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

SANDRA M. McCONNELL, 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 11, 2019

CLASS MOTION FOR ENTRY OF CASE MANAGEMENT ORDER

This historic class action has reached a pivotal moment. The Office of Federal Operations has remanded this case for determination of disputed individual class member claims for relief. The volume of disputed claims is unprecedented: over 28,000 disputed individual claims for relief. Given the extremely large number of disputed claims at issue, it is imperative that the Commission establish an adjudicatory framework that can efficiently address all disputed claims in a reasonable time-frame. The Case Management Order proposed by the Class accomplishes this goal, with a process that is fair to all parties, and is consistent with EEOC Management Directive 110, Chapter 8, Section 12(C) ("Oversight of Individual Claims for Relief").

As explained below, swift processing of an initial batch of 50 class member claims will be feasible with the appointment of Special Masters. Adjudication of the first 50 claims as proposed by the Class will make it easier for the Commission and Special Masters to process the next 500 claims even more quickly, and so on.

This brief is organized as follows: Section I addresses Class Counsel's continuing role as the representative of all Class Members who have elected to proceed through the relief process. Section II identifies problems in connection with the Agency's responsibility for notifying all Class Members of their right to file a claim for individual relief. Section III explains the adjudicatory framework proposed by the Class, including a description of the important role for

Special Masters. And Section IV presents a proposed process for addressing the Class's attorney's fees and costs during this phase of the case.

I. Class Counsel Represents All Class Members Who Seek Relief

The Commission previously appointed and designated Class Counsel to represent the interests of all Class Members in this class complaint. *See McConnell v. U.S. Postal Serv.*, EEOC No. 0720080054 (2010). The Agency moved for decertification of the class, but that motion was denied by the Commission. *See McConnell v. U.S. Postal Serv.*, EEOC Nos. 0720160006 & 0720160007 (2017); *req. for recons. den'd*, EEOC No. 0520180094 & 0520180095 (2018). No EEOC order has stripped Class Counsel of its role as the representative of the Class. Thus, Class Counsel continues to represent all Class Members who have submitted claims for relief.[1]

The Agency has asserted that Class Counsel no longer represents Class Members during the relief phase of this case. *See, e.g.*, Agency Mot. to Strike Appeal at 8 (Oct. 1, 2018).[2] The Agency's argument has already been rejected by the Commission in this case, is inconsistent with the procedures used by the EEOC and courts in other class actions, and is devoid of any legal support.

The most recent decision from the Office of Federal Operations (issued November 7, 2018) rejected the Agency's argument that Class Counsel no longer represents all Class Member claimants. The Agency's brief to OFO sought to strike the Class appeal, arguing that Class Counsel could not act on behalf of all Class Members. *See* Agency Mot. to Strike Appeal at 8 (Oct. 1, 2018). Yet, the Commission ruled in favor of the appeal filed by Class Counsel, issued relief *to all Class Members* who filed relief claims, and served (in OFO's certificate of service)

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[1]Class Counsel represents the interests of all Class Members. Class Members who were properly notified and elected not to pursue a claim for individual relief have no remaining interest in this case.

[2]As a consequence of this erroneous legal position, the Agency has refused to include Class Counsel in official correspondence related to this case, has repeatedly engaged in *ex parte* contact with Class Members, and Agency counsel rejected a request from Class Counsel to confer prior to the February 14, 2019 status conference.

only Class Counsel (and the Class Agent) on behalf of all Class Member claimants. *McConnell v. U.S. Postal Serv.*, EEOC No. 0120182505 (2018). Thus, the Commission recognized Class Counsel's standing to represent all Class Member claimants, and rejected the Agency's position.

The Commission's decision to continue recognizing Class Counsel's role is fully consistent with the regular practice in previous class actions. Management Directive 110 states that class members are not able to opt out of a certified class: "The class members may not 'opt out' of the defined class; however, they do not have to participate in the class or file a claim for individual relief." EEOC MD-110 at Ch. 8 § VI(C). In other EEOC class actions, the Commission has found that the class representatives continue to represent the certified class during the relief phase of the case. For example, in a currently-pending class action before the EEOC Washington Field Office, the Commission has acted with class counsel representing the interests of all class members who sought individual relief. *See Bella S. v. Dep't of Justice*, EEOC No. 0120150750 (2018) (noting that an issue related to class counsel's attorney fees was pending before Administrative Judge as part of Phase II relief process). In a class action against the Social Security Administration, the Commission approved of class counsel continuing to represent all class members in determining the relief to be provided to each individual class member following the agency's breach of a settlement agreement, and ordered the agency to pay quarterly fee payments for class counsel's work. *Anthony Z. v. Soc. Sec. Admin.*, EEOC No. 0720140007 (2016). Federal courts have also acknowledged that class counsel continues to represent the interests of all class members during the relief phase of employment discrimination class actions. *See, e.g., Trout v. Garrett*, 741 F. Supp. 280 (D.D.C. 1990); *McClain v. Lufkin Indus., Inc.*, 2009 U.S. Dist. LEXIS 125630, Case No. 9:97CV63 (E.D. Tex. Dec. 22, 2009); *McKenzie v. Kennickell*, 645 F. Supp. 427 (D.D.C. 1986).

There is no question that Class Counsel was approved to represent the interests of all Class Members when the class was certified. Indeed, the Agency never objected to the ability of Class Counsel to serve in that capacity on behalf of all Class Members. *See, e.g.*, Agency Reply re. Mot. for Class Certification at 21 (April 28, 2008) ("the Postal Service does not challenge the experience and ability of the array of attorneys representing McConnell" with respect to adequacy of representation of the Class). Likewise, there is no question that during the liability phase of this case, Class Counsel represented the interests of all Class Members. At no point has

the Commission entered any opinion or order that would even suggest that this representation has terminated; to the contrary, as noted above, the Commission's most recent opinion in this case fully acknowledges Class Counsel's continuing role in the relief phase of this matter.[3] It follows that there should be no question that Class Counsel continues to serve in the appointed capacity as the representative of all Class Members who elect to proceed through the relief process.

II. Agency Failed to Properly Notify All Potential Class Members of Right to Seek Relief

As ordered by the Commission, the Agency notified many Class Members about the Commission's finding of class-wide discrimination and the right to seek relief. However, it appears that the Agency's actions were incomplete. Class Counsel has been contacted by many Class Members who state that they never received any notice from the Agency. Therefore, it will be necessary for the Agency, under the supervision of the Administrative Judge, to take additional action to ensure that every potential Class Member is provided notice and an opportunity to submit a claim for relief, as ordered by the Commission.

Class Counsel reached out to the Agency to inquire about the steps taken by the Agency to notify potential Class Members, but the Agency refused to provide detailed information. Therefore, EEOC intervention is required. The Agency should be ordered to provide specific information about what steps were taken to locate potential Class Members, what measures were taken when notices were returned, what communications were provided to the estates of deceased Class Members, and whether the Agency knows of any potential Class Members who never received any notice. Additional action by the Agency to notify potential Class Members may be required based on the information that is produced.

[3]The Agency recently recognized the Commission's determination that Class Counsel continues to represent all Class Member claimants. In submitting its notice of compliance with the most-recent OFO order, the Agency on January 28, 2019 served a copy only on Class Counsel and the Class Agent.

III. Framework for Processing Initial Batch of Claims for Relief

In order to establish a routine procedure for consideration of disputed Class Member claims, the Class proposes starting with a limited number of claims. Adjudication of an initial batch of claims will allow the Commission and the parties to determine the best approaches for efficiently reviewing the high volume of disputed claims, and could assist the parties' evaluation of possible settlement positions.

The Class proposes that the process begin with adjudication of 50 claims for relief. Under this proposal, the Class would identify 50 claims to be the initial batch of claims, and the parties would conduct limited discovery regarding those claims. The initial batch of 50 claims is large enough to indicate significant forward progress, but not so large that the Commission's adjudicatory capacity would be overtaxed.

Discovery is necessary in order for the parties to develop evidence regarding the disputed relief claims. For example, during discovery regarding the merits of the class-wide claims, the Class sought production of certain files for the Class Members, such as OWCP injury compensation claim files maintained by the Postal Service. These files contain medical documentation related to each Class Member's disability. The Agency successfully fought to delay production of these and other records until after a class-wide liability finding was entered. The Agency "repeatedly objected that this discovery should be properly postponed until liability has been determined," and produced in connection with "Phase II individual relief" proceedings. Agency's Discovery Status Update at 2 n.2 (Jan. 14, 2013). Limited discovery is now necessary in order for the parties to access evidence related to the relief claims disputed by the Agency.

The Class proposes that discovery on the initial batch of claims be limited for each Claimant to twenty interrogatories, twenty requests for production, twenty requests for admissions, and three depositions. Discovery disputes could be addressed by the Administrative Judge, and orders on discovery matters would govern all relief claims, so that common objections or discovery disputes can be considered and ruled upon one time rather than separately in every claim.

The Class also proposes that the Administrative Judge utilize Special Masters in processing the initial batch of claims. The Special Masters (or "claims examiners") would provide assistance to the Administrative Judge by reviewing the claims and evidence from the

parties, drafting fact-findings on the claims, and providing recommended decisions to the Administrative Judge for review and approval. The Special Masters could hold hearings if necessary. For the initial batch of 50 claims, the Class recommends appointment of five Special Masters, to whom the Administrative Judge would assign ten claims each.

Special Masters of this kind are commonly used to assist federal court judges during relief proceedings in employment discrimination class actions. *See, e.g.*, Newberg & Conte, Newberg on Class Actions § 24.122 (3d ed. 1992) (appointment of special masters is useful once liability has been established in Title VII cases); *Williams v. Macon Cty. Greyhound Park, Inc.*, 2013 U.S. Dist. LEXIS 45355 (M.D. Ala. Mar. 29, 2013), *rev'd on other grounds*, 562 Fed. Appx. 782 (11th Cir. 2014) ("There also are a number of 'class action' tools available to the district court to help manage any individualized issues [including] appointing a magistrate judge or special master to preside over individual damages proceedings.").

The cost for Special Masters is to be borne by the Agency, as it is the Agency's class-wide discrimination that has created the need for the relief process. *See, e.g., United States v. City of New York*, 847 F. Supp. 2d 395, 434 (E.D.N.Y. 2012) (allocation of cost of special master against employer appropriate in Title VII relief proceedings); *Neal v. Dir., D.C. Dep't of Corrections*, 1995 U.S. Dist. LEXIS 11515, Case No. 93-2420 (RCL) (D.D.C. Aug. 9, 1995); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1363 (5th Cir. 1995) ("a district court does not abuse its discretion by taxing the losing party with the full share of the special master's fee.") (quotation marks and citation omitted); *Gary W. v. Louisiana*, 601 F.2d 240, 246 (5th Cir. 1979) (appropriate to impose cost of special master upon liable defendant).

The November 7, 2018 order from the Office of Federal Operations indicates that Special Masters may be used in this case. The Agency argued in its OFO appeal brief that Special Masters were unauthorized, and that it would infringe on the Agency's sovereign immunity for the EEOC to order the use of Special Masters (or Agency payment thereto) in this case. The Commission's order states that in the absence of "an accurate number of disputed claims," Special Masters were not yet seen as necessary. *McConnell v. U.S. Postal Serv.*, EEOC No. 0120182505 (2018). Notably, OFO did not accept the Agency's arguments that it would be improper for the EEOC to appoint Special Masters to assist in the processing of claims or to compel the Agency to bear the cost of using Special Masters.

The Agency has recently confirmed that the Agency is disputing more than 28,000 claims. Now that the Agency has confirmed the enormous number of disputed claims, it is appropriate for the Administrative Judge to utilize Special Masters to efficiently and effectively process the disputed claims. Put another way, now that the number of claims disputed by the Agency has been definitively[4] identified as roughly four times the amount of hearing requests the Commission receives in an entire year,[5] there can be no dispute that appointment of Special Masters is necessary.

The Class proposes that the Class provide the Administrative Judge with a list of possible Special Masters to be considered. The Agency could strike ten of the twenty proposed Special Masters. The Administrative Judge would then select the Special Masters from the remaining list of candidates supplied by the parties or by other appropriate means. The Agency would be responsible for directly contracting with and paying the Special Masters.

The parties would present evidence and argument regarding the claims to the Special Masters. The Special Masters would be able to conduct hearings or use other means to compile additional information and evidence. Pursuant to a schedule to be set by the Administrative Judge, the Special Masters would be responsible for providing a proposed decision to the Administrative Judge regarding each disputed claim for relief. The Administrative Judge would then be in a position to accept or modify the proposed decisions submitted by the Special Masters. The attached proposed Case Management Order provides a possible schedule of deadlines to be used in processing the initial batch of claims.

Under this proposal, the initial batch of 50 disputed claims will be processed in a matter of months. This framework would provide the parties (and the Commission) with crucial information in a timely fashion regarding the actual value associated with these disputed claims. Moreover, the proposed framework can be applied to the remaining disputed claims with

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[4]Subject, of course, to additional claims being filed by Class Members who have not received notice of their rights to file a claim for individual relief.

[5]*See* Annual Report on the Federal Workforce Fiscal Year 2015, *available at* https://www.eeoc.gov/federal/reports/fsp2015/index.cfm.

enhanced speed and efficiency. Thus, the Case Management Order proposed by the Class is designed to process *all* disputed claims in a reasonable period of time.

IV. Payment of Class Counsel Attorney's Fees and Costs

The processing of the disputed relief claims in this case has been and will continue to be an extremely time-consuming and expensive process for the Class. Class Counsel's continuing efforts are directly related to the Agency's class-wide discrimination and the Agency's decision to dispute tens of thousands of the relief claims submitted in this case. Under these circumstances, the Commission should provide for Agency payment of interim fees *pendente lite*, as explicitly authorized by the Commission's rules.

The Commission's governing rules provide for payment of interim attorney's fees where a party has already prevailed on aspects of the merits of the case. EEOC Management Directive 110 states:

> An Administrative Judge may award interim fees *pendente lite* where the complainant has prevailed on an important non-procedural allegation of discrimination in the course of the case. *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Trout v. Garrett*, 891 F.2d 332 (D.C. Cir. 1989). However, interim awards should be granted only under special circumstances, such as where a complainant's attorney has invested substantial time and resources into a case over a long period of time.

EEOC MD-110 at Ch. 11 § VI(H)(1) (footnote omitted). In this case, the Class has already prevailed in demonstrating class-wide discrimination, in a case that has been in litigation for over a decade. Thus, the "special circumstances" described in Management Directive 110 are present here.

The Class has already been found to be a prevailing party in this litigation. *See* 42 U.S.C. § 2000-e; 29 C.F.R. § 1614.501(e); EEOC MD-110 at Ch.11 § VI(B) ("'prevailing party,' ... is a complainant who has succeeded on any significant issue that achieved some of the benefit the complainant sought in filing the complaint"). The Commission already determined that the Class "is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint." *McConnell v. U.S. Postal Serv.*, EEOC Nos. 0720160006 & 0720160007 (2017); *req. for recons. den'd*, EEOC No. 0520180094 & 0520180095 (2018). Due to the Agency's class-wide discrimination and the Agency's decision to dispute thousands of relief claims filed

by Class Members, the Class will continue to necessarily incur additional attorney's fees and costs related to the processing of this matter.

Precedent supports this request for payment of interim fees *pendente lite*. In *Anthony Z. v. Soc. Sec. Admin.*, EEOC No. 0720140007 (2016), the Commission found that the agency violated terms of a class-wide settlement agreement. The Commission established a process for determining the relief to be provided to each class member resulting from the Agency's breach of settlement. The Commission affirmed the Administrative Judge's order of interim fees and costs to class counsel for work performed on the relief process. The Commission noted,

> The Commission determined that the Agency breached the agreement and ordered these proceedings to remedy the breach. These proceedings are not, as the Agency argues, "a separate action" ... but rather are part and parcel of the breach action. The monitoring of the compliance proceedings is necessitated solely by the Agency's breach of the settlement agreement.

Id. The Commission affirmed the Administrative Judge's use of quarterly submissions for payment of class counsel's attorney's fees and costs. *Id.*

Here, the Agency's class-wide discrimination, and the Agency's decision to dispute tens of thousands of claims for relief, are the reason for the continued litigation in this case. The Agency could eliminate the need for the Class to incur additional attorney's fees and costs by electing not to dispute thousands of valid relief claims. The Agency's discriminatory actions and litigation tactics have caused and will continue to cause the Class to incur attorney's fees and costs in the processing of this case.

The Class proposes that quarterly submission of attorney's fees and costs be authorized, to be submitted by Class Counsel to the Agency. The Agency would then issue a fee award regarding the fee submission. If Class Counsel does not agree with the fee award issued by the Agency, the Class would have the right to appeal the disputed portions of the Agency's decision to the Office of Federal Operations.

Conclusion

The Class looks forward to working with the Commission to process the unprecedented number of disputed claims in this historic case. The Case Management Order proposed by the Class is designed to adjudicate an initial batch of 50 claims in a matter of months, with the use of

Special Masters, and even faster adjudication of the remaining claims. This proposed framework therefore provides a feasible process for adjudicating all disputed claims in a reasonable period of time, as ordered by the Office of Federal Operations.

Respectfully submitted,

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