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

[redacted], et al a/k/a
Stan G.,[1]
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2020004534

Hearing No. 531-2008-00034X

Agency No. OCO-07-0377-SSA et al

DECISION

Following its August 10, 2020, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's certification of a class complaint alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Specifically, the Agency argues that the Administrative Judge erred in granting certification of the class because she did not conduct a "rigorous analysis" of the certification criteria, nor examine the merits of the underlying claims. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

The issue is whether the Administrative Judge properly determined that the complaint at issue in this case met the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification.

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

On July 23, 2007, Complainant and two other complainants (Class Agents) requested that the Agency convert their individual claims of discrimination into a class action complaint. Class Agents alleged discrimination based on race and sex (African American males), excluding those at the Senior Executive Service level, since April 7, 2003, to the present, at the Agency's headquarters with respect to promotions and the distribution of monetary and non-monetary awards. The Agency forwarded the class complaint to the EEOC's Baltimore Field Office. On April 5, 2013, an EEOC Administrative Judge (AJ1) issued a Joint Stipulation and Scheduling Order and included rights for the parties to seek discovery prior to certification and designate an expert in connection with a motion for certification or opposition to certification. AJ1 also noted that Class Agents had 60 days to file a motion for class certification, after the close of all pre-certification fact and expert discovery.

On January 25, 2016, Class Agents filed a Motion for Class Certification and requested certification of the following class:

> All African American male employees at the general schedule (GS) level 15 and below at the Agency's headquarters in Baltimore, Maryland, excluding employees in the Office of Disability Adjudication and Review and field employees, for the time period of April 7, 2003, to the present, who were treated disparately and/or adversely impacted by the Agency's awards programs in the awarding of monetary awards.

Class Agents stated that in 2002, the Agency settled a class action brought by African American males at the Agency's headquarters who alleged discrimination with regards to the employee awards system.[2] In the settlement agreement, the Agency agreed that its policies and practices for granting performance awards and Quality Step Increases (QSI) would be fair, equitable, and consistent with merit principles; and that it would 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. The Agency also agreed to collect data and compile reports, and to the extent possible, provide in-house statistical and economical analyses to monitor its compliance with the settlement agreement.

Class Agents argued that the Agency took no action, and that the discriminatory effects of its policies did not disappear, but rather, the statistical evidence demonstrated that the discrimination against African American males with respect to the headquarters awards system had only gotten worse. Class Agents noted that the Agency produced reports on the distribution of employee awards and QSIs among headquarters employees during 2003-2006, and that the Agency's own statisticians noted a statistically significant disparity that disfavored African American males, and that the degree of disfavor indicated that the pattern was due to "something other than chance."

[2] The date of final approval of the settlement agreement was April 7, 2003.

Class Agents noted that in Dunbar, Burden, Jefferson, et al. v. Social Security Administration, EEOC Appeal Nos. 0120081816, 0120081817, 0120081818 (April 28, 2011), the Commission found "statistically significant imbalances" in awards at the Agency headquarters through at least October 1, 2005.

Class Agents noted that the Agency had a centralized, unified awards system for its headquarters employees, which was developed by the Office of Personnel, under the Deputy Commissioner for Human Resources, who had oversight over the Agency's policies and performance management systems related to headquarters employee awards. Class Agents argued that Agency officials testified that all headquarters components and all individual managers complied with the Agency's centralized policies for awards.

Class Agents stated that, in addition to the Agency's own statistical data, their expert witness produced statistical evidence showing that after 2005, the disparities persisted through at least September 2014.[3] Class Agents also asserted that even when an African American male was given a monetary award, the value of that award was statistically significantly lower than the amount given to a similarly situated coworker, and that the distribution of QSIs also demonstrates a routine disparity at the expense of African American males.

Class Agents noted that in Dunbar, Burden, Jefferson, et al. v. Social Security Administration, EEOC Appeal Nos. 01975435, 01975436, 01975437 (July 8, 1998), the Commission certified a class complaint that included an allegation that the Agency's awards system discriminated against African American males employed at headquarters. Class Agents asserted that other than the time period at issue, there was simply no difference between the system-wide claim here and the system-wide claim (relating to awards) certified under the same EEOC class certification requirements in 1998.

Regarding numerosity, Class Agents stated that there were over 2,000 African American males who have been subjected to the Agency headquarters awards system from 2003 to the present. Class Agents also stated that their attorneys have been approved to serve as class counsel in numerous class complaints before the Commission, including the Dunbar, Burden, Jefferson, et al. v. Social Security Administration litigation.

On June 6, 2020, the Agency opposed the Class Agents' motion for class certification. The Agency asserted that Class Agents argued an alleged breach of a settlement agreement in a different matter; however, the cited agreement expressly prohibits Class Agents' reliance on its terms and the Commission already denied Class Agents' res judicata argument.

The Agency argued that the Commission should disregard the opinion of the Class Agents' expert because his findings and conclusions rested on unsound methodology.

[3] Fiscal year 2013 was left out of this analysis because no monetary awards were distributed to headquarters employees that fiscal year.

Specifically, the Agency asserted that the central premise of this expert's opinion was that any awards distribution that differed from unlawful population-based quotas constituted evidence of discrimination, but that he failed to account for numerous factors, such as performance or education. The Agency further argued that the Class Agents' expert admitted that "around 85" percent of the offices at headquarters exhibited no statistically significant evidence of discrimination.

The Agency also argued that Class Agents did not establish commonality because discrimination claims based on subjectivity do not satisfy the commonality requirement. The Agency noted that certification may be possible where subjective discretion is exercised in a common fashion by a "relatively small" group of individuals, but that this was not the case here. The Agency also argued that Class Agents offered no credible proof, much less "significant proof," of commonality.

The Agency asserted that Class Agents did not show typicality and that they only offer a single conclusory paragraph, asserting only that they were subject to the same awards policies as the putative class and "were denied awards that were deserved" because they were disfavored. The Agency did not dispute numerosity per se, but it stated that any class should be far smaller than Class Agents suggested, and at most 674 would-be class members.

On June 30, 2020, another EEOC Administrative Judge (AJ2) issued a Decision on Certification of the Proposed Class. AJ2 noted that 29 C.F.R. §§ 1614.204(a)(2), 1614.204(d)(2) provide that a class complaint must meet all the following prerequisites or be dismissed:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;
(ii) There are questions of fact common to the class;
(iii) The claims of the agent of the class are typical of the claims of the class;
(iv) The agent of the class, or his/her representative, if any, will fairly and adequately protect the interests of the class.

AJ2 noted that these prerequisites closely follow Rule 23(a) of the Federal Rules of Civil Procedure, but that the putative class agent in an EEOC federal administrative hearing process is not held to the same standard of proof as a plaintiff in United States District Court regarding Rule 23.

AJ2 noted that the Agency has a centralized awards system for its headquarters employees, and that during the relevant time period, the Agency had two award systems: (1) until October 2006, the Agency had a system in which awards panels decided who should receive monetary awards; and (2) in October 2006, the Agency implemented the new Performance Appraisal and Communication System (PACS).

In response to the Agency's argument that the Class Agents' expert relied on "unsound methodologies,"

AJ2 found that the Agency's arguments were unpersuasive and would go to the merits of the case. AJ2 noted that the statistical analyses used by the Class Agents' expert to demonstrate disparate impact are well-established methodologies accepted by federal courts and the Commission, and commonly used in employment discrimination cases. Specifically, the Class Agents' expert compared the difference between the proportion of African American males in the workforce to the proportion of those who actually received monetary awards to calculate the likelihood that the difference between the two groups was attributable to chance, while controlling for the pay grade of the employees, from 2007-2014. AJ2 determined that the analysis showed a statistically significant result, which meant that the probability of the disparity occurring by chance is unlikely and may have been due to some other factor. The Class Agents' expert also found a statistically significant difference with regards to the average dollar amount of the monetary awards and the distribution of QSIs.

AJ2 found that, while Class Agents estimated a class size of approximately 2,000 members and the Agency estimated up to 674 members, even using the Agency's smaller estimate, the class size was sufficiently large to meet the numerosity criterion.

AJ2 noted that the Agency argued against finding commonality because there was no specific policy or practice which tied all of the class allegations together, citing to Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011). However, AJ2 determined that to the extent that the U.S. Supreme Court decided to decertify the class in the Wal-Mart case based on an examination of Rule 23 (a) and (b), Wal-Mart was not controlling in the instant matter because the Commission only applies the provisions of Rule 23(a) and not any other portion of the rule. AJ2 further noted that the Commission had not adopted the Wal-Mart decision as controlling or determined that Rule 23 has more than general applicability in federal sector complaints, beyond the provisions that have been adopted in Commission regulations.

In addition, AJ2 found that Wal-Mart was distinguishable because that proposed class failed to identify any overall policy, while Class Agents presented evidence of a specific policy which tied all the class allegations together, namely the headquarters awards process from a centralized administration in the Office of Personnel, which developed the award policies and oversaw their distribution. AJ2 noted that Wal-Mart did not set out a per se rule against class certification where subjective decision-making or discretion is alleged, but that the Wal-Mart corporation gave unfettered discretion to local decision-makers, with no identifiable centralized policy, at thousands of locations nationwide, involving 1.4 million class members. AJ2 also stated that Class Agents presented sound statistical evidence and 41 affidavits of potential class members to support commonality for certification.

AJ2 noted that the Commission found typicality in classes with employees of different GS levels and/or positions where the specific discriminatory policy created the nexus between the class agent's claim and those of the purported class, and where the differences in GS levels and positions had no impact on the harm each class member allegedly suffered. AJ2 also noted that the Agency did not contest the adequacy of representation, and that Class Agents submitted sufficient information to support adequacy of the representation requirements.

AJ2 granted the Class Agents' Motion for Class Certification but found that there was insufficient evidence to include employees at the GS-15 level in the class because the statistical analysis did not include GS-15 employees in critical analyses because they are subjected to a different performance rating system. As such, the AJ amended the class to include:

> All African American male employees at the GS-14 level and below at the Agency's headquarters in Baltimore, Maryland, excluding employees in the Office of Disability Adjudication and Review and field employees, for the time period of April 7, 2003, to the present, who were treated disparately and/or adversely impacted by the Agency's awards programs in the awarding of monetary awards.

On August 10, 2020, the Agency issued a final order declining to fully implement AJ2's decision to certify the class and filed the instant appeal. Class Agents opposed the Agency's appeal. On October 15, 2020, the Agency filed a Motion for Leave to File Reply in Support of Appeal and simultaneously submitted a brief in response to Class Agents' opposition. Class Agents requested that the Commission deny the Agency's motion because there is no provision allowing for reply briefs. Class Agents also noted that the Agency did not provide a reason that the arguments asserted in its reply brief could not have been presented in the Agency's August 2020 appeal brief.[4]

CONTENTIONS ON APPEAL

Agency's contentions

On appeal, the Agency argues that AJ2 erred in granting certification of the class because she did not conduct a "rigorous analysis" of the certification criteria, nor examine the merits of the underlying claims. Specifically, the Agency asserts that there were three errors: (1) AJ2 took the Class Agents' allegations at face value, despite the Agency showing errors in the Class Agents' underlying statistical analysis; (2) the Agency showed that the decision-making at issue was too subjective and diffuse to support the finding of a common discriminatory practice; and (3) the certification decision failed to explain how Class Agents established commonality when a significant number of class members were not subject to the same appraisal or awards policies, both in any given year and from one year to another.

The Agency argues that the Supreme Court "made clear" in Wal-Mart that conducting a preliminary inquiry into the merits of a case when deciding whether to certify a class is necessary, and that AJ2 erred by refusing to do so and when she found that "the putative class agent in the EEOC federal administrative hearing process is not held to the same standard of

[4] The Commission's regulations provide that "[a]ny statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal." 29 C.F.R. §1614.403(d). Here, the Agency submitted a second brief on October 15, 2010, which was beyond 20 days after it filed its appeal on August 10, 2020; as such, we will not consider the arguments in the Agency's untimely second brief.

proof to which a Rule 23 plaintiff . . . is held." The Agency argues that AJ2's refusal to conduct "any" inquiry into the merits, particularly the unreliable statistical analysis, at the pre-certification stage was error and warrants reversal.

The Agency argues that Class Agents failed to demonstrate the necessary "significant proof" that it operated under a general policy of discrimination, and that the awards decisions were made by such a large number of diffuse, independently operating managers as to preclude a finding of common policy of discrimination that could support a finding of commonality here. The Agency notes that AJ2 appeared to have identified two neutral policies: the policy underlying the distribution of the awards themselves and the PACS. However, the Agency argues that AJ2 did little more than incorrectly determine that these two neutral policies applied to all of the putative class members. The Agency also states that it provided evidence to show that "PACS and its awards determinations processes" are not inherently discriminatory.

The Agency argues that AJ2 did not address the "many flaws" in the unreliable statistical report generated by the Class Agents' expert. For example, the methodology employed by the Class Agents' expert was "fundamentally unsound" because he omitted a number of significant variables and improperly aggregated his analysis. The Agency states that the Class Agents' expert conceded that his statistical analysis might not explain any of the differences in awards and performance scores, and that work performance scores could explain the legitimate difference in award distributions between the putative class members and their comparators.

The Agency also argues that the Class Agents' expert testified that he looked at the data at the "office" level and found no statistically significant differences in awards distributions in approximately 85% of the offices at headquarters, and that only about 20% to 35% of the African American men in the 15% of offices that did allegedly exhibit statistically significant differences in awards distributions were actually affected by those differences. The Agency asserts that this "invalidates any evidentiary value" of the Class Agents' expert's opinions.

The Agency argues that AJ2 failed to consider the expert testimony of its industrial psychologist, who validated the Agency's use of PACS and its awards procedures, and that he found that award decisions were based on employee performance; the performance appraisal process used to evaluate employee performance was based on tasks and responsibilities that comprise each job; and managers and supervisors receive extensive training on proper implementation of the appraisal process. The Agency argues that hundreds of individual supervisors implemented the policies and that they retained discretion to decide the particular amount of each award for the employees under their direct supervision, within provided ranges.

In addition, the Agency asserts that any finding of commonality was undermined because the members of the putative class could not meet the commonality requirement if the Agency applied different procedures for calculating some of their awards in various years during the relevant period. For example, the Agency states that from 2003 through 2006, it employed different procedures for bargaining unit and non-bargaining unit employees.

In addition, the Agency argues that the certified class includes not only rank-and-file employees, but as many as 103 supervisors and perhaps more, and that at least some part of the certified class is responsible for the discriminatory decisions of which Class Agents complain. The Agency requests that the Commission reverse the certification decision and enter judgment in favor of the Agency.

Class Agents' Contentions

Class Agents assert that AJ2 considered and rejected the Agency's arguments opposing class certification, and that the Agency raises no compelling reason on appeal to overturn the well supported decision to certify the class. Class Agents argue that the Agency misrepresents Supreme Court language regarding Federal Rule of Civil Procedure 23, when it asserted that AJ2 was required to make a finding of class-wide liability in order to certify the class complaint. Class Agents assert that they do not need to prove class-wide discrimination at this stage; and that the Commission has repeatedly and unequivocally directed that the only issue to be considered at this stage is whether the class complaint satisfies the four regulatory requirements for certification. Class Agents state that while the Administrative Judge may have to "probe behind the pleadings" to understand the nature of the class complaint or whether the legal question raised is judicable, the Agency asserts an incorrect standard, and that it would have been legal error for AJ2 to weigh the merits of the class complaint when reviewing class certification.

Class Agents state that the Agency's failure to properly establish or monitor its employee awards system, and the resulting statistically significant disfavor, creates a common question of fact for African American males at headquarters, and that the three Class Agents have claims that are typical of the class as a whole.

Class Agents argue that the Agency does not attempt to show that its awards system is fair or properly managed, but rather, the Agency raises a race-based defense to the statistically significant disparities in its awards system. Specifically, the Agency argues that African American men at headquarters must be assumed to have performed worse than others, and thus received fewer and lower-valued awards, because of their "pre-market characteristics," such as "family and community environments, and poorer schools." Regarding "pre-market characteristics," Class Agents argue that they have no application to a limited analysis of the current federal employee workforce at headquarters, and that their expert focused solely on those who had already been hired by the Agency to work in headquarters positions; those working in the same office and at the same grade level as their comparators; and only those who were unquestionably performing at an acceptable level in their jobs. Further, Class Agents note that the Agency failed to provide any evidence that consideration of "premarket characteristics" would have any impact whatsoever on a statistical analysis of awards.

Class Agents note that the Agency conducted statistical analyses of awards at headquarters after the "Burden" settlement agreement became effective, which showed statistically significant disparities in the number of monetary awards and QSIs being given to African American males versus other employees. Class Agents state that their expert provided additional statistical evidence showing that the disparities persisted after 2005. Class Agents assert that the Agency's arguments ignore the simple fact that their expert employed widely-accepted methods and tests to measure for statistical significance. Class Agents further note that their expert controlled his analysis to focus only on comparing similarly situated employees; reviewed award decisions made during the same year; considered only employees who were eligible for awards; compared only employees working within the same headquarters office; and compared only employees within each office who were employed at the same pay grade. Class Agents assert that their expert's statistical analyses present reliable, statistically significant evidence of a common, year after year pattern of disfavor of African American males.

Class Agents state that AJ2 found that certification of the class was appropriate based on the evidence of a headquarters-wide awards system; the statistical evidence of a significant disparity; and the anecdotal evidence from the proposed class, which demonstrate that Class Agents' claims are common and typical to the class. Class Agents state that the Agency does not contest that the class complaint satisfies the requirement of numerosity, and it makes no mention of any assertion that the three Class Agents cannot adequately represent the interests of the class. Accordingly, Class Agents request that the Commission affirm AJ2's decision certifying the class complaint.

ANALYSIS AND FINDINGS

Class Certification

EEOC Regulation 29 C.F.R. § 1614.204(a)(2) states that a class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent are typical of the claims of the class; and (iv) the agent of the class, or if represented, the representative will fairly and adequately represent the interests of the class. EEOC Regulation 29 C.F.R. § 1614.204(d)(2) provides that a class complaint may be dismissed if it does not meet the four requirements of a class complaint or for any of the procedural grounds for dismissal set forth in 29 C.F.R. § 1614.107. The class agent, as the party seeking certification of the class, carries the burden of proof, and it is his obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. Anderson, et al. v. Dep't of Def., EEOC Appeal No. 01A41492 (Oct. 18, 2005); Mastren, et al. v. U.S. Postal Serv., EEOC Request No. 05930253 (Oct. 27, 1993).

As an initial matter, we note that the Agency argues that a "rigorous analysis" is needed to make a determination on certification of a class and that this analysis will overlap with the merits of the complaint.

However, we find that the Agency argues beyond a "rigorous analysis" to make a determination on certification of the class, and that its arguments that the class should not be certified because the evidence shows no discrimination against African American men regarding the issuance of awards goes to the ultimate question of discrimination for this complaint. However, the Commission has found that it is improper to consider the merits of a complaint, prior to certification. See David H. v. Dep't of Homeland Security, EEOC Appeal No. 0120182576 (June 30, 2020); Powers v. Dep't of Transportation, EEOC Appeal No. 07A40067 (May 5, 2005).

While the Agency argues that AJ2 erred regarding the application of Rule 23 when she refused to conduct "any" inquiry at all into the merits, particularly the statistical evidence, we note that AJ2 did conduct an inquiry and found that the statistical analyses used by the Class Agents' expert to demonstrate disparate impact were well-established methodologies accepted by federal courts and the Commission, and commonly used in employment discrimination cases. As such, we find that AJ2 properly looked at the evidence for her analysis on the four certification factors to support her decision.

With regard to commonality and typicality, the purpose of these requirements is to ensure that a class agent possesses the same interests and has experienced the same injury as the members of the proposed class. See Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982). While these two criteria tend to merge and are often indistinguishable, they are separate requirements. Id. Commonality requires that there be questions of fact common to the class; that is, that the same agency action or policy affected all members of the class. The Class Agents must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. Belser, et al. v. Dep't of the Army, EEOC Appeal No. 01A05565 (Dec. 6, 2001). Typicality, on the other hand, requires that the claims, or discriminatory bases, alleged by a class agent be typical of the claims of the class, so that the interests of the putative class members are encompassed within a class agent's claim. Falcon, 457 U.S. at 156. The underlying rationale of the typicality and commonality requirement is that the interests of the class members be fairly encompassed within the class agent's claim. Falcon, 457 U.S. at 147.

The Agency argues that Class Agents did not establish commonality because they did not identify any discriminatory policy or practice. However, AJ2 specified that the Agency's centralized awards system for its headquarters employees established commonality, and we note that the Agency asserted that its industrial psychologist validated the Agency's use of PACS and its awards procedures. In addition, the record contains copies of the Agency's policy manuals on performance awards. As such, we find that AJ2 appropriately identified the Agency's relevant policies to establish commonality of the putative class members.

The Agency also argues that AJ2 erred when she took the Class Agents' allegations at face value, despite the Agency showing errors in the Class Agents' expert's underlying statistical analysis. For example, the Agency states that the Class Agents' expert's analysis was "fundamentally unsound" because he omitted a number of significant variables, notably, the work performance scores were omitted as a variable in his analysis; and when he improperly aggregated his analysis.

The record shows that the Class Agents' expert provided two reports, and that the second report addressed the Agency's expert's criticisms of his first report. In response to the criticism that his analyses omitted performance rating data, the Class Agents' expert noted that he did not expect the performance appraisals of African American males to be identical to similarly situated colleagues, but that they would be similar and that there was no evidence to support, or reason to assume, that the African American males at Agency headquarters are poorer performers on average, as compared to other headquarters employees. In addition, the Class Agents' expert testified that it was not an uncommon practice for experts to aggregate their results to either a year or an "overall bottom line."

The Agency states that the Class Agents' expert conceded that his statistical analysis might not explain any of the differences in awards and performance scores. Specifically, the Agency argues that the Class Agents' expert testified that race and sex discrimination "could have accounted for anywhere between zero and 100% of the statistical disparities that he observed," and he acknowledged at his deposition that work performance scores could explain the legitimate difference in award distributions between the putative class members and their comparators. The Agency asserts that the Class Agents' expert admitted that if you accounted for work appraisal scores, it eliminated any statistically significant disparities in awards distributions. The Agency argues that this "invalidates any evidentiary value" of the Class Agent's expert's opinions.

However, we find that the Agency's characterization of the Class Agents' expert's testimony is misleading. A review of the Class Agent's expert testimony shows that he replied, "that's correct," in response to the Agency's question, "Is it true that as little as zero percent or as much as 100 percent of the difference that you found in awards practices at Agency headquarters could be explained by race and gender discrimination?" Regarding the elimination of any statistically significant disparities in awards distributions when performance scores are factored, the Class Agents' expert testified that he believed that this was "largely correct" but that he did not personally look into the matter and his response was based on "others' reports." The Class Agents' expert added that he did not analyze this data because he did not have it. To the extent that the Class Agent's expert responded affirmatively to the Agency's hypothetical questions, we find that this is not sufficient to conclude an invalidation of "any evidentiary value" of his opinions.

The Agency also argues that Class Agents' expert testified that he looked at the data at the "office" level and found no statistically significant differences in awards distributions in approximately 85% of the offices at headquarters. However, the Class Agents' expert further testified that most of the African American employees were contained in the offices where there were statistically significant differences. The Agency also argues that the Class Agents' expert found that only about 20% to 35% of the African American men in the 15% of offices that did allegedly exhibit statistically significant differences in awards distributions were actually affected by those differences, but the Class Agents' expert actually testified that the number of employees who were affected in the offices that showed statistically significant differences was "somewhere between 65 and 80 percent," which "struck [him] as a fairly large proportion of the

African American population." Accordingly, we are not persuaded that AJ2 erred when she considered the Class Agents' expert analysis to support certification of the class.

The Agency argues that it showed that the decision-making at issue was too subjective and diffuse to support the finding of a common discriminatory practice. However, the Commission has found that Wal-Mart "did not set out a per se rule against class certification" where subjective decision-making or discretion is alleged. Complainant v. Dep't of Justice, EEOC Request No. 0520120575 (November 17, 2015). In addition, as noted by the Agency, the managers were given "extensive training and guidance" on performance appraisals. We find that the "extensive training and guidance" provided to managers and supervisors undermines the Agency's argument that their decisions related to performance and awards were very subjective and diffuse.

The Agency argues that AJ2 erred because she failed to explain how Class Agents established commonality when a "significant number" of class members were not subject to the same appraisal or awards policies, both in any given year and from one year to another. For example, the Agency argues that the certified class includes not only rank-and-file employees, but as many as 103 supervisors and perhaps more, and that at least some part of the certified class is responsible for the discriminatory decisions of which Class Agents complain. In addition, the Agency asserts that the class includes African American men who served on panels that decided monetary awards, and that this conflict between class members is another reason to reverse the certification decision. However, the Agency only made general assertions regarding supervisors who were included in the class and also responsible for the alleged discriminatory decisions, and an unspecified number of "conflicted" class members, which we find are insufficient to conclude that commonality cannot established in this case. Rather, we find that if there are any specific members who are not eligible to be included in the class, those determinations need to be made at a future stage, and not at the certification stage.

We further note that the Agency's argument goes toward numerosity of the class, and that AJ2 determined that even when using the Agency's lowered estimate of class members, there were enough employees to support class certification. In addition, we note that the Agency did not challenge typicality or the adequacy of the representation of the Class Agents, and we find no need to address these matters.

We find that AJ2 properly determined that the complaint at issue in this case met the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2) for class certification. As such, we REVERSE the Agency's final order rejecting AJ2's certification decision and REMAND the complaint for further processing, as ORDERED below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order and REMAND the complaint for further processing, in accordance with the ORDER below.

ORDER

The Agency is ORDERED to perform the following:

1. Notify class members of the accepted class claim within fifteen (15) calendar days of the date this decision is issued, in accordance with 29 C.F.R. § 1614.204(e).

2. Forward a copy of the class complaint file and a copy of the notice to the Hearings Unit of EEOC's Baltimore Field Office within thirty (30) calendar days of the date this decision is issued. The Agency must request that an Administrative Judge be appointed to hear the certified class claim, including any discovery that may be warranted, in accordance with 29 C.F.R. § 1614.204(f).

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the Agency's actions.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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 (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

May 19, 2021
Date