

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE**

SANDRA M. McCONNELL,)	
A/K/A VELVA B., ET AL.)	
Class Agent,)	EEOC Case No. 520-2010-00280X
)	
v.)	Agency No. 4B-140-0062-06
)	
MEGAN J. BRENNAN,)	Administrative Judge
POSTMASTER GENERAL,)	Monique Roberts-Draper
UNITED STATES POSTAL SERVICE,)	
Agency.)	DATE: February 28, 2019

**CLASS COUNSEL MOTION TO RECONSIDER CASE MANAGEMENT
ORDER PENDING THE SCHEDULED STATUS CONFERENCE**

Undersigned Class Counsel is in receipt of the Administrative Judge’s February 27, 2019 Case Management Order. Class Counsel urges the Administrative Judge to reconsider aspects of the Case Management Order, or at least stay any order until the parties are afforded the opportunity to address the questions at issue during the status conference scheduled for March 20, 2019.

A. Order to Revoke Class Counsel’s Role is Contrary to Law

The Administrative Judge’s Order stripping the appointment of Class Counsel to represent the interests of Class Members in this case is contrary to the orders of the Office of Federal Operations in this case, violate the EEOC’s class complaint regulations, and would create unnecessary practical difficulties.

The Office of Federal Operations appointed the undersigned law firms to represent the interests of all Class Members in this class complaint. *See McConnell v. U.S. Postal Serv.*, EEOC No. 0720080054 (2010). The appointment was not limited to certain aspects of this case or certain phases of the litigation – Class Counsel was appointed to represent all interests of all Class Members.¹ As recently as November 7, 2018, OFO recognized Class Counsel’s role to act

¹There is no dispute, for example, that Class Counsel had the authority during the Phase I liability litigation to settle all Class Member relief claims. *See* 29 C.F.R. § 1614.204(g)(2) (“The complaint **may be resolved** by agreement of the agency and the agent **at any time** pursuant to

on behalf of all Class Member claimants. The Agency had sought to strike the 2018 appeal filed by Class Counsel, asserting the very same arguments about Class Counsel supposedly no longer acting on behalf of all Class Members. *See* Agency Mot. to Strike Appeal at 8 (Oct. 1, 2018). OFO rejected the Agency’s motion, and recognized Class Counsel’s ongoing role as representatives for the entire Class. OFO denied the Agency’s motion to strike the appeal, ruled in favor of the appeal filed by undersigned Class Counsel, and issued relief **to all Class Members** who filed relief claims. That is, OFO rejected the very same arguments now presented by the Agency, issued the relief that was sought by Class Counsel, and extended that relief to every single Class Member claimant. Further, OFO served *only* Class Counsel (and the Class Agent) on behalf of all Class Member claimants. *McConnell v. U.S. Postal Serv.*, EEOC No. 0120182505 (2018).² Thus, OFO appointed undersigned counsel to represent the interests of all Class Members in this class complaint, and recognized Class Counsel’s continued role on behalf of all Class Member claimants in its November 7, 2018 Decision.

The Commission’s class complaint regulations demonstrate that Class Counsel continue to represent the interests of all Class Member claimants. The Commission’s class complaint regulations highlight the difference between the “class complaint,” and “claims” that come within that class complaint. The regulations define a “class complaint” as “a written complaint of discrimination filed on behalf of a class by the agent of the class” 29 C.F.R. § 1614.204(a)(2). The class complaint in this case is the complaint filed by Ms. McConnell. The regulations provide:

When discrimination is found in the final order and a class member believes that he or she is entitled to individual relief, the **class member may file a written claim** with the head of the agency or its EEO Director within 30 days of receipt of notification by the

the notice and approval procedure contained in paragraph (g)(4) of this section”) (emphasis added). The parties in this case engaged in mediation on that very basis. The Agency fails to demonstrate how the EEOC’s class complaint regulations would permit Class Counsel to represent the individual relief claims of all Class Members during one phase of this case, and lose that role during a later phase of the same case.

²The Agency’s Response does not address OFO’s November 7, 2018 denial of the Agency’s motion to strike, or OFO’s decision to award relief to all Class Member claimants based on the appeal filed by Class Counsel.

agency of its final order. Administrative judges shall retain **jurisdiction over the complaint** in order to resolve any disputed claims by class members.

29 C.F.R. § 1614.204(1)(3) (emphasis added). The regulations make clear that the relief claims filed by class members (whether 25 or 25,000) are encompassed within one class complaint. As noted above, undersigned Class Counsel was appointed by the Commission to represent the interests of all Class Members in the class complaint, which includes individual claims asserted within the class complaint.³ Class Member claims for relief do not establish new “complaints.” Rather, these claims fall within the certified class complaint filed more than ten years ago (*i.e.*, the class complaint for which Class Counsel has been appointed).⁴

This case is a single class complaint. There is one EEOC case number assigned to this class complaint, one Administrative Judge assigned to oversee the relief process in this class complaint, and one set of rules and standards that will be applied to all relief claims presented in this class complaint. Throughout every aspect of the litigation of this class complaint, Class Counsel has been authorized to represent all interests of all Class Members, including relief; and Class Counsel has been charged with the responsibility to be answerable to the Commission on behalf of the entire Class. Class Counsel was appointed to represent the interests of all Class Members in this class complaint,⁵ OFO acknowledged that continuing role in denying the

³Similarly, when certifying the class complaint and appointing Class Counsel, OFO identified the “claims” raised by Class Agent against the NRP: “(1) The NRP fails to provide a reasonable accommodation; (2) The NRP wrongfully discloses medical information; (3) The NRP creates a hostile work environment; and (4) The NRP has an adverse impact on disabled employees.” *McConnell v. U.S. Postal Serv.*, EEOC No. 0720080054 (2010). These separate legal claims all came within the sole class complaint. Class Counsel was explicitly appointed by OFO to represent the interests of all Class Members with respect to each of these “claims.”

⁴Class Counsel cited a number of cases, in the federal sector and federal courts, where it was clear that the appointed class counsel continued to represent the class members during the relief stage of those cases. There were no cases cited by the Agency or the others who submitted briefs on this issue pointing to cases where the class counsel was found to no longer represent all class members during the relief stage.

⁵Many Class Members identified other representatives during earlier stages of this same case. Over 1900 individual EEO complaints were subsumed into this class complaint, either by order of the Agency or by the EEOC. In many of those individual EEO complaints, representatives other than Class Counsel had been designated. However, consistent with the

Agency's 2018 motion to strike the appeal filed by Class Counsel, and there has never been an order issued stripping Class Counsel of its role or decertifying the single class complaint. The Administrative Judge's Order would contradict the orders of OFO and the EEOC's class complaint regulations.

Additionally, stripping Class Counsel of its appointed role would create numerous practical concerns that would unnecessarily complicate the processing of disputed relief claims. Agency counsel has refused to confer with or discuss settlement⁶ with Class Counsel based on its argument that Class Counsel no longer represents the Class. Therefore, cooperation between the parties or exploration of class-wide settlement would be highly compromised by stripping Class Counsel of its assigned role. Further, taking away Class Counsel's role would create unnecessary duplication of all litigation aspects related to the claims process. Rather than a single request for extension of time on behalf of the Class Member claimants, the Administrative Judge will likely be inundated by hundreds, if not thousands, of extension requests. And routine matters, such as service of pleadings and orders, or status conferences, may become overwhelming affairs.⁷ Avoiding multiplicity of litigation is precisely why the Commission established the class complaint process. The Administrative Judge's Order stripping Class

practice in every EEOC class action, those individual EEO complaints were subsumed within this class complaint, and Class Counsel assumed responsibility to represent the interests of those Class Members in this case.

⁶Any large scale settlement discussions would be severely complicated by revoking Class Counsel's role. The Case Management Order acknowledged that "group settlements" would have to be approved under the EEOC's class complaint resolution process, which explicitly reviews whether the settlement is "fair, adequate and reasonable to the class as a whole." 29 C.F.R. § 1614.204(g)(4). It would appear difficult for the Administrative Judge to make such a decision without the participation of a class counsel.

⁷For example, the Administrative Judge served the Case Management Order only on Class Counsel and four other representatives identified by the Agency. The Agency's briefing indicates that there are many other designated representatives, in addition to numerous Class Members who seek to pursue their relief claims *pro se*. If Class Counsel is not authorized to receive submissions on behalf of those other Class Members claimants, the Commission will need to determine how to effectively serve those individuals with important communications about their claims, such as the Case Management Order.

Counsel of its appointed role threatens to create the overwhelming chaos that the class action mechanism seeks to alleviate.

Class Counsel asks that the Administrative Judge reconsider the order stripping Class Counsel of its appointed role to represent the interests of all Class Members. Such a decision should not be made until, at least, the parties are able to address this important topic during the upcoming status conference.

B. Case Management Procedure May Prove Ineffective

The case management process outlined in the Administrative Judge's Case Management Order appears to move this matter forward with alacrity. However, this process threatens to inundate the Administrative Judge with incomplete submissions, which may require much more lengthy future re-litigation or appeals.

Without any discovery, Class Member claimants will not be afforded basic evidence that relates directly to the burdens placed by the Commission on the claimants. Agency records would clearly demonstrate when a Class Member was reviewed under the NRP, which USPS officials had access to the Class Member's medical records, and other information that is highly relevant to the issues to be addressed in relief submissions. Of note, this same information may never have been provided to the Class Member at the time of the NRP. Limited discovery should be permitted to allow each Class Member claimant to at least review the NRP documents held by the Agency that relate directly to the NRP review of that claimant. Failure to allow Class Member claimants access to basic information about the NRP review of them would lead to submissions that are incomplete. These incomplete submissions will require further information to be sought, or appeals based on a lack of access to relevant information.

Extensions of time will be necessary, at least for undersigned Class Counsel. Even if the Administrative Judge revokes Class Counsel's role to act on behalf of all Class Members, over 25,000 individual Class Member claimants have designated Class Counsel to act on their behalf in the relief process.⁸ It will necessarily take more than 20 days for Class Counsel to provide responses to the submissions to be filed by the Agency.

⁸Class Counsel will provide documentation demonstrating that all of these 25,000+ Class Member claimants have designated Class Counsel.

While the process announced in the Case Management Order would promptly provide the Administrative Judge with an enormous volume of paperwork on every Class Member claim for relief, the process provides no indication on how such claims would be considered. Adjudicating almost 30,000 claims, even without the benefit of discovery, would be a daunting task.⁹ Class Counsel's proposed process sought to provide initial litigation of bellwether claims to represent different factual scenarios within all of the claims, thus easing the adjudication of all subsequent claims of the same type. The Case Management Order would have all of the initial work performed by the parties completed in a very short amount of time, but would leave the Administrative Judge with an extremely tall task of considering all the claims disputed by the Agency. Class Counsel seeks a process that quickly brings this longstanding class complaint to a completion. However, that process must also be efficient and effective.

Undersigned Class Counsel asks that the Administrative Judge reconsider the procedure noted in the Case Management Order, and at least stay the ordered process until the parties have a chance to be heard during the March 20, 2019 status conference.

Conclusion

For the reasons noted above, Class Counsel asks that the Administrative Judge reconsider aspects of the Case Management Order, and stay any order until after the March 20, 2019 status conference.

Respectfully submitted,

/s/

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⁹Were the Administrative Judge to give only 30 minutes to review of the parties' submissions and draft a decision on each disputed claim, it would take over 7 years of full-time work to issue the decisions.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing CLASS COUNSEL MOTION TO RECONSIDER CASE MANAGEMENT ORDER PENDING THE SCHEDULED STATUS CONFERENCE was filed via HECAPS and served via electronic mail on this the 28th of February, 2019 upon:

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