

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE FIELD OFFICE**

WILKERSON, et al., CLASS AGENTS,	(EEOC CASE NO.
		531-2008-00034X
v.	(
	(
COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, AGENCY.	(AGENCY CASE NOS. HQ-07-0333; OCO-07-0377; HQ-07-2105
	(
	(June 30, 2020

DECISION ON CERTIFICATION OF THE PROPOSED CLASS

I. Introduction

This proposed class case is before the United States Equal Employment Opportunity Commission pursuant to § 717 of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e-16. Class Agents filed a Motion for Class Certification (Motion); the Agency filed its Response in Opposition to Class Agents' Motion for Class Certification (Response);¹ and Class Agents filed a Reply (Reply). The case is now before the undersigned to issue a determination on the certification of the proposed class.²

II. Background

Class Agents present the following proposed class for certification: All African American male employees at general schedule (GS) level 15 and below at the Social Security Administration's (Agency or SSA) Headquarters in Baltimore, Maryland, excluding employees in the Office of Disability Adjudication and Review³ 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.⁴

The Agency has a centralized awards system for its Headquarters employees. Motion, Ex. 7. It has had two award systems during the relevant period. Until October 2006, the Agency had a system in which awards panels decided who should receive monetary awards.⁵ Response, at 10; Motion, Ex. 9 at Resp. to Int. 14. In October 2006, the Agency implemented a new performance appraisal system called Performance Appraisal and Communication System (PACS), which it used to appraise its non-NTEU and non-GS-15 employees. Response, at 10. The Agency's awards now

¹ Class Agents' comment in its Reply that the Agency Response was filed untimely will not be considered, as a formal motion was not filed.

² This case was transferred to the undersigned on January 16, 2020.

³ During the relevant time period, this office has also been named Office of Hearings Operations, and Office of Hearings and Appeals.

⁴ The initial proposed certification included promotions, which was subsequently severed. Agency Ex. 7 at 44.

⁵ Award panels remained in use for National Treasury Employee Union (NTEU) members until 2015. Response, at 11.

depend on certain PACS score averages, and the Agency sets specific award ranges based on the score averages. With the elimination of the awards panels, management determines all monetary awards in this system. Motion, Ex. 12 at 2. This system continues today. Awards are issued by an employee's supervisor after approval by a higher-level manager. Motion, Ex. 11 at Sec. 5.3. Employees are eligible for a variety of performance-based monetary awards. Response, Ex. 3 at 13-16. A Quality Step Increase (QSI) increases the employee's pay by moving an employee's step to the next higher level. Cash awards have been distributed as Recognition of Contribution awards (ROC), Bonus awards, Commendable Act or Service (CAS) awards,⁶ and On the Spot (OTS) awards.

Class Agents obtained an expert to analyze the distribution of employee awards at SSA Headquarters from October 1, 2006 to September 30, 2014.⁷ One of the significant comparisons made by the expert included a comparison of the proportion of African American males in the workforce to their proportion among those who received awards, restricting the pool to those eligible to receive an award based on performance rating. Motion, Ex. 1 at 7. According to the expert, the data shows that in the number of monetary awards given, for each year analyzed,⁸ African American males received statistically significantly fewer awards than would be expected in a discrimination-free environment. Motion, Ex. 1 at 7. In the overall time period, African American males received 543 fewer monetary awards than would be expected. The expert calculated that the probability that this could occur by chance is less than 1%. The expert also found that the difference in the amount of the awards, the dollar value, given to African American males, was significantly smaller. *Id.*

Class Agents allege that the Agency awards system has created a disparate impact disfavoring African American males in the selection of monetary awards as supported by statistical analyses. Class Agents allege further that the Agency engaged in disparate treatment when after being placed on notice by the Agency's own statistical review that the above alleged disparate impact existed, it failed to substantively rectify the inequality. This is an alleged violation of § 717(b) of Title VII; Management Directive 715 (MD-715), Part A; and the EEOC's Uniform Guidelines (UGESP). 29 C.F.R. § 1607.1 *et seq.*; Motion, at 42-43. These laws and regulations require that agencies make all personnel actions free from any discrimination on the bases of race, color, religion, sex or national origin. Agencies are required to regularly examine their equal employment opportunity programs to identify and rectify any disparities found, in order to eliminate the barriers to equal opportunity.

Prior to the instant matter, the Commission certified a very similar class in *Jefferson, Burden, Dunbar, et al v. SSA*, EEOC Appeal Nos. 01975435, 01975436, 01975437 (1998), *recon. den.*, EEOC Request Nos. 05981075, 05981076, 05981077 (Jan. 22, 1999) (*Burden*). The Commission certified the class in *Burden* as: African American male employees at SSA Headquarters who were "subjected to disparate treatment in regard to performance appraisals, awards and bonuses, and disciplinary actions."⁹ The class definition included the time period

⁶ CAS awards were generally phased out after implementation of the PACS system.

⁷ Pursuant to the settlement agreement, the Agency conducted an analysis of awards given to African American males in the period of 2003-2005, and again in 2006, which found a statistically significant disparity. Motion Ex. 4.

⁸ In 2013, no monetary awards were given because of the federal government shutdown.

⁹ Class Agents argue that because the class in *Burden* was certified by the Commission, the class in the instant matter should be certified under the doctrine of *res judicata*. I reject the argument because the proposed classes are not

ending April 6, 2003. The parties in the *Burden* case subsequently entered into a settlement agreement, which the class subsequently alleged that the Agency breached. Motion, Ex. 3. The case is still in litigation as it relates to the implementation of the settlement agreement.¹⁰

III. Applicable Law

The only issue to be addressed in this decision is whether the putative class meets the four requirements of certification. An inquiry into the merits of the class complaint will not be conducted, and all arguments presented on the merits will not be addressed. At this point in the process, Commission regulations 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.

29 C.F.R. §§ 1614.204(a)(2), 1614.204(d)(2). These prerequisites closely follow Rule 23(a) of the Federal Rules of Civil Procedure. Notwithstanding the above, the putative class agent in the EEOC federal administrative hearing process is not held to the same standard of proof to which a Rule 23 plaintiff in United States District Court is held. *See Curtis Hines, Jr., et al. v. Dep't of the Air Force*, EEOC Appeal No. 01931776 (July 7, 1994), *aff'd*, EEOC Request No. 05940917 (Jan. 29, 1996), wherein the Commission stated:

[T]he Commission is mindful that our decisions in class certification cases must take into consideration the fact that a class agent does not get access to precertification discovery in the same manner and extent that a Rule 23 plaintiff does.

The EEOC regulations provide for a development of the evidence by the parties at a greater extent once a class complaint has been certified. The Administrative Judge may issue orders for the investigation of a class complaint, and then may take appropriate action if the evidence reveals that the class should be redefined, subdivided or dismissed. 29 C.F.R. § 1614.204.

IV. Analysis and Findings

As an initial matter, the Agency argues against class certification first by claiming that the findings of the Class Agents' expert rest on unsound methodologies. The Agency's arguments are unpersuasive and, regardless, would go to the merits of the case. The statistical analyses used by Class Agents' expert, Dr. Charles Mullin, to demonstrate disparate impact are well-established

sufficiently similar in all relevant aspects, and the subsequent Supreme Court decision in *Wal-Mart Stores, Inc., v. Dukes* had not been decided, which must be addressed here. 131 S. Ct. 2541 (2011).

¹⁰ In 2019, both parties requested reconsideration of the latest OFO decision, which is currently before OFO. The case is now referred to as *Jefferson* rather than *Burden*.

methodologies accepted by federal courts and the Commission, and commonly used in employment discrimination cases.¹¹ See *Garcia, et. al v. Dep't of Justice*, EEOC Appeal No. 0120122033 (June 7, 2013), *req. for recons. den.*, EEOC No. 0520130561 (Aug. 12, 2014).¹² Dr. Mullins performed many relevant analyses which support Class Agents' allegation that African American males were disparately impacted in the receipt of monetary awards at Agency Headquarters. For example, using Fisher's Exact Test, which examines the significance of the association between two kinds of classifications, Dr. Mullin first 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 is attributable to chance. Motion, Ex. 1 at 7. He controlled for the pay grade of the employee and performed the test for each year from 2007-2014. The analysis resulted in a "statistically significant" result, which means that the probability of the disparity occurring by chance is unlikely, and may have been due to some other factor. A probability of random occurrence that is less than 5% or exceeding 1.96 deviations is considered statistically significant. Dr. Mullin's analysis found that all of the probabilities for each year are well under 1%, and thus, highly statistically significant. Dr. Mullins additional analyses found that the average dollar amount received by African American males is lower than non-African American males every year, and is statistically significantly lower in six of the eight years examined. *Id.* at 9. His examination of the distribution of Quality Step Increases (QSIs) also showed a statistically significant difference between African American males and all others who received QSIs in six of the seven years examined. *Id.* at 11.

Numerosity

The criterion of numerosity requires that the class be sufficiently numerous that a consolidated complaint by the members is impractical. 29 C.F.R. §1614.204(a)(2)(i). While there is no minimum number required to form a class, courts have traditionally been reluctant to certify classes with less than thirty members. *Mastren v. U.S. Postal Serv.*, EEOC Request No. 05930253 (Oct. 27, 1993).

Class Agents contend that the class comprises approximately 2,000 members. Motion, at 48. The Agency does not argue that Class Agents have not met the numerosity criterion, only that the class will be much smaller when it is properly measured, to count only those who "were affected by the employer's alleged discriminatory actions." See *Moten v. FERC*, EEOC Appeal No. 01910018 (Dec. 30, 1991). The Agency contends that the number of class members will be at most 674 or less. The exact number need not be established at this stage. Even assuming the Agency's much smaller estimated number is more accurate, the class of potential members is sufficiently numerous to meet Class Agents' burden. Furthermore, the estimated size of the class is sufficiently large to demonstrate that joinder is impractical in this case.

Commonality and Typicality

The purpose of class complaints is to economically address claims "common to [a] class as a whole ... turn[ing] on questions of law applicable in the same manner to each member of the

¹¹ The expert's credentials, contrary to the Agency's averment, are clearly sufficient, and noted in the statistical report. Motion, Ex. 1.

¹² The Agency also argues that other variables were incorrectly omitted in Mullin's analysis, and therefore his analysis should not be admitted. For the purpose of determining the certification of class, Mullin's analysis is sufficient.

class.” *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 152 (1982). In order for a Class Agent to represent a class, he must show that his claims are common and typical to the members of the class. The purpose of the commonality and typicality requirements is to ensure that class agents possess the same interests and suffer the same injury as the members of the proposed class. *Natalie S. v. Dep’t of Defense*, EEOC Appeal Nos. 0120180009, 0120181896 (Feb. 21, 2019). While these two criteria tend to merge and are often indistinguishable, they are separate requirements. 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. Typicality, on the other hand, requires that the bases of the class agent be typical of the claimed bases of the class. 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. *Hudson v. Dep’t of Veterans Affairs*, EEOC Appeal No. 01A12170 (Mar. 27, 2003).

Factors to consider in the determination of commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members’ treatment will involve common questions of fact. *Garcia v. Dep’t of Int.*, EEOC Appeal No. 07A10107 (May 8, 2003) (citing *Mastren*, EEOC Request No. 05930253). Evidence to establish commonality may include a specific discriminatory policy, statistical evidence and anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner. *Id.*; *Hines*, EEOC Request No. 0590917, at 3. An “across-the-board” claim that fails to identify the policy or practice is insufficient to establish commonality. *Natalie S.*, EEOC Appeal Nos. 0120180009, 0120181896.

The overriding typicality principle is that the interest of the class members must be fairly encompassed within the class agent’s claims. Typicality exists where the class agent demonstrates some “nexus” with the claims of the class, such as the similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. USPS*, EEOC Appeal No. 01A03195 (March 22, 2001). The Commission has found typicality where a complainant alleges class-wide discrimination due to excessive subjectivity in the promotion process. *Taylor v. SSA*, EEOC Appeal No. 07A50060 (May 5, 2006); *Davis v. Labor, Employment & Training Admin.* EEOC Appeal No. 01930457 (Sept. 10, 1993); and *Conanan v. FDIC*, EEOC Appeal No. 01952486 (Jan. 13, 1998). The claims need not be identical, only sufficiently typical to encompass the general claims of the class members so that it will be fair to bind the class members by what happens with the agent’s claims. *Cosentine, et al. v. Dep’t of Homeland Sec.*, EEOC Appeal No. 01A23856 (Mar. 24, 2004).

The Agency argues against finding commonality by stating that Class Agents have failed to demonstrate that the claims “depend upon a common contention” as the Supreme Court’s decision in *Wal-Mart Stores, Inc., v. Dukes* requires. 131 S. Ct. 2541 (2011). The Agency asserts that there is no specific policy or practice which ties all of the class allegations together and this precludes certification in the instant matter. Class Agents counter that the Agency’s Headquarters-wide awards policy and its degree of centralized administration is the “glue” that holds the claims of the class members together. Even if the policy grants an exercise of discretion to Headquarters’ local component management, that discretion is influenced by the Agency’s award policy, which according to Class Agents, disparately impacts African American males. *See McReynolds v. Merrill Lynch*, 672 F 3d 482, 488 (7th Cir. 2012), *cert. den.*, 133 S.Ct. 338 (2012) (post-*Wal-Mart*

certification granted where causal effect of a company-wide policy that delegated discretion to brokers to form teams could cause a disparate impact on African-Americans and was appropriate for class certification).

In raising the Supreme Court's decision in *Wal-Mart*, two points should be made. First, the Federal Rules of Civil Procedure are instructive, but not controlling in federal sector cases. The Commission only applies the provisions of Rule 23(a) and not any other portion of the rule. 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* is not controlling in the instant matter. Indeed, the Commission has 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.

Second, as to any possible legal implications the *Wal-Mart* decision might have on the instant matter, the facts are distinguishable. Unlike *Wal-Mart*, where the class failed to identify any overall policy, Class Agents present evidence of a specific policy which ties all the class allegations together. The Headquarters awards process comes from a centralized administration in the Office of Personnel, which develops the award policies and oversees their distribution. Motion, Ex. 7 at 14. Agency officials testified that the Agency was unaware of any managers failing to comply with these policies. *Id.* at 50-54. In further support of Class Agents' contention that the Agency's Headquarters awards process is a single centralized program, Class agents point to the fact that the program has been reviewed as a single program. Reviews have been conducted by the Office of Personnel Management, Class Agents expert, and the Agency, which supports that the program is a common singular program appropriate for system-wide analysis in this case. Response, at 11.

Contrary to popular belief, *Wal-Mart* did not set out a *per se* rule against class certification where subjective decision-making or discretion is alleged. 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. Neither of the relevant awards policies at Headquarters SSA, which is one location, gave unfettered discretion in the selections of awards without a guiding policy. Response, at 9-11 (see detailed description of Agency policies).

Finally, and not least importantly, Class Agents present sound statistical evidence that a disparity exists in the distribution of the monetary awards between African American males and other employees at SSA Headquarters from 2005-14. Motion, Ex. 1 at 6. Class Agents also produced 41 affidavits of potential class members all of whom are African American males who did not receive monetary awards under circumstances in which they arguably should have received them.

As to the putative class members' affidavits, the Agency argues that they do not exhibit typicality of the class they seek to represent because of their different GS levels and positions. The Commission has found typicality in classes which comprised 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. *See, e.g., Conanán*, EEOC Appeal No. 01952486 (finding typicality and commonality in a class of 400 African American

males of different grade levels and positions who were not promoted). Thus, different GS levels and positions of class members in this case are not fatal flaws.

Contrary to the Agency's arguments, I find that these are not merely "across-the-board" claims that fail to identify a policy or practice that [allegedly] has the effect of discriminating against the class as a whole." *Garcia*, EEOC Appeal No. 07A10107. Challenging the policies at issue in this proposed class action is not foreclosed by the *Wal-Mart* decision. The evidence of a Headquarters-wide awards system, the statistical evidence of a significant disparity, and the anecdotal evidence from the proposed class distinguishes *Wal-Mart* and demonstrates sufficiently that Class Agents' claims are common and typical to the class.

Adequacy of Representation

Adequacy of representation is an important prerequisite because it will determine the rights of absent class members. *Bailey, et al. v. DVA*, EEOC Request No. 05930156 (July 30, 1993). This requires that the agent of the class will be able to fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(iv). The class representative should have no conflicts with the class and any attorney representing the class agent and class must have the requisite skill and experience. *Sedillo v. Dep't of Agriculture*, EEOC Appeal No. 07A20071 (Aug. 7, 2002). The Agency did not contest the adequacy of representation. Class Agents have submitted sufficient information to support adequacy of representation requirements. Motion, at 49-50.

Order

The Class Agents' Motion for Class Certification is GRANTED with one refinement. Class Agents did not produce sufficient evidence that GS-15s should be included in the class. The expert's analysis did not include GS-15s in critical analyses because they are subjected to a different performance rating system. Motion, Ex. 1 at 7, 11. Without that critical statistical evidence to support their inclusion, one affidavit from a GS-15 employee is not sufficient to include them in the class.

Notification

The Agency is Ordered to identify all African-American male employees who were employed at the Agency's Headquarters in Baltimore, Maryland, as delineated in the description of the class and provide the name, address, email address, and telephone number to the Class Representative. Within 30 days of the date of this Order, the Agency shall notify all class members of the acceptance of the class complaint via email and regular mail to last known address. Such notice shall contain:

- (i) The name of the agency and organizational segment, its location, and the date of acceptance of the complaint;
- (ii) A description of the issues accepted as part of the class complaint;
- (iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and
- (iv) The name, address, email address and telephone number of the class representative.

Discovery

The parties may conduct discovery pursuant to EEOC Regulations at 1614.204(f). Discovery shall close on **November 2, 2020. The parties are expected to initiate and complete discovery without intervention by the Administrative Judge. The parties will make every attempt to resolve any discovery disputes without intervention by the Administrative Judge.** If attempts to resolve a dispute are unsuccessful, the moving party shall notify the undersigned *via* email within **five (5) calendar days** of the impasse. Failure to timely raise objections to discovery may result in waiver of such objections. The notification shall advise that a discovery dispute has arisen, briefly describe the dispute and the parties' efforts to resolve the dispute, and propose **two (2) dates/times** when **both** parties are available for a teleconference with the undersigned to address the dispute. The parties shall avail themselves of this process in an effort to quickly and efficiently resolve discovery disputes requiring the intervention of the Administrative Judge, and as a prerequisite to filing a motion regarding a discovery dispute. Any motion to compel or request to develop evidence filed without prior resort to the informal resolution process described herein may be rejected.

Dispositive Motions

Any Motions for Summary Judgment shall be filed no later than **November 20, 2020.** Oppositions to any Motions for Summary Judgment shall be filed no later than **December 11, 2020.** Any Reply in Support of a Motion for Summary Judgment shall be filed no later than **December 21, 2020. Extensions will not be granted based on holidays, which have already been taken into consideration.**

Settlement

I invite the parties to participate in a settlement conference to determine whether this matter may be resolved without resort to discovery. In the event that the parties believe my assistance or that of a neutral, third party settlement official would be mutually beneficial in helping the parties achieve a resolution to this case through settlement, the parties may seek such by joint motion by **July 13, 2020.** Prior to holding a hearing in this matter, I will require the parties to participate in a settlement conference in advance of the hearing.

Sanctions

Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to EEOC Regulations at 29 C.F.R. §1614.109(f)(3) and §1614.2014(f)(2). The Administrative Judge may, where appropriate:

- (A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- (B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

- (C) Exclude other evidence offered by the party failing to produce the requested information or witness;
- (D) Issue a decision fully or partially in favor of the opposing party; or
- (E) Take such other actions as appropriate.

It is so ORDERED.

For the Commission:

Julie Schmid
Administrative Judge

NOTICE

The Administrative Judge's decision to accept or dismiss the class complaint is subject to final agency action. The agency has forty (40) days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing complainant as to whether the agency will fully implement the decision. If the agency informs complainant that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order served on complainant. The agency may use the form Appendix O to file its appeal with the Commission. Complainant will have thirty (30) days from receipt of the final order to file an appeal and the agency shall provide complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P). See EEO Management Directive for 29 C.F.R. § 1614, MD-110 (August 2015).