letter, the Commissioner noted that the July 2006 Analysis also showed that African-American males received a higher than expected number of disciplinary actions in the Office of Operations; however, she explained that this result was isolated to the second and third quarters of fiscal year 2005, where a large number of these disciplinary actions were imposed on employees for misuse of Agency computer systems. Class Brief, Exhibit 3. We note the Commissioner did not provide any purported explanation for the statistically significant findings that African-American males employed at the Agency’s Headquarters Office received fewer honor awards, monetary awards, and QSIs than their peers. Accordingly, for purposes of this decision, the Commission places full reliance on the results reported in the July 2006 Analysis.

Pursuant to the class settlement agreement, the Agency agreed that “its policies and practices for granting performance awards and Quality Step Increases will be fair and equitable and consistent with merit principles.” Section III(D) of the Settlement Agreement approved April 7, 2003. However, as evidenced by the July 2006 Analysis, the record reveals that between April 1, 2003, and September 30, 2005, African-American males were underrepresented as compared to their peers with regard to honor awards, monetary awards, and QSIs.

Specifically, the July 2006 Analysis revealed that statistically significant imbalances existed for African-American males relative to honor awards (-3.16 standard deviations), monetary awards (-6.10 standard deviations), and QSIs (-3.65), suggesting that “something other than chance plays a role in determining receipt” of honor awards, monetary awards and QSIs for African-American males at the Agency’s Headquarters Office. July 2006 Analysis. Thus, we find the Agency did not ensure that its policies and practices for granting performance awards and QSIs were equitable and fair between April 1, 2003, and September 30, 2005.

Additionally, pursuant to the terms of the class settlement agreement, the Agency agreed that “it will correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles.” Section III(D) of the Settlement Agreement approved April 7, 2003. We find the Agency was on notice that its policies resulted in unfair and inequitable distribution of performance awards and QSIs for African-American males from April 1, 2003, through, September 30, 2005, at the latest when it received the July 2006 Analysis.

The record reveals that the Commissioner issued a September 8, 2006 letter acknowledging the July 2006 Analysis found underrepresentation of class members with regard to QSIs in OBFM; cash awards in the Office of Communications; and QSIs, cash awards, and honor awards in the Office of Operations. Class Brief, Exhibit 3. As a result, the Commissioner noted that the DC for Human Resources and the AC for Civil Rights met with the DCs for Operations and OBFM and a meeting is scheduled with the DC for the Office of Communications later in September 2006. The Commissioner stated that as a result of the meetings, “the DCs for Operations and OBFM have reviewed their internal practices to ensure compliance with the Agency’s policies and procedures and are taking steps to address the area(s) of concern highlighted in the report.” *Id.* Specifically, the Commissioner stated that as a result, the AC for the Office of Central Operations established new procedures to provide greater oversight of personnel decisions throughout the organization, including holding ongoing meetings with the Assistant ACs to discuss trends in personnel actions for awards, training, and promotions. *Id.*

Additionally, the Commissioner noted the DC for OBFM met with all of his ACs to discuss the report by Expert 2 and reminded them of ensuring that equal consideration is given to all qualified candidates for awards. The Commissioner also stated the DC for OBFM will closely monitor the monetary awards processes to ensure they are equitably distributed. *Id.*

Finally, the Commissioner noted that in October 2006, the Agency is implementing a new employee appraisal program known as the Performance, Assessment and Communication System (PACS) which will provide recognition for varying levels of performance and stress ongoing interaction and communication between the employee and supervisor. *Id.* The Commissioner stated the Agency is also implementing a new Monetary Awards Program to recognize superior achievement and acknowledge individual and collaborative efforts of employees in accomplishing Agency and component goals. *Id.* The Commissioner stated that

the actions outlined in the letter and the new performance management system and awards program, will help ensure equitable treatment for all employees.

Upon review, we find the Agency has failed to show that it complied with provision III(D) requiring the Agency to "correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles." Despite the Commissioner's September 8, 2006 letter stating that the AC for the Office of Central Operations has established new procedures to provide greater oversight of personnel decisions throughout the organization, there is no evidence showing a new procedure was established. Similarly, although the Commissioner stated that the AC for the Office of Central Operations will review awards before they are approved and distributed, the Agency failed to show this action was actually taken. The Commissioner also stated that the DC for OBFM will closely monitor the monetary awards process to ensure equitable distribution; however, there is no evidence showing that this was accomplished. Furthermore, with regard to the Commissioner's statement that in October 2006 the Agency would implement a new employee appraisal program and a new awards program with the new performance management system, the Agency has failed to show that these actions were realized. Thus, we find the Agency has produced no evidence that the stated policies and procedures mentioned in the Commissioner's September 8, 2006 letter were established or that they effectively corrected the misapplication of its policy for granting performance awards and QSIs. Moreover, the Agency has failed to show that it has implemented any policy or procedure to apply to the entire Headquarters Office as a single entity to effectively correct the misapplication of its policy for granting performance awards and QSIs that resulted in the underrepresentation of African-American males from April 1, 2003, through September 30, 2005.

As a result of our finding that the Agency breached provision III(D) of the Settlement Agreement approved on April 7, 2003, when it failed to ensure that its policies and practices for granting performance awards and QSIs were fair and equitable and consistent with merit principles, and when it failed to correct any misapplications of its policies for granting performance awards and QSIs to ensure fair and equitable distribution of such awards, consistent with merit principles, we find that Complainants are entitled to specific enforcement of the class settlement agreement.

Accordingly, in the present case, we find that all African-American males working for the Agency's Headquarters Office in Baltimore, Maryland from April 1, 2003, through September 30, 2005, are presumptively entitled to the average honor award, monetary award, and QSI received during the relevant time. The presumption of entitlement to the average honor award, monetary award, and QSI can be rebutted if the Agency can establish by clear and convincing evidence that an employee is not entitled to this relief. Due to the nature of relief awarded to class members, the case is being remanded to an EEOC AJ to oversee the processing of relief. When determining the relief due, the AJ should determine the total amount of honor awards, monetary awards, and QSIs awarded to all employees working at the Agency's Headquarters office in Baltimore, Maryland from April 1, 2003, through September 30, 2005. This total amount should then be divided by the total number of employees who received awards during the relevant time frame, to determine the average honor, monetary, and QSI awarded. The

resulting amount should then be awarded to each African-American male who worked for the Agency's Headquarters Office in Baltimore, Maryland from April 1, 2003, through September 30, 2005, unless the Agency shows by clear and convincing evidence that an employee is not entitled to such relief.

Additionally, the Agency shall produce evidence showing it has complied with provision III(D) of the April 7, 2003 settlement agreement requiring the Agency to "correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles." Specifically, the Agency shall produce evidence that it has taken the actions identified in the Commissioner's September 8, 2006 letter. To the extent it has taken any additional actions to correct the misapplications of its policies for granting performance awards and QSIs, the Agency shall produce evidence detailing these actions.

CONCLUSION

The Agency's final decision finding no breach of the class settlement agreement is REVERSED and the matter is REMANDED to the Agency for specific enforcement in accordance with this decision and the Order herein.

ORDER

The Agency shall request that an Administrative Judge of the EEOC Baltimore Field Office be appointed to oversee the relief awarded in this matter in accordance with this decision. Specifically, the relief shall include that all African-American males working for the Agency's Headquarters Office in Baltimore, Maryland from April 1, 2003, through September 30, 2005, are presumptively entitled to the average honor award, monetary award, and QSI received during the relevant time. The "average" honor award, monetary award, and QSI shall be calculated by the method set forth earlier in this decision. Additionally, the AJ shall ensure that the Agency has complied with provision III(D) of the April 7, 2003 settlement agreement requiring the Agency to "correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles." The Agency is directed to provide written notification to the Compliance Officer at the address set forth herein that the appointment of an Administrative Judge has been requested.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30)

calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

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), at 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 77960, Washington, DC 20013. 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 (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 (Z0610)

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 from the Court that the Court appoint an attorney to represent you and that the Court also 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 with the Court 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

APR 28 2011

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:


Gilbert M. Jefferson, Ken A. Burden, Harry M. Dunbar
c/o M.Kator #1000
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Michael J. Kator, ESQ
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A. Jacy Thurmond, Associate Commissioner
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APR 28 2011

Date



Equal Opportunity Assistant