

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
BALTIMORE FIELD OFFICE - 531  
10 South Howard Street, 3rd Floor  
Baltimore, Maryland 21201

in the certification of: )  
)  
RONALD D. JANTZ )  
)  
COMPLAINANT )  
)  
V )  
)  
MICHAEL J. ASTRUE, COMMN. )  
Michele Noel (A) Assoc. Commn )  
for Civil Rights & EO )  
Post Office Box 17712 )  
Baltimore, MD 21235-7712 )  
)  
AGENCY )  
)

EEOC CASE NO.:  
531-2006-00276X

AGENCY CASE NO.:  
HQ-06-2518-SSA

**DECISION TO ACCEPT, REJECT OR CANCEL**  
**CLASS COMPLAINT**

APPEARANCES:

COMPLAINANT'S REPRESENTATIVE:

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BEFORE:

DAVID NORKEN  
ADMINISTRATIVE JUDGE

## I. INTRODUCTION

This matter came before the United States Equal Employment Opportunity Commission pursuant to §717 of Title VII of the Civil Rights Act of 1964, as amended, and § 501 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), 29 U.S.C. § 791.<sup>1</sup> The issue is whether this complaint should be accepted as a class complaint of discrimination in accordance with EEOC Regulations, 29 C.F.R. Section 1614.204(d). For the reasons set forth below, I accept the above captioned matter as a class complaint in part and reject it in part.

## II. BACKGROUND

Putative Class Agent Ronald Jantz is totally deaf. He is employed as a Management Analyst, GS-343-12, by the Office of Buildings Management (OBM) of the Office of Facilities Management (OFM) of the Office of the Deputy Commissioner, Budget, Finance and Management (ODCBFM) of the Social Security Administration (Agency) at its offices in Baltimore, Maryland.

The Class Agent first sought EEO counseling on August 22, 2005 in his individual complaint in this case with respect to three non-selections for promotion occurring on July 21, 2005 for the position of Management Analyst, GS-343-13, August 3, 2005 for the position of Lead Management Analyst, GS-343-13, and August 22, 2005 for the position of Management/Program Analyst, GS-343-12. EEO Counselor's Report, ROI I, Ex. 2. The Agency gave Complainant a 15-day notice of Right to File a Formal Complaint of Discrimination on November 7, 2005 and that day he filed a timely Formal Complaint. Notice and Formal Complaint, ROI, Ex. 1. On or about June 21, 2006, Complainant notified the Investigator in his individual case that he was interested in pursuing the case as a class action and was therefore changing his "individual" complaint to a class complaint. 29 C.F.R. § 1614.204(3)(b) ("A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint").

By Order dated September 25, 2006, the Administrative Judge directed the parties to provide any and all additional information they wished to present concerning the class complaint, especially with regard to the following:

- (1) Whether the complaint is within the purview of Subpart B - class complaints of discrimination, 29 C.F.R. § 1614.204;

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### <sup>1</sup> REFERENCE CODES:

- Ex. - Exhibit
- ROI - Report of Investigation or Investigative File
- Compl.- Complainant
- Att. - Attachment

- (2) Whether the complaint was timely filed;
- (3) Whether the complaint consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the same class which is pending in the Agency or which has been resolved or decided by the Agency;
- (4) Whether the agent(s) consulted an EEO counselor in a timely manner;
- (5) Whether the complaint lacks specificity and detail;
- (6) Whether the complaint meets the following prerequisites:
  - (a) The class is so numerous that a consolidated complaint of the members of the class is impractical;
  - (b) There are questions of fact common to the class;
  - (c) The claims of the agent(s) of the class are typical of the claims of the class;
  - (d) The agent(s) of the class, or his representative will fairly and adequately protect the interests of the class.

On October 23, 2006, prior to any class certification discovery, Complainant filed a Motion for Provisional Class Certification, to which, on November 22, 2006, the Agency filed an Opposition. On December 13, 2006, I issued an Acknowledgment and Order Regarding Discovery and Briefing Schedule setting the parameters for discovery on the class claims. Jantz has since filed an additional timely complaint alleging non-selection for two additional promotions. They involved non-selection for a Staff Assistant, GS-301-13, position on August 11, 2006 and a Building Manager, GS-1176-13, position on January 23, 2007. Complainant timely sought EEO Counseling on September 20, 2006 claiming discrimination on the bases of disability (bi-lateral deafness) and reprisal for prior EEO activity. Complainant filed a formal complaint on January 12, 2007, the same day he was given a 15-day notice of right to file a formal complaint. The January 23, 2007 denial of promotion to the Staff Assistant position was later added to this second formal complaint. Revised ROI Summary, Goldstein Aff., Ex. SS.

After some intensive but limited pre-certification discovery, expert reports and expert depositions, on June 27, 2008, the Agency filed its Motion for Class Certification (Motion). On July 18, 2008, the Agency filed its timely Opposition to the Motion (Opposition). On August 1, 2008, Complainant filed a motion for leave to file a Reply Brief (Reply), which the Agency did not oppose. Complainant attached the Reply to the motion for leave to file the Reply. On August 15, 2008, the Agency filed a motion to file a Surreply Brief (Surreply) and attached the Surreply. Complainant did not oppose the motion to file a Surreply. Upon consideration, I have decided to consider both the Reply and Surreply and the motions to file them are hereby GRANTED.

### III. APPLICABLE LAW

Equal Employment Opportunity Commission regulation, 29 C.F.R. §1614.204(a)(2), provides that:

- (2) A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agency 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 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.

A class complaint may be dismissed if it does not meet the prerequisites of a class complaint under 29 C.F.R. §1614.204(a)(2) or §1614.107.

EEOC regulation 29 C.F.R. §1614.107, provides that a complaint may be rejected for any of the following reasons:

- (1) It fails to state a claim;
- (2) It fails to comply with the applicable time limits;
- (3) It is the basis of a pending civil action in a United States District Court or was the basis of a civil action decided by a United States District Court;
- (4) The Complainant has raised the matter in a negotiated grievance procedure;
- (5) It is moot or alleges a proposal to take a personnel action or other preliminary step to taking a personnel action;
- (6) The Complainant cannot be located;
- (7) The Complainant has failed to respond to a written request to provide relevant information;
- (8) The Complainant refuses to accept an offer of full relief.

## IV. ANALYSIS AND FINDINGS

### **A. Introduction**

Complainant is an individual with a disability pursuant to 29 C.F.R. § 1630.2(j)(1)(ii).<sup>2</sup> He is totally deaf in both ears. This impacts the major life activity of hearing because he simply cannot do it. This affects him in his daily life because he cannot normally communicate with others since he cannot hear them. Further, Complainant does not know any form of sign language. Complainant uses a TDD for telephone usage, closed captioning for watching television and movies and he has a personal assistant at work who types for him on a laptop computer when he attends meetings, training or conferences. Jantz Aff., ROI I, Ex. 10, pp. 5-7. Complainant is also a qualified person with a disability pursuant to 29 C.F.R. § 1630.2(m). He was found minimally qualified for each vacancy at issue in his individual complaints, his application was rated and ranked and he made the best qualified list for each vacancy. Jantz Aff., ROI I, Ex. 10, pp. 8-12; BQL Certificates, ROI I, Exs. 22(g), 23(d) and 24(f).

There is no dispute over the timeliness of Complainant's class allegations or of his notice to the Agency of his class claims. Complainant has met all other regulatory guidelines and fulfilled all other administrative requirements to permit the case to proceed as a class action. Moreover, Complainant knows of no other class complaint making the same allegations as in this case. Motion, p. 34.

Complainant desires to represent one of two alternate classes consisting of all employees with targeted disabilities (TDE's) denied equal promotion opportunities or all TDE's who have applied for promotions, appeared on a best qualified list (BQL) and not been selected. The EEOC defines the following as targeted disabilities: deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness, and genetic and physical conditions affecting limbs and/or spine. EEOC Management Directive 715 (MD-715), App. A, Goldstein Aff., Ex. A. Complainant alleges that the mechanism for the discrimination in this case is the unfettered discretion and subjective decision making that the Agency gives selecting officials when they make their selection decisions. Complainant alleges that:

The evidence shows that SSA's policies allow decision-makers to exercise unchecked subjective discretion in selecting individuals for promotion. The statistics establish that this wide discretion results in highly statistically significant disparities in promotions for TDE's who apply for promotion and make the BQL, a necessary step for obtaining any competitive promotion,

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<sup>2</sup>The Rehabilitation Act adopts the substantive standards of the Americans with Disabilities Act (ADA) in determining whether the Rehabilitation Act has been violated. 29 U.S.C. § 791(g).

shows that TDE's are promoted at a selection rate of 7.7% while non-TED's who apply for promotion and make the BQL are promoted at a selection rate of 11.7%.

Motion, p. 4. Complainant states that the likelihood of these results occurring absent disability discrimination is less than one in 10 trillion. Id.

Complainant seeks certification of two alternate classes. They are:

1. All current and former employees with targeted disabilities at the Social Security Administration at General Schedule Grade five or above who on or after August 22, 2003,<sup>3</sup> have been denied equal promotional opportunities.

Motion, p. 2. The alternate class is:

2. All current and former employees with targeted disabilities at the Social Security Administration who, on or after August 22, 2003, have applied for and made a Best Qualified List for promotion, but have been denied equal promotion opportunities.<sup>4</sup>

Motion p. 3.

As an initial matter, only the second class option is in any way viable. After a year of discovery regarding the first class option, Complainant offered nothing better than statistical analyses derived from MD-715 reports. 2004-2007 715 Reports from the Agency, Goldstein Aff., Exs. J-M; Saberhagen Aff. and Saberhagen Report, Goldstein Aff., Exs. C and D. The Agency has not kept consistently the evidence necessary to determine who applied for positions but who did not make it onto BQL's. Further, Complainant failed to offer any evidence as to any irregularity in the rating and ranking system which would be a mechanism for discrimination or any evidence regarding outside applicants for initial hire. Moreover, the Agency has been compelled to disclose and produce substantial information regarding selection and non-selection of TDE's and Non-TDE's who did make it onto BQL's which Complainant has presented as statistically significant evidence of discrimination concerning the second option. The second class option has the further virtue that, if a TDE can be shown to be a person with a disability, the

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<sup>3</sup>August 22, 2003 is two years before Complainant first sought EEO Counseling. See 42 U.S.C. § 2000e-5(g)(1) of Title VII of the Civil Rights Act of 1964, as amended, which limits an award of backpay to two years prior to the filing of a charge. The Rehabilitation Act adopts the remedies set forth in 42 U.S.C. §§ 2000e-5(f) through (k). 29 U.S.C. § 794a(a)(1).

<sup>4</sup>Being "denied equal employment opportunities" is vague. It is more precise to say, "but were not selected for promotion."

TDE would automatically be a qualified person with a disability since he or she had made it onto a BQL. Consequently, only the second alternative, the one where TDE's made it onto BQL's, will be considered during the remainder of this Decision.

The mechanism the Complainant attacks in this case is the alleged unfettered discretion that the Agency affords its selecting officials. Such unfettered discretion makes it unlikely that decision makers will employ only one discriminatory practice to avoid selecting TDE's for promotion. The Agency objects that class treatment is not appropriate in Rehabilitation Act cases unless it involves a violation of 42 U.S.C. § 12112(b)(6) when an employer uses:

[Q]ualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

Essentially, the Agency argues that class treatment of disability claims are limited to specific qualification standards which can be tested for consistency with business necessity. The Agency offers no cases in support of this proposition other than to say that other disability class cases where the Commission has upheld certification have involved narrowly defined employment practices. The Agency cites, e.g., Glover v. USPS, EEOC Appeal No. 01A04428 (April 23, 2001), request for reconsideration denied, EEOC Request No. 05A10711 (August 16, 2001) (alleging that the agency maintained a nationwide policy of denying promotional opportunities to individuals with disabilities in permanent rehabilitation duty (also know as "light duty") positions). Opposition, p. 8.

However, discrimination against a qualified individual with a disability is not by any means limited to § 12112(b)(6). Disability discrimination is generally prohibited under 42 U.S.C. § 12112(a); limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee is prohibited under 42 U.S.C. § 12112(b)(1); and not making reasonable accommodation is prohibited under 42 U.S.C. § 12112(b)(5). There is no reason why a class action must be limited to a narrowly defined employment practice. The Commission has certified a class of disabled employees challenging a set of discretionary practices as discriminatory. See Cyncar v. USPS, EEOC Appeal No. 0720030111 (February 1, 2007) (certifying class of individuals with disabilities in the agency's Western Region who were allegedly subject to discrimination under the Rehabilitation Act when they were denied reasonable accommodation through (1) denial of their applications for leave; (2) disciplinary actions for leave violations following denial of their FMLA status; and (3) unreasonable requirements to re-certify their medical conditions), reconsideration denied, EEOC Review No. 0520070348 (May 1, 2007). Further, the Commission has rejected the argument that actions brought under the Rehabilitation Act are "ill-suited" for class treatment. See Travis v. USPS, EEOC Appeal No. 01992222, \*3 (October 10, 2002) (Commission response to "ill-

suited” argument was the Commission had adopted no such policy; limited duty carriers who had reached maximum medical improvement but could not perform all the duties of a carrier sought class certification; case remanded to Administrative Judge for further class certification consideration).

Moreover, the Commission and the courts have approved class certification in cases attacking uncontrolled and unmonitored discretionary decision making coupled with discriminatory attitudes in the workplace as raising common questions of fact. See, e.g., *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1183 (9<sup>th</sup> Cir. 2007) (sex discrimination class action; “use of entirely subjective personnel processes that operate to discriminate [sufficient to] satisfy the commonality and typicality requirements of Rule 23(a). In fact, the Commission has certified classes attacking SSA’s unfettered discretion in promotion selection decisions and in awards selection in two other cases. They are *Taylor v. SSA*, EEOC Appeal No. 07A50060 (May 5, 2006) (class of African American women, attacking unfettered discretion in promotion decisions and a process where promotional opportunities are conveyed by word-of-mouth by supervisors), reconsideration denied, EEOC Review No. 05A60801 (July 18, 2006); and *Dunbar v. SSA*, EEOC Appeal No. 01975435 (July 8, 1998) (certifying class of African American males challenging unfettered discretion in awards at SSA), reconsideration denied, EEOC Review No. 05981075 (January 22, 1999). See also *Harrison-Grey, et al. v. DVA*, EEOC Appeal No. 01A42149 (July 6, 2005) (African American class certified attacking unfettered discretion in awards), reconsideration denied, EEOC Review No. 05A51147 (August 24, 2005). There is no reason, if TDE’s can establish they are persons with disabilities under the Rehabilitation Act, that they cannot be affected in a discriminatory manner on a class wide basis through discriminatory unfettered discretion in promotion selection decision the same as any other protected class. Accordingly, I conclude that the Rehabilitation Act does not limit class claims to violations of 42 U.S.C. § 12112(b)(6).

## **B. Rule 23 Prerequisites**

### **Introduction**

The requirements contained in Sections 1614.204 of the EEOC regulations are based on Rule 23 of the Federal Rules of Civil Procedure, and the definitions, scope, and criteria for rejection of class complaints under Part 1614 are intended to conform as closely as possible with Rule 23. 42 Fed. Reg. 11808 (1977). In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), the United States Supreme Court declared categorically that for a discrimination suit to qualify for class certification, it must, like any other type of action, satisfy the requirements of Rule 23. Therefore, decisions interpreting Rule 23 are clearly relevant and should be considered in interpreting the regulations.

Notwithstanding the above, the putative Class Agent in the EEOC administrative process is not held to same standard of proof to which a Rule 23 plaintiff in United States District Court is held. As the Commission stated in *Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the*

Air Force, EEOC Appeal No. 01931776 (July 7, 1994), aff'd, Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the Air Force, EEOC Request No. 05940917 (Jan. 29, 1996):

[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.

Rather, the EEOC regulations provide for development of the evidence by the parties once a class complaint has been accepted. In addition, an Administrative Judge may issue orders for the investigation of a class complaint. The Administrative Judge may then take appropriate action if the evidence reveals that the class should be redefined, subdivided or dismissed. 29 C.F.R. Section 1614.204.

In this case, there has been substantial precertification discovery. However, the precertification discovery was still restricted to information necessary for identification of and notice to potential class members and to perform limited statistical analyses.

### **Typicality and Commonality**

In order for a Class Agent to represent a class, he must show that his claims are typical and common to the members of the class.<sup>5</sup> He can do so by presenting a claim which could be used as a "prototype for resolution of the common claims of the class. . ." Stastny v. Southern Bell Telephone and Telegraph Company, 628 F.2d 267 (4th Cir. 1980). As the Commission stated in Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the Air Force, EEOC Appeal No. 01931776 (July 7, 1994):

These prerequisites [typicality and commonality] require the class agent to possess the same interest and suffer the same injury as the members of the proposed class. While the class agent need not prove the merits of the class claims, he must identify specific facts that are common to the class. In this regard,

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<sup>5</sup> As the Supreme Court stated in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982):

The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence.

457 U.S. at 157, n.13.

the appellant's individual claim must show some nexus with the claims of the putative class. In other words, as presented, the appellant's individual claim and claims of the members of the proposed class must be sufficient to raise common questions of fact and law.

Hines, *supra*, at pp. 6 & 7.

### Commonality

To demonstrate commonality, Complainant must demonstrate there is a question of fact common to the class. 29 C.F.R. 1614.204(a)(ii). In other words, Complainant must establish an evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. See Mastren v. USPS, EEOC Request No. 05930253 (October 27, 1993); Garcia v. Interior, EEOC Appeal No. 07A10107 (May 8, 2003). See also Hines, EEOC Request No. 05940917 (evidence to establish commonality may include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions).

Factors to consider in determining 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, EEOC Appeal No. 07A10107 (citing Mastren, EEOC Request No. 05930253).

With respect to commonality in this case, Complainant presents evidence that the overriding practice of discrimination is the Agency's centralized policy of affording selecting officials unfettered discretion in making promotion selection decisions. Bargaining unit and non-bargaining unit policies are similar to each other. See merit promotion policies, Goldstein Aff., Exs. W, X, Y and Z. Once rating and ranking occurs and applicants for promotion appear on the BQL, the selecting official may select anyone on the BQL. He or she may interview all, some or no one on the BQL. Selection decisions are based on the "selecting official's personal judgment as to which of the candidates has the greatest potential for successful performance of the duties and responsibilities of the position to be filled." 2006 Management Officials Promotion Plan (MOPP), Goldstein Aff., Ex. Z, § 17.1 and § 17 generally; see 1999 MOPP, Goldstein Aff., Ex. Y, § 15.1 and § 15 generally; 2005 Collective Bargaining Agreement (CBA), Goldstein Aff., Ex. W, Art. 26, § 11; and 2000 CBA, Goldstein Aff., Ex. X, Art. 26, § 11. The selecting official does not have to give a detailed or any reason supporting his or her selection decision or in fact document any reason in writing or even orally nor is the selecting official required to give a reason to applicants for promotion when they request one. *Id.*; and American Federation of

Government Employees (AFGE) Council-President Witold Skwierzanski Aff., Goldstein Aff., Ex. WW, ¶¶ 13, 14. Further, the selecting official can opt not to select any of the candidates identified either competitively or non-competitively through CBA or MOPP procedures. SSA Personnel Policy manual, Goldstein Aff., Ex. BB, ¶ 18.1.3; 1999 MOPP, Goldstein Aff., Ex. Y, § 15.1.3; 2006 MOPP, Goldstein Aff., Ex. Z, § 17.1.3; see also Laurie Taylor Dep., Goldstein Aff., Ex. II.

The Agency argues that selecting officials' discretion is limited by the requirement that they adhere to merit promotion procedures. Opposition, p. 19; Gower Aff., Opposition Ex. 17, p. 6. However, the unfettered discretion afforded selecting officials means there is practically nothing preventing selecting officials from exercising their biases should they choose to do so. Consequently, Complainant has established that there is a centralized policy affording selecting official maximum unfettered discretion which could allow them to exercise unlawful bias against TDE's in promotion selection decisions.

In order for a promotion applicant to get onto an BQL, the employee's application must be rated and ranked using a numerical scoring system. Sometimes the response to knowledge, skill and ability (KSA) questions are also rated and ranked. In order to get onto any BQL, the applicant must achieve a score of at least 50% of the total maximum score possible. Then, a certain number, depending on the number of vacancies to be filled, usually at least the top 15, are included in the BQL. Inclusion on the BQL is a condition precedent for consideration for a competitive promotion. 2005 CBA, Goldstein Aff., Ex. W, Art. 26, § 10(H); 2000 CBA, Goldstein Aff., Ex. X, Art. 26, § 10(D)(5); 1999 MOPP, Goldstein Aff., Ex. Y, §§ 12.1.1.1 and 12.1.1.2; 2006 MOPP, Goldstein Aff., Ex. Z, §§ 16.1.2 and 16.1.4.<sup>6</sup>

The Agency produced lists of self-identified TDE's from August 2003 to January 4, 2008 and BQL's for the same period. The Agency produced BQL's for 1,915 different vacancy announcements from the 2003 to 2007 period containing 45,952 applicants and a list of selectees for each BQL. Complainant retained the services of Dr. Richard Drogin, Ph. D., Professor Emeritus of Statistics, Calif., State University, Partner, Drogin, Kakigi and Assoc., Statistical Consultants. Drogin matched the named TDE's against the BQL's and selection lists and performed a statistical analysis comparing the selection rates of TDE's against those of non-TDE's to assess whether any disparities were statistically significant. Drogin Aff., Goldstein Aff., Ex. G, p. 1; Drogin Vita, Goldstein Aff., Ex. G, App. 1. For every year from 2004 forward, Drogin found that there was a statistical disparity in selection rates ranging between 3.46 and

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<sup>6</sup>The 2000 CBA did not provide for a predetermined number of candidates per vacancy. Instead, it depended on a natural break in the scoring to separate those on the BQL and those given no further consideration for the posted vacancy. 2000 CBA, Goldstein Aff., Ex. X, Art. 26, § 10(D)(6); Gower Aff., p. 4.

4.64 standard deviations.<sup>7</sup> Drogin Aff., Goldstein Aff., Ex. G, p. 3. Drogin concluded that there was “a consistent pattern of statistically significant shortfalls in selection of applicants with TDE’s [sic] over the time period covered. During this time period, only 195 TDE’s who made the BQL were selected for promotion, an overall selection rate of 7.7%. This compared to 4,810 non-TDE’s selected for promotions, an overall rate of 11.1%. The probability of these results occurring by chance, *i.e.*, that disability did not influence the selection process, is far less than .05, it is less than one in 10 trillion ( $P < .0000000000001$ ). *Id.*, ¶¶ 4, 8, 9. Dr. Lisa Harpe, the Agency’s statistician, admitted that she performed some statistical runs that showed similar disparities concerning selection rates for TDE’s. Harpe Dep., Goldstein Aff., Ex. V, Tr. 68-73.

The Agency argues that these statistics should be discounted as fatally flawed. The Agency first argues that TDE’s should not be treated as a group because their disabilities are individual and supervisors reaction to them will vary according to how noticeable the disabilities are. The Agency also pointed out that the EEOC states in the MD-715 that “any statistical analysis is complicated by the fact that disabilities are individual in nature, making gross statistical comparisons of limited value.” MD-715, Part B(III); Opposition, p. 27.

Nonetheless, the Agency’s attacks on Dr. Drogin’s analysis are misplaced. First, initially, at least for class certification purposes, it makes sense to treat Targeted Disabled Employees (TDE’s) as one group. EEOC and SSA treats them as one group for MD-715 reporting purposes. EEOC Management Directive 715, (MD-715), Part B(III). Further, as MD-715 itself notes, “the EEOC has paid particular attention to the progress of individuals with targeted disabilities because these individuals tend to have more severe disabilities that are immediately apparent to potential employers and which the employers are likely to believe will require accommodation.” Accordingly, TDE’s serve as the “harbingers for success or failure of the Agency’s efforts concerning individuals with disabilities.” Statement of Carlton M. Hadden Director of EEOC’s Office of Federal Operations, Goldstein Ex. T, p. 2. It makes sense to group TDE’s together since the policies and practices may affect them in similar ways. Although it is true that one deaf person may be a lip reader and, thus, less noticeable than someone who is deaf but who signs, the Agency’s policies and practices may affect them in ways more similar than they are different. Consequently, I reject the assertion that the purported class must be broken down into its component disabilities.

Next, the Agency argues that the statistics are flawed because TDE’s self identify themselves as having targeted disabilities and there has been no tests of whether any of the self-identified TDE’s are actually disabled under the Rehabilitation Act. Opposition, pp. 14, 24; Linda Jackson Aff., ¶¶ 4-13. While Complainant should have undertaken a better effort to verify

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<sup>7</sup>Under both social science and judicial standards, roughly two or more standard deviations is widely considered statistically and legally significant. Two standard deviations is roughly equivalent to a 0.05 probability that an selection decision occurred by chance, a probability where statistical significance begins. See Hazelwood School Dist., V. United States, 433 U.S. 309-312 and n. 14, 17 (1977).

that TDE's are truly TDE's and persons with disabilities under the Rehabilitation Act, that omission is not fatal to Complainant's case at this time. Complainant has provided a remarkable amount of evidence at this stage of the proceedings, much more than most other successful applicants for class certification before the Commission. This has been made possible through an intensive period of discovery which was limited in scope. Complainant, in order to win at trial or to survive a latter motion to decertify the class, will have to contact the self-identified TDE's and obtain evidence from them to establish that they are in fact TDE's and disabled under the Act, or at least obtain such information from a properly drawn random sample. But for now, at this stage, Complainant has done enough to justify class certification using the TDE's self-identification data.

Also, the Agency criticizes Complainant's statistics because Dr. Drogin made his calculations assuming that all individuals who made the best qualified lists (BQL) were equally qualified. Such an assumption is sufficient for class certification purposes but may have to be refined to take into account variables such as job series, education and job component after they have been carefully validated. The Agency's experts, Drs. Harpe and Marjorie Baldwin, claim that dividing the proposed class into cohorts taking into account job series, education and work component is more predictive of valid outcomes than Dr. Drogin's approach. However, at this point in the case, I find that such cohorts merely serve to "slice and dice" the class so that the groups are made so small that statistical significance disappears. Thus, I reject the validity of Dr. Harpe's report. The reasons for this finding are many as detailed below.

First, the Agency violated my March 22, 2007 order compelling it to respond to Interrogatory No. 6 which required it to state in detail all evidence relied upon to support its rejection of Complainant's allegations of class discrimination. I make this determination regardless of whether Complainant was timely or attempted to settle the discovery dispute prior to making its recent Motion for Sanctions. There are consequences for violating my orders. At the March 22, 2007 on the record conference, I compelled the Agency to provide whatever evidence it had in narrative form to show that there was no discrimination in this case. Opposition Ex. 16, Hearing Transcript of March 22, 2007, Tr. 30. Interrogatory 6 was, thus, in the nature of a contention interrogatory. The Agency had to describe in detail the evidence it offered to prove there was no discrimination. The Agency failed to do that. Instead, although all of its objections had been overruled, it made attorney work product objections and stated generally that Complainant could not prove the alleged class had commonality, typicality or numerosity. Moreover, the Agency had a continuing duty to supplement this Interrogatory. Consequently, the Agency was obliged to describe its evidence including its methodology for Dr. Harpe's analysis. Dr. Harpe decided to include job series, education and organizational component as variables but failed to describe in her report her methodology for determining which job series to include or which organizational components to select. Further, the Agency failed to specifically cite where in her deposition, if at all, how and why she made her component and job series selections. If Harpe did not include such information in her report or the Agency did not cite it in her deposition, it should have been included in response to Interrogatory No. 6. The failure to provide the detail required by my order on such a crucial matter as Harpe's

methodology causes me to reject her report.

Second, I find that Harpe's report is technically flawed. Harpe admitted that she never validated her decisions to control for education, job series or organizational component. Harpe Dep., Tr. 139. That meant that she never established a justification for controlling for these variables, never defined these variables and never explained how she went about making judgments about which variables she should select. Part of the problem of alleged discrimination against TDE's may well be based on the selection of the organizational component. It may make sense to select a candidate from the entire processing center but may make no sense whatever to insist on selecting a candidate from group A as opposed to group B when both groups do the same thing and are under the same second-line manager. Not knowing which component Harpe chose and why denies me the opportunity to determine whether her judgment on which component to select was sound.<sup>8</sup> Also, I find that education does not have such an impact on selection that it should be raised to the level of an independent variable in all cases. The crediting plans the Agency attached contradicts any inference that education should be a separate variable across-the-board in creating cohorts. Both of the crediting plans that Harpe attached to her rebuttal affidavit stated that a degree could be substituted for years of experience. Crediting Plans, Harpe Aff., Opposition Ex. 24, Exs. However, this meant that those with the degree were competing directly against those who had more years of experience but no post-graduate degree. To control for education would artificially cut out direct competitors who had more experience but less education. Moreover, many jobs at the Agency take education into account to get on the best qualified list but not significantly otherwise. That is exactly what the crediting plans did which Harpe attached to her Rebuttal Affidavit, determine who qualified for the BQL's. Using them to justify controlling for education is unwarranted. There is no basis for finding that the Agency's selecting officials usually relied on education in making their selection decisions. Instead, there is every reason to believe that selecting officials focus upon on-the-job experience and performance in making selection decisions regarding such positions as Social Insurance Specialists who are disability or claims representatives or for similar positions. Thus, without further validation, controlling for education was not justified.<sup>9</sup>

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<sup>8</sup>If some of these justification were contained in Harpe's deposition, the Agency did not specifically explain and cite them. Although I read all of the expert reports and affidavits with citations to attachments, I do not read whole depositions. Instead, it is counsel's job to provide a detailed explanation in its brief and then cite and attach deposition extracts and documents in support.

<sup>9</sup>Adam Gower, Human Resources Specialist, GS-14, testified that in his experience, it was reasonable to take into account job series, organizational component and education since that is what selecting officials did. Gower Aff., Opposition Ex. 18, ¶¶ 15-16. However, as explained above, Harpe did not set forth any rules for when to take into account these variables or explain her judgments as to how and when she took them into account. Gower's testimony is insufficient given that data on how and why selecting officials normally make selection choices using these variables is lacking. Although a selecting official might reasonably take education into account

Harpe's failure to describe her methodology for controlling for job series causes me to reject her report as well. Employees applying for promotion from more than one job series may be equally qualified for the position at issue. For example, engineers and architects may be equally qualified for space manager positions but are in different job series. Harpe failed to describe the basis for her judgment of which job series to include and which to reject in the fashioning of her cohorts. The possibility, in fact, the likelihood that Harpe was too restrictive meant that many TDE's were excluded from direct comparison in Harpe's cohorts. Such decisions unjustifiably narrowed the size and scope of the promotion pool unjustifiably causing statistical significance to disappear.

Also, Dr. Baldwin criticized Dr. Drogin's analysis because it failed to take into account the fact that some Schedule A employees who are TDE's may have gotten onto BQL's on a non-competitive basis. Baldwin Report, Opposition Ex. 25, pp. 8-9. Such employees might be less qualified than others on competitive lists because they met minimal qualifications but were not subjected to review of their applications to assign them points as compared against a crediting plan. However, both Baldwin and Harpe admitted that they never determined how often certificates listing Schedule A employees were sent to selecting officials and whether they appeared on BQL's or on separate noncompetitive lists. Baldwin Dep., Opposition Ex. 26, Tr. 72; Harpe Dep., Opposition Ex. 24, Tr. 194-95. Consequently, Dr. Drogin's statistics are more than appropriate at this stage of the proceedings to justify class certification. It is inappropriate at this stage to reject Dr. Drogin's statistics based on a possible hypothetical flaw which the Agency did not at this stage investigate or validate to determine its significance.<sup>10</sup>

In addition to a centralized policy affording selecting officials unfettered discretion in selection decisions and strong statistical evidence of discrimination, Complainant also offered anecdotal evidence of discriminatory treatment from more than 40 TDE's. About 35 of these individuals applied for positions during the relevant time period, made the BQL but were not selected for the positions. Thus, these 35 are potential class members. These individuals provided testimony about non-selection from BQL's and discriminatory comments. They also provided background evidence of refusals to provide adequate accommodations so TDE's could compete for positions on an equal playing field, and of TDE's made less competitive for promotion through denial of awards, training and developmental assignments. Motion, pp. 27-28;

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in deciding whom to select for an economist position, it would probably be entirely irrelevant for promotion into an upper level claims representative position.

<sup>10</sup>Dr. Baldwin makes the claim that "productivity can be limited by the same health conditions that make workers with disabilities eligible for civil rights protection." Opposition, p. 39; Baldwin Report, Opposition Ex. 25, p. 6. While this claim may be true without reasonable accommodation, the Rehabilitation Act and ADA were passed in part to afford disabled employees reasonable accommodation in order to level the playing field and make qualified persons with disabilities able to compete in the job market. ADA Findings and Purposes, 42 U.S.C. § 12101.

Goldstein Aff., Exs. DD-II, KK-QQ, UU-GGG.

Dr. Peter Blanck took all of the statistical and anecdotal information and performed a social science analysis. Dr. Blanck's Declaration and Report consists of a scientifically based social science analysis of the Agency's organizational culture. Blanck based this analysis on review of depositions and affidavits from potential class members, depositions of Agency managers, MD-715 Agency reports, a 1991 report on under-representation of TDE's in the Agency's workforce in terms of hiring and promotion and the statistical analyses of Drs. Lance Saberhagen and Drogin. Blanck determined that:

SSA has a common organizational culture affecting the career training and advancement opportunities available to, and promotion of employees with Targeted Disabilities. In addition, there are features of SSA's barriers to the career advancement of employees with Targeted Disabilities. Finally, SSA's policies and practices are not effective in the areas of identifying and eliminating potential barriers facing employees with Targeted Disabilities.

Blanck Aff., Motion Ex. P, p. 8. A similar report was relied upon as scientifically reliable in Dukes v. Wal-Mart, 509 F.3d at 1178-81.

Blanck explained that promotion decisions based on excessively subjective and discretionary criteria, such as those allegedly applicable at the Agency, are susceptible to stereotyping and bias against people with disabilities. He found the selecting official's broad discretion to choose applicants off the BQL's problematic with respect to the low promotion rates of TDE's. Blanck said "[t]his step is a critical flaw that allows for in-group bias and prejudices/stereotypes, discomfort from being around people with disabilities, exclusion caused by communication barriers (such as speech and hearing impairments) and lack of meaningful contact with people with disabilities, which may exacerbate the effects of negative stereotypes, discomfort, marginalization, and dislike." The testimony involved TDE's who are given the most difficult assignments but then passed over for promotion because his production numbers were low (Christopher Casey); given filing assignments while others get analytical assignments (James Hulbert); told that she was passed over for promotion because she was not mentally and emotionally stable enough for promotion (Linda Bieri); threatened by co-workers for being in a wheel chair (Dennis Bozzell); or told she was not selected because telephone contact was a communication barrier even though she had a TTY (Geraldine Murray). Blanck Aff., Goldstein Ex. P, n. 38, 40, 41, 48. See also Affidavit of Barbary Penny, Goldstein Aff., Ex. OO, ¶ 12 (selection panel given race, sex, and disabilities list of those on BQL prior to selection) and Affidavit of Ellen Altemose, Goldstein Aff., Ex. YY, ¶ 8 (former manager told Altemose that he would have to take her disability, multiple sclerosis, into consideration for promotions).

Others were denied reasonable accommodation or developmental details or training, such

as denial of an ergonomic chair (Laurie Darsil Taylor); having accommodation leave held against him (Steve Lance); denial of videophone and required to use outdated TYY (Daryl Keith Robertson). *Id.* at n. 44. See also Cynthia Lee Picollo Aff., Class Member Ex. 34, ¶¶ 13-14 (denied training, given “busy work”); Donna Kay Ring Aff., Class Member Ex. 36, ¶ 12 (interview cut short when she told interviewer she was blind); and Altemose Aff., Goldstein Aff., Ex. YY, ¶¶ 6, 9, 10 (cannot walk due to multiple sclerosis, denied scooter which prevents her from attending training and work on projects outside of her limited work space).

The Agency’s attack on Dr. Peter Blanck’s Declaration and Report fails because it amounts to firing with blanks. The Agency’s attack on Dr. Blanck’s report attempts to point out numerous contradictions and selective quotations of testimony to support Dr. Blanck’s alleged predetermined thesis of Agency systemic discrimination. Opposition, pp. 44-50. The problem with these asserted contradictions is that the Agency failed approximately 80 to 90 percent of the time to attach any deposition extracts to support its citations and assertions. The Agency failed to attach any of its own deposition extracts of potential class members and Complainant naturally attached only those extracts which he deemed supportive of his case. This is a grave and perhaps fatal flaw in the Agency’s argument in this case. The failure to attach deposition extracts for dozens of deposition citations means that these citations are not backed by evidence and I will give them no evidentiary weight.

Moreover, even if the Agency had attached the cited deposition pages, I would still not find that Dr. Blanck’s report should be rejected as biased or unfair at this stage of the proceedings. The Agency explained that some potential class members never applied for jobs during the relevant period of the class complaint. Opposition n. 24. While these individuals may not be class members, they may still provide relevant background evidence. The Agency argues that those TDE’s who made a BQL only one or two times during the relevant time period should be discounted. Opposition n. 7 and p. 49. However, the Agency’s refusal to promote them those one or two times may still be discriminatory and their testimony adds to the cumulation of evidence and fits within the statistical framework of Dr. Drogin’s analysis. The Agency claims that I should discount claims of mistreatment because some class members are being treated well by some current managers. Opposition, p. 46. However, it is relevant and a possible violation that past or other current managers treated poorly the TDE’s who complain here if the mistreatment occurred within the relevant time period. The Agency claims I should discount claims of denial of awards, training, details or developmental assignments because many of those potential class members giving testimony received one particular award, detail, training or developmental assignment in the past. Opposition, pp. 47-49. However, it may be discriminatory to have denied them other awards, details or training.

Also, Dr. Baldwin criticized Dr. Blanck for considering a 1991 report showing underrepresentation of TDE’s at the Agency as too old to be relevant. Baldwin Report, Opposition Ex. 25, p. 11. However, at this stage of the proceedings, it is relevant to show that the denial of advancement to TDE’s is a longstanding problem.

For the foregoing reasons, the Agency has failed to successfully attack Dr. Blanck's Declaration and Report to such an extent that at the certification stage of the proceedings I should discount it.

Complainant has presented evidence of a centralized practice affording selecting officials unfettered discretion, statistically significant evidence that TDE's are selected for promotion at lower rates than non-TDE's, anecdotal evidence of discrimination and a social science report on the Agency's organizational culture which permits discrimination against TDE's. Accordingly, Complainant has presented a question of fact common to the class, class wide non-selection of TDE's due to an Agency-wide practice of affording selecting officials unfettered discretion in selection decisions.

### Typicality

Under 29 C.F.R. § 1614.204(a)(iii), Complainant must demonstrate that his claims are typical of the class. 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 and Training Administration, EEOC Appeal No. 01930457 (September 10, 1993); and Conanan v. FDIC, EEOC Appeal No. 01952486 (January 13, 1998).

The claims of Complainant Ronald Jantz are typical of the class. Jantz claims that he is unable to obtain a promotion at the Agency due to his status as a TDE. In his 20 years employed at the Agency, he has never been promoted. He has made BQL's 30-40 times for a variety of positions but has never been selected. He contends, as do other class members, that the reason for his non-selection is his TDE status. His claims are thus typical of all TDE's allegedly denied equal promotional opportunity despite making a BQL in violation of the Rehabilitation Act. Like others in the proposed class, Complainant will attempt to prove his case through the same types of evidence, statistical analyses of relative promotion rates, reports and studies by experts and the Agency, the effect of Agency-wide policies and practices, and testimony from Agency managers and representative class members. Jantz Dep., Goldstein Aff., Ex. E, Tr. 22, 23, 26; Jantz Aff., ROI I, Ex. 10, pp. 4, 13-14, Merit Promotion Material on non-selections, ROI I, Exs. 22-25.

The Agency's assertions that Complainant performed poorly in interviews and was an undistinguished performer in his job, that the selecting officials did not know about his disability and that he applied from outside the organizational component from which the selecting official chose to make his selections goes to the merits of the case and are not proper considerations \* concerning a motion for class certification. See Opposition, pp. 15-17; Donna Siegel Aff., Opposition Ex. 12. The Agency also claims that Complainant's interests are in conflict with the

class as a whole since he claims other bases in his individual complaints, such as sex and age discrimination, discrimination against disabled veterans and that deaf employees are especially discriminated against. Opposition, p. 20-21; Compl. Aff., ROI I, Ex. 10. However, there is no reason to believe that Complainant cannot focus on the claims of the class and realize his other bases must take a back seat to the claims of the class. Further, there is no reason to believe that he cannot represent TDE's since he believes that the Agency systematically discriminates against those who are severely disabled (including TDE's) even though he believes the deaf are "especially" so discriminated against. Compl. Aff., ROI I, p. 4. I see no conflict of interest and find that Jantz's claims are typical of the claims he seeks to represent as class agent.

Further, Complainant offers four other class members as alternate class members and posits that their claims are also typical of the class.

The claims of T. Jameel Muhammad, a Benefits Technical Examiner in Baltimore, GS-9, are typical of the class. He suffers from a permanent suprachondral fracture from a 1994 car accident and is wheel chair bound. He meets the definition of a TDE and is almost certainly a person with a disability under the Rehabilitation Act. He has been an owner and manager of two private laboratories and has been a GS-11 manager with the U.S. Virgin Islands Department of Health. Despite these qualifications, during the relevant time period, Muhammad made BQL's at least twice and was not selected to fill either vacancy. Muhammad Affs., Goldstein Aff., Exs. BBB and CCC. Also the claims of Donna Ring, a Service Representative, GS-8 in Detroit, Michigan are typical of the class. She is blind. Despite the fact that she has a master's degree and prior experience, she has been on several BQL's and not been selected. Ring Aff., Goldstein Aff., Ex. DDD. Complainant has offered both Muhammad and Ring as additional class agents with claims typical of the class in order to provide additional representation at differing GS levels and different targeted disabilities. I find that their claims are typical of the class and they are appropriate additional class agents.

Complainant also offers Ellen Altemose and Karl Baldwin as additional class agents. Motion, p. 45. The Agency objects to them as class agents since Complainant did not supplement his response to Interrogatory No. 5 which required him to identify Altemose and Baldwin as potential class members. Opposition, pp. 22-23. Complainant failed to supplement despite the fact that he had Altemose's affidavits in hand in April 2008 and June 18, 2008 and Baldwin's Affidavit on June 9, 2008. Altemose Affs., Goldstein Aff., Exs. YY, ZZ; Baldwin Aff., Goldstein Aff., Ex. AAA. However, Interrogatory No. 5 only required Complainant to identify potential class members, not additional potential class agents and Interrogatory No. 5 was never the subject of an Agency motion to compel.<sup>11</sup> I will consider Altemose and Baldwin as additional class agents provisionally provided Complainant promptly corrects this oversight by supplementing Interrogatory No. 5. The Agency's objections to Altemose and Baldwin are

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<sup>11</sup>Complainant obtained the June affidavits just days or a couple of weeks before the filing of the June 27, 2008 Motion. While regrettable, the failure to supplement caused minimal prejudice, if any, to the Agency.

otherwise OVERRULED.

Altemose, who is a Claims Representative, GS-11, in Allentown, Pennsylvania, has multiple sclerosis and cannot walk. She is a qualified person with a disability. She has applied for seven vacancies during the relevant time period, made the BQL each time and was not selected. She has been denied a scooter which would have allowed her to attend training, work on job-related projects outside of her work area and work on developmental assignments. A former manager told her he would take her disability into consideration regarding promotions. She is willing to take on the responsibilities of a class agent. Altemose Aff., Goldstein Aff., Exs. YY and ZZ. Karl Baldwin was a Claims Representative, GS-11, until his retirement in 2007. He has hearing loss in both ears, Post Traumatic Stress Disorder (PTSD) and depression. During the relevant time period, Baldwin applied for a Management Analyst, GS-12 position, made the BQL but was not selected. Baldwin has won a disability discrimination promotion case against the Agency in the past. He is willing to take on the responsibilities of a class agent. I find that the claims of Altemose and Baldwin are typical of the class and that there would be no conflict of interest in including them as class agents.

### Numerosity

As cited earlier, 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). It is clear from a review of the case law that numerosity is a fluid concept which requires examination of the facts in each case so that as a general rule, the number of class members is not, in and of itself, determinative. Nevertheless, the sheer number of members that a proposed class comprises may create a presumption that the joinder of their claims is impracticable. See, EEOC v. Printing Industry of Metropolitan Washington, D.C., Inc., 92 F.R.D. 51 (D.D.C. 1981); Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir. 1984).

Complainant satisfies the numerosity requirement for the proposed class of TDE's who made the BQL but were not selected for promotion.<sup>12</sup> Complainant has submitted testimony of approximately 35 TDE's who have applied for competitive promotions, made the BQL but have not been selected.<sup>13</sup> Further, in discovery, the Agency produced the files of 2,545 TDE applicants on BQL's over four years. Drogin Aff., Motion Ex. G, ¶ 4 and Table 1. Even with some TDE's making multiple applications, the proposed class easily satisfies the numerosity

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<sup>12</sup>I have already ruled that the fact that TDE's are self-identifying does not prevent class treatment at this stage of the proceedings. Supra, p. 12.

<sup>13</sup> The Agency notes that six of the potential class members have recently been promoted. Opposition, pp. 11-12; Charles Lewis Aff., Opposition Ex. 11. However, their promotions do not prevent them from being class members since they applied for, made the BQL and were not selected for other vacancies. These individuals would still be entitled to backpay and compensatory damages should they prevail regarding their non-selection claims.

requirement.

### **Adequacy of Representation**

Adequacy of representation is the most crucial requirement because the judgment will determine the rights of absent class members. Bailey, et al. v. DVA, EEOC Request No. 05930156 (July 30, 1993). Adequacy requires that the agent of the class, or, if represented, the representative, will 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. Agriculture, EEOC Appeal No. 07A20071 (August 7, 2002).

Jantz, Muhammad, Ring, Altemose and Baldwin, as discussed in the section on typicality, have no conflicts with the class they seek to represent and their interests are squarely aligned with other TDE's at the Agency. They have testified that they seek relief on behalf of all TDE's who have made it onto BQL's but were not selected. Complainant is represented by a consortium of law firms with extensive experience in class action litigation, including claims of employment discrimination and disability discrimination. They are the firms of Berger and Montague, P.C., Brown Goldstein & Levy, LLP, Schneider Wallace Cottrell Brayton Konecky LLP and the non-profit, Disability Rights Advocates. Their affidavits outline their extensive experience. Shannon J. Carson, Laurence W. Paradis, Todd M. Schneider and Daniel Goldstein Affs. Moreover, class counsel state that they have committed their resources to fully and professionally prosecute the claims of the class.

Based on the foregoing, I find that there is adequacy of representation both with respect to the class agents and class counsel.

### **V. DECISION**

Based upon full consideration of the complaint and record before me, for the reasons stated above, individually and cumulatively, pursuant to 29 C.F.R. § 1614.204(d)(7), I hereby accept and certify Complainant's class complaint with respect to certain issues. The class is defined as:

All current and former employees with targeted disabilities at the Social Security Administration who, on or after August 22, 2003, have applied for and made a Best Qualified List for promotion, but were not selected for promotion.

Based upon full consideration of the complaint and record before me, I reject as a class complaint all other aspects because they do not meet the commonality and typicality requirement.

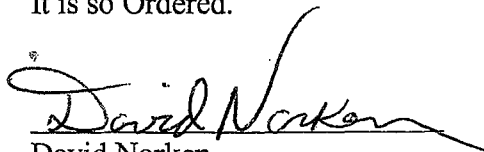
The partial rejection of this complaint as a class complaint does not preclude the utilization of the individual complaint procedures.

Further, Ronald Jantz, T. Jameel Muhammad, Donna Ring, Ellen Altemose and Karl Baldwin are hereby accepted as Class Agents for the accepted class complaint.

It is so Ordered.

FOR THE COMMISSION:

10/8/08  
DATE

  
David Norken  
Administrative Judge

## **NOTICE TO THE PARTIES**

### **1. TO THE AGENCY:**

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. §§ 1614.204(d)(7) and 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O.

### **2. TO THE COMPLAINANT:**

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. §§ 1614.401(c) and 1614.402(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, pp. 9-2, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

### ***WHERE TO FILE AN APPEAL:***

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

#### **BY MAIL:**

Director, Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 19848  
Washington, D.C. 20036

#### **BY PERSONAL DELIVERY:**

Director, Office of Federal Operations  
Equal Employment Opportunity Commission  
1801 L Street, NW

Washington, D.C. 20507

BY FACSIMILE:

Number: (202) 663-7022

*Facsimile transmissions of more than ten (10) pages will not be accepted.*

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing **DECISION TO ACCEPT, REJECT OR CANCEL CLASS COMPLAINT and SEOND SANCTIONS ORDER** within five (5) calendar days after the date it was sent *via* first class mail. I certify that on October 28, 2008 the foregoing **DECISION & ORDER** was sent *via* first class mail to the following:

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