UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

SANDRA M. McCONNELL, ET AL.	)	**EEOC Hearing No. 520-2010-00280X**
Class Agent,	)	
	)	
v.	)	**EEOC Docket No. 0120182505**
	)	
	)	
MEGAN J. BRENNAN,	)	**Agency Case No. 4B-140-0062-06**
POSTMASTER GENERAL,	)	
UNITED STATES POSTAL SERVICE,	)	
Agency.	)	**Date:** August 31, 2018

CLASS BRIEF IN SUPPORT OF APPEAL OF FINAL AGENCY DECISIONS REGARDING CLAIMS FOR INDIVIDUAL RELIEF

In 2006, the Postal Service launched the National Reassessment Process, an operation avowedly aimed at reducing the number of Injured-on-Duty employees, *i.e.*, disabled employees whom the Agency had accommodated by modifying their duties. As the Commission has found, in implementing this program the Agency unlawfully inquired about and disclosed the medical records of over 100,000 employees, removed the accommodations of roughly 25,000 employees, and ended the employment of another 35,000 employees. Specifically, the Commission found that "the driving force [of the NRP] was to eliminate limited-duty and rehabilitation positions. As a policy, the NRP was an instrument that effectively deprived thousands of people of their livelihoods because of the need to work in modified positions." *Velva B. v. U.S. Postal Serv.*, EEOC Nos. 0720160006 & 0720160007 (2017).

Since embarking on this misguided and unlawful quest, the Agency has been rebuked by the Commission at every turn. The Commission upheld the Administrative Judge's determination to certify this matter as a class action, and, after years spent building the evidentiary record, the Commission upheld the Administrative Judge's entry of summary

judgment against the Agency. Most recently, in its decision denying the Agency's request for reconsideration, the Commission found classwide discrimination and remanded the matter for a determination of the appropriate relief for individual Class Members. *Velva B. v. U.S. Postal Serv.*, EEOC Nos. 0520180094 & 0520180095 (2018).

Undaunted, the Agency has pursued a rogue process to bar Class Members from presenting their claims for individual relief to the Administrative Judge. Tens of thousands of Class Members have submitted written claims for individual relief. Yet the Agency has disputed every one of those claims, and by virtue of improperly-issued Final Agency Decisions, has denied relief altogether to virtually every single Class Member.

The Agency's efforts to preclude aggrieved Class Members from presenting their disputed claims for relief to the Administrative Judge must be seen for what it is: a transparent attempt to undermine and negate the Commission's finding of class-wide discrimination by depriving Class Members – victims for the Agency's insidious NRP – of the relief to which they are entitled. The Commission cannot allow the Agency's scheme to succeed.[1]

The purported Final Agency Decisions regarding Class Member claims for individual relief have been issued in error, and in violation of the EEOC's class action regulations and procedures for relief claims. The Agency has preemptively and prematurely issued dispositive decisions without due process and without supporting evidence. In so doing, the Agency attempted to take jurisdiction away from the Administrative Judge, and inappropriately shifted the entire burden of this process onto the EEOC appellate function, requiring OFO to address

[1]The Class filed a Petition for Enforcement of Final Order with the Commission on June 26, 2018. If the Commission grants the relief sought by the Class in the Petition for Enforcement, then this class-wide appeal would be rendered moot.

thousands and thousands of Class Member appeals regarding empty, invalid FADs.[2] Pursuant to 29 C.F.R. § 1614.204 and EEOC Management Directive 110, Chapter 8, Section XII, all of these disputed Class Member claims for relief must initially be adjudicated by the EEOC Administrative Judge, not OFO. Only following factual development and relief determinations by the Administrative Judge, may OFO be called upon to handle appeals from Class Member claimants.

Simply stated, in a transparent effort to deny relief to tens of thousands of victims of its class-wide discriminatory practices, the Agency is attempting to avoid any independent review over Class Member claims that the Agency has disputed. The Agency issued purported FADs even though the Administrative Judge retains jurisdiction over the Class Member claims for relief. The Commission must take control of the individual relief process in this class action by directing the Agency to comply with the Commission's regular class action procedures. Further, the Commission should authorize the Administrative Judge to appoint Special Masters to efficiently and effectively consider Class Member relief claims.

I. FACTS AND BACKGROUND

The EEOC Final Order in this case (issued on March 9, 2018) found class-wide discrimination. The Commission held that the Agency violated the Rehabilitation Act by creating and implementing the National Reassessment Process, a program targeted at injured-on-duty employees. The Final Order determined that the NRP subjected employees to disparate treatment, improperly accessed and disseminated employee confidential medical information, led

[2]On information and belief, the Agency has disputed **every claim** for individual relief submitted by Class Members in this case.

to improper medical inquiries, failed to properly accommodate employees with disabilities by withdrawing accommodations, caused harassment against employees, and caused some employees to be forced from their jobs. *See Velva B. v. U.S. Postal Serv.*, EEOC Nos. 0720160006 & 0720160007 (March 9, 2018). The Final Order directed the Agency to issue notices to Class Members regarding the decision and the availability of individual relief. *Id.*[3]

EEOC regulations explain that individual relief disputes must be handled at the Administrative Judge level before OFO becomes involved. The key EEOC regulation explicitly provides that "[a]dministrative judges **shall retain jurisdiction** over the complaint in order to resolve any disputed claims by class members." 29 C.F.R. § 1614.204(l)(3) (emphasis added). The meaning of this regulation is plain: disputed claims are to be resolved by the Administrative Judge in the first instance, with appeals to OFO (if any) taking place after the Administrative Judge has adjudicated disputed claims associated with the class complaint.[4]

The Commission has formally adopted specific, step-by-step directions for agencies and administrative judges to follow when processing disputed claims pursuant to 29 C.F.R. § 1614.204(l)(3). The instructions are set forth in EEOC Management Directive 110, Chapter 8, Section XII, and may be divided into five steps: Step One requires the Agency "to inform [the Administrative Judge] in writing within sixty (60) days of the agency's receipt of a claim from a class member that it intends to dispute the class member's claim, and provide a copy of such

[3]The Commission's Final Order directed a separate process for consideration of relief for Class Agent Sandra McConnell. Ms. McConnell's relief is not at issue in this appeal.

[4]This regulation is carefully worded to emphasize that the class *complaint* remains under the jurisdiction of the Administrative Judge until all disputed class member *claims* are resolved by the Administrative Judge.

notice to the class member"; Step Two mandates that the Agency must "provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within fifteen (15) days";[5] Step Three provides that the class member will "respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency"; Step Four is for the Administrative Judge to "determine whether s/he needs additional information or should hold a hearing in order to further develop the record regarding the class member's claim"; and Step Five, "[a]t the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and the agency."

Put another way, the Administrative Judge retains jurisdiction over a disputed claim (pursuant to 29 C.F.R. § 1614.204(l)(3)) until the Administrative Judge "issues a decision concerning the class member's claim and forwards the decision to the class member and the agency" (pursuant to Management Directive 110, Ch. 8, § XII(C)(4)). Then, and only then, may the Agency properly issue a Final Agency Decision for each claim.

In this case, the Agency appeared to follow the initial steps in the Commission's process, but then skipped over development of the evidence and adjudication by the Administrative Judge. Specifically, the Agency sent out notices to Class Members regarding the EEOC Final Decision.[6] After thousands of Class Members submitted claims, the Agency complied with Step

[5]The Administrative Judge may extend deadlines if appropriate. EEOC Management Directive 110 at Ch. 8 § XII(C)(3).

[6]The Agency has conceded that it failed to mail out all notices in a timely manner, and the Agency failed to deliver the notices to the appropriate addresses for many Class Members. Indeed, many Class Members have yet to receive a notice from the Agency. The Agency's failure to properly deliver the notices complicates any analysis regarding the timeliness of Class

One by issuing a written notice of dispute for each claim, and presenting the disputed claims to the Administrative Judge. *See, e.g.*, Ex. 2. However, the Agency did not comply with the remainder of the process mandated by the Commission in Management Directive 110. The Agency did not provide "supporting evidence within fifteen days" (Step Two). Indeed, the Agency skipped Step Two, Step Three, Step Four and Step Five. The Agency leap-frogged to issuance of Final Agency Decisions without waiting for development of evidence and adjudication of claims by the Administrative Judge.

On July 12, 2018, Class Counsel filed a notice of appeal on behalf of all Class Members in this case. Class Counsel represents the interests of all Class Members, and this appeal explicitly covers all Final Agency Decisions (and other dispositive decisions) issued by the Agency in this matter concerning any Class Member claim for individual relief.[7]

As now shown, the Agency has issued thousands of Final Agency Decisions in error. These individual claims are not yet ripe for consideration by OFO. Instead, the Commission must remand these claims for development of evidence and adjudication by the Administrative Judge, in accordance with EEOC regulations and Management Directive 110.[8]

Members' written claims for individual relief. For example, if a Class Member has not yet received a notice from the Agency, the claim deadline has not passed for that Class Member. *See* 29 C.F.R. § 1614.204(l)(3) (a "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 agency").

[7]Along with the notice of appeal, Class Counsel has provided the Commission with lists of the tens of thousands of individual Class Members who have filed a claim for relief and retained Class Counsel as their representatives for their relief claims.

[8]The Agency has issued letter decisions finding Class Member claims for relief untimely. These letter decisions do not include any evidence in support of the allegation of untimeliness, and describe no process for EEOC review. These dispositive decisions denying Class Member claims for relief should also be presented to the Administrative Judge through the individual claims process for a decision, based on evidence, regarding the timeliness of the submitted

II. LEGAL ANALYSIS AND ARGUMENT

A. Agency's Purported FADs Are Invalid, as the Administrative Judge Retains Jurisdiction Over Disputed Claims

The Agency has purported to issue tens of thousands of Final Agency Decisions regarding these disputed Class Member claims for individual relief. But the Commission's regulations explicitly state that "Administrative judges **shall retain jurisdiction** over the complaint in order to resolve any disputed claims by class members." 29 C.F.R. § 1614.204(l)(3) (emphasis added).

The Agency's purported FADs are invalid. The Commission's class action regulations provide that the Administrative Judge retains jurisdiction over disputed claims. The Administrative Judge has not resolved any of the claims that have been filed by Class Members and disputed by the Agency. Accordingly, the Agency issued its FADs at a time when the Administrative Judge retained jurisdiction over the claims.[9]

The Commission's regulations and Final Order indicate that the Agency is to issue FADs within 90 days of receipt of a Class Member claim for individual relief. However, that 90-day deadline is automatically tolled if the Agency disputes the claim for relief. Management Directive 110 dictates that once the agency disputes a class member claim for relief, "the Administrative Judge will issue an order tolling the 90-day period within which the agency is

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claims. In other words, claims that have been denied by the Agency due to alleged untimeliness are "disputed claims" that must proceed through the same process as all other disputed claims, in accordance with Management Directive 110.

[9]The Commission already advised in this case that the Administrative Judge "is the appropriate person to manage the individual claim relief process for class members." *Velva B. v. U.S. Postal Serv.*, EEOC Nos. 0520180094 & 0520180095 (2018).

required to issue a decision on the class member's claim." EEOC Management Directive 110 at Ch. 8 § XII(C)(2). The language in Management Directive 110 is not discretionary, but mandatory. This mandatory language reflects the jurisdictional status of a disputed claim under the EEOC regulations, as the matter rests with the Administrative Judge pursuant to 29 C.F.R. § 1614.204(l)(3) ("Administrative judges **shall retain jurisdiction** over the complaint in order to resolve any disputed claims by class members") (emphasis added).

The Administrative Judge's failure to issue an explicit order tolling the Agency's deadline in this case does not somehow confer jurisdiction over disputed claims to the Agency. Rather, the mandatory language in Management Directive 110 means that the Agency's deadline to issue a final order is tolled while the Administrative Judge retains jurisdiction over disputed Class Member claims for relief. As the Commission has explained, "[t]he Agency is ... deprived of both the power and jurisdiction to adjudicate the matter while it is pending before the Administrative Judge." *Jonathan V. v. HHS*, EEOC 0120152151 (2017).

As the Administrative Judge had jurisdiction over the claims, the Agency had no authority to issue FADs, and its purported FADs (and other dispositive decisions), issued without jurisdiction, are a nullity and of no force or effect. *See Casie S. v. U.S. Postal Serv.*, EEOC No. 0120161412 (2018) (vacating FAD issued when case within jurisdiction of AJ, remanding case to AJ); *Gia M. v. U.S. Postal Serv.*, EEOC No. 0120180848 (2018) (same); *Lacy R. v. U.S. Postal Serv.*, EEOC No. 0120152566 (2017) (same).

B. By Issuing Premature FADs, the Agency Has Improperly Preempted Development of Evidence and Skipped Over the Administrative Judge's Role in the Process

The Agency has issued tens of thousands of premature Final Agency Decisions regarding disputed individual claims for relief. After Class Members took appropriate action to initiate individual claims for relief, the Agency preempted development of the evidence, discovery, and the Administrative Judge's adjudicatory role by issuing tens of thousands of premature FADs. The Commission must promptly take control by remanding Class Members' claims for relief to the Administrative Judge for processing and review as required by EEOC regulations and Management Directive 110.

1. Class Members Initiated Process for AJ Consideration of Disputed Claims

Class Member initial written claims for individual relief establish the beginning of the relief process, not the complete evidence on the matter. The Commission's rules and regulations make clear that if a Class Member's claim for relief is disputed by the Agency, there must be an opportunity for development of evidence and fact finding by the Administrative Judge. *See* 29 C.F.R. § 1614.204(l)(3); EEOC Management Directive 110 at Ch. 8 § XII(C).

Adhering to the EEOC's regular process for reviewing claims for individual relief, the Final Order in this case presents an initial threshold for claimants to satisfy, followed by additional steps to be guided by the Administrative Judge. The Final Order in this case includes a detailed "order" at pages 5-9. The order states, in paragraph "a" of section 6, that initial written claims are to include information showing "that the claimant was subjected to an evaluation under the National Reassessment Program between May 5, 2006, and July 1, 2011 ... as well as the consequences of that evaluation." *Velva B. v. U.S. Postal Serv.*, EEOC Nos. 0520180094 &

0520180095 (2018) at *7. Paragraph "a" thus sets forth the expectation for all initial claims, without regard to the type of relief sought by each individual class member. By contrast, paragraphs "b" through "g" in section 6 of the Final Order set forth additional expectations associated with specified types of relief (such as evidence that the claimant was a qualified individual with a disability). From a procedural perspective, paragraph "a" refers to the initial claim, whereas paragraphs "b" through "g" refer to evidence that may be submitted during the subsequent claims process managed by the Administrative Judge. *Id.* at **7-9; *see also id.* at *5 (Commission agrees "that the AJ is the appropriate person to manage the individual claim relief process for class members").

Consistent with the Commission's direction and guidance, tens of thousands of Class Members submitted written claims for individual relief. However, rather than allow Class Members to proceed through the EEOC's relief process for disputed claims (with development of evidence and fact finding guided by the Administrative Judge), the Agency here issued premature FADs without any further development of evidence or fact finding.[10]

For example, Class Member [redacted] filed a written claim for relief on March 31, 2018. Ex. 1. The Agency issued a letter noting a dispute regarding [redacted] claim on June 4,

[10]In violation of EEOC regulations, the Agency failed to serve on counsel any documents related to the individual claims process, including notices regarding disputed claims, Final Agency Decisions, or other dispositive decisions. *See* 29 C.F.R. § 1614.605(d) ("after the agency has received written notice of the name, address and telephone number of a representative for the complainant, *all official correspondence shall be with the representative* with copies to the complainant") (emphasis added); 29 C.F.R. § 1614.402(b) ("If the complainant is represented by an attorney of record, then the 30-day time period ... within which to appeal shall be calculated from the *receipt of the required document by the attorney*") (emphasis added). The Agency's violation of EEOC regulations in an effort to prevent an opportunity to respond further reveals the Agency's true strategy of simply burying the EEOC under unnecessary appeals.

2018. Ex. 2. But instead of permitting the Administrative Judge to allow for discovery, conduct fact finding, and issue a decision on [redacted] disputed relief claim, the Agency issued a preemptive Final Agency Decision. Ex. 3. The Final Agency Decision states, "On 5/25/2018, NEEOISO notified you that your claim for relief was being disputed." Ex. 3 at 1.[11] Nevertheless, the Agency issued a FAD on [redacted] disputed claim without allowing for any process before the Administrative Judge. The Agency has denied Class Member [redacted] and all other Class Members the opportunity to develop evidence regarding their claims and have their disputed claims resolved through fact finding and a decision by the Administrative Judge, as required by Management Directive 110.[12]

The Commission has previously ruled that the procedure for review of class member claims for relief requires a process to develop the evidence following the filing of an initial claim for relief. In *Mitchell, et al. v. Dep't of Agriculture*, EEOC No. 01960816 (July 3, 1997), the agency argued that class member claims were properly denied because the initial claims failed to

[11]The dispute notice is dated June 4, 2018, though the FAD states that it was sent on May 25, 2018. June 4, 2018 is beyond 60 days from when [redacted] submitted his written claim for individual relief. If the Agency is found to have missed its deadline for issuing a Final Agency Decision to [redacted] the Commission could impose a default judgment in favor of [redacted] claim for relief, including his claim for $300,000 in compensatory damages. Moreover, because the Agency failed to serve any Final Agency Decisions upon counsel (in violation of EEOC regulations), *every* FAD could be deemed untimely, resulting in default judgments in favor of every Class Member who submitted a claim.

[12]Class Counsel represents the interests of all Class Members, and this appeal covers the procedural failing impacting all Class Member claims. A written designation of representation specifically naming Class Counsel was submitted to the Agency by [redacted] on March 31, 2018. *See* Ex. 1. Tens of thousands of individual Class Members have submitted similar designations of representation naming Class Counsel or retained Class Counsel to represent them in their individual claims. Class Counsel has notified the Commission and the Agency regarding all Class Members who have formally retained Class Counsel.

provide detailed supporting evidence. The Commission firmly rejected this argument, explaining that the class member's initial burden is merely to show "that she is a class member." *Id*. Upon that minimal showing, "the burden shifts to the agency to show, by clear and convincing evidence, that it had legitimate reasons for the adverse action at issue." *Id*. The Commission in *Mitchell* determined that class members satisfying the low "initial threshold" would be permitted to develop evidence for their claims in subsequent proceedings, before a final determination would be made on the claims.[13] In other words, "those claims meeting the **initial threshold** will be referred for further fact finding and ... during such fact finding, appellants may present additional information in support of their claims." *Id.* (emphasis added). *See also Mitchell v. Dep't of Agriculture*, EEOC Petition No. 04970021 (Dec. 4, 1997) (*Mitchell II*) (rejecting agency's argument "that [class members] should be rigidly limited to whatever information they were able to cobble together, without the resources at the agency's disposal, within thirty days.").

The initial claim form submitted by tens of thousands of class members in *McConnell* provides more than sufficient evidence to satisfy the "initial threshold" for further processing. The initial claim form provides a sworn statement that explicitly states "I am a Class Member in this case, and I understand that I was subjected to evaluation under the National Reassessment

[13]A small number of individual class member claims in *Mitchell* were found to have been insufficient for further processing. But in each of these examples, the claimant failed to assert any basis for relief, failing to meet the initial threshold. For example, several of the claims rejected in *Mitchell* did not assert any possible negative effect within the class relief time period (1986-1994). For this small number of initial claims, "the Commission finds that the appellants simply have failed to make a sufficient showing to establish a possible entitlement to relief." *Mitchell, et al. v. Dep't of Agriculture*, EEOC No. 01960816 (July 3, 1997). Of note, due to the settlement agreement at issue in *Mitchell*, the relief process in that case did not include any consideration of compensatory damage awards.

Program (NRP) between May 5, 2006 and July 1, 2011." *See, e.g.*, Ex. 1. The initial claim form asserts "I was harmed by the NRP as a result of being subjected to an unlawful medical inquiry ... [and] as a result of having my confidential medical information accessed by unauthorized persons." *Id.* The initial claim form further states, "I was subject to harassment and/or disparate treatment under the NRP, and this caused me additional harm." *Id.* The initial claim form also includes the adverse consequences to the Class Member's employment as a result of the NRP. For example, Class Member [redacted] written claim declares that as a result of the NRP, he had his work hours or pay reduced, and he was forced to leave his USPS employment. Ex. 1. Class Members' sworn declarations readily satisfy the "initial threshold" for further processing of class member claims for relief.

The applicable regulation requires merely that the claim show "that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which class-wide discrimination was found in the final order." 29 C.F.R. § 1614.204(l)(3). The initial claim form submitted by *McConnell* Class Members provides this required information: each claim form explicitly asserts that the claimant is a class member who was impacted by the NRP during the class time period (between May 5, 2006 and July 1, 2011). This sworn evidence is all the information that is necessary to establish that the claimant is a *McConnell* Class Member impacted during the Class time period who seeks relief. Thus, in this case, the initial claim form provides information sufficient to satisfy the preliminary standard for a specific, detailed showing.[14]

[14]The Agency mailed notices to Class Members (as opposed to mailing notices to all USPS employees). That is, the Agency sent written notices to the subset of USPS employees who were reviewed under the NRP during the time period at issue in this case, and the Agency

By providing sufficient information to meet the EEOC's initial threshold, Class Members in this case are entitled to full processing of their disputed claims for individual relief. The Agency's position that Class Members are to be held only to the information included with their initial claim forms is contrary to the Commission's class action procedures, and that argument was squarely rejected by the Commission in *Mitchell*.[15]

2. Agency Denied AJ and Class Members Opportunity to Review Evidence

The purported Final Agency Decisions were issued without any opportunity for either party to present evidence regarding the claims. The Commission's Final Order in this case established a relief process based on evidence. *See Velva B., supra.* (Class Members must "provide a specific and detailed showing that they suffered compensable harm"). Class Members must be given the opportunity, as mandated by Management Directive 110, to develop the record in order to present this evidence.

Management Directive 110 requires the Agency "to provide a statement in support of its decision to dispute the class member's claim **and any supporting evidence**" to the Administrative Judge and the class member. EEOC Management Directive 110 at Ch. 8 § XII(C) (emphasis added). The purpose of this process is clear: the agency must provide its "supporting evidence" to the class member so that the class member may assess the evidence and provide

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has information regarding each employee's outcome under the NRP. Under the circumstances of this case, the Agency's inclusion of claimants on its list of Class Members creates a presumption that claimants on that list satisfy the initial threshold upon submitting a written claim for individual relief.

[15]Indeed, the Commission in *Mitchell* explained that imposing a significant pleading requirement at the outset of the Phase II individual relief process would be contrary to the "presumption of entitlement to relief" for each class member. *Mitchell, et al. v. Dep't of Agriculture*, EEOC No. 01960816 (July 3, 1997).

rebuttal evidence and/or clarifying evidence as appropriate. Naturally, this production of evidence by the agency is to occur prior to any decision by the Administrative Judge regarding the class member's claim for relief.

Here, however, the Agency issued Final Agency Decisions (and other dispositive decisions) without either party having the opportunity to develop the record or present evidence to the Administrative Judge. The Agency therefore failed in its obligation to provide supporting evidence for its decision to dispute Class Members' claims for relief prior to the issuance of a final decision. In other words, the Agency bypassed Step Two, Step Three, Step Four, and Step Five in the process mandated by Management Directive 110. *See supra* at pp. 4-6. Accordingly, each and every FAD issued by the Agency is premature and invalid.

3. Agency Withheld All Discovery From Class Members

The Agency's misapplication of the claims process also foreclosed discovery, even though thousands of Class Members formally requested discovery, and the Agency previously noted in this case that certain information would be produced in discovery during the individual relief process.

Thousands of Class Members formally requested production of certain records in discovery requests served on the Agency. For example, Class Member [redacted] submitted a written discovery request along with his claim for relief. Using the standard initial claim form used by thousands of Class Members, [redacted] written claim for relief stated:

> I hereby authorize and direct the USPS to access applicable NRP records, management/HR records, and Injury Compensation records to provide additional evidence regarding my Claim, and to **provide a copy of all such records** to me and my representative.

Ex. 1 (emphasis added). The Agency failed to provide any response to this discovery request served by [redacted] and tens of thousands of other Class Members. The Agency simply disregarded the Class Members' requests for production of Postal Service records that are likely to support the Class Members' claims for individual relief.

Notably, the Agency previously represented to the Commission in this case that it would produce just such information to Class Members during the Phase II individual relief process. In resisting discovery requests served by the Class during the class-wide liability phase of this case (*i.e.*, Phase I), the Agency argued that certain discovery should be produced during the individual relief process (*i.e.*, Phase II). The Agency "repeatedly objected that this discovery should be properly postponed until liability has been determined," and later produced in connection with "Phase II individual relief" proceedings. Agency's Disc. Status Update at 2 n.2 (Jan. 14, 2013). The Commission granted the Agency's request, agreeing that the Agency need not produce information regarding damages and relief until Phase II. *See, e.g.*, Sched. Ord. (July 7, 2011) ("No discovery with regard to Phase II damages may be conducted until after a decision on liability becomes final"); Order at 2 (March 22, 2013) ("information sought is related to damages, which is more appropriately sought in Phase II (damages) of this case"). However, the Agency continues to withhold this requested information, even though this case has reached Phase II.

Information supportive of Class Member claims for relief would be produced in discovery. As a threshold observation, it should be noted that the discrimination found by the Commission occurred during implementation of the NRP from 2006 to 2011, and thousands of Class Members may no longer have access to records from that time period. Moreover, the

Agency maintained extensive NRP documentation regarding each Class Member, but the Agency never shared its NRP files with these employees. The Agency's NRP documentation is directly relevant to each Class Member's description of exactly what happened to them during the NRP, which is part and parcel of most relief claims.

In particular, the Agency has documents regarding the NRP review and outcome of each employee who was subject to the program, including information regarding which management officials were improperly provided each employee's personal medical records. The Agency has extensive medical information regarding employees affected by the NRP, records that may no longer be otherwise available to Class Members. The Agency has possession of communications to Class Members regarding the NRP, including directions and orders issued to Class Members under the program. There can be no question that the Agency has extensive evidence that would support Class Member claims for relief, yet the Agency has sought to foreclose discovery of that evidence.

The Agency has attempted to use its own refusal to produce any discovery as a basis for denying relief claims. For example, as noted above, Class Member [redacted] sought production of certain records with his initial written claim. Ex. 1. The Agency never produced that information, or any other information to [redacted]. The Agency then issued a Final Agency Decision regarding [redacted] claim, faulting the Class Member for not including all possible evidence with his initial claim document. When [redacted] sought to submit additional information and documents, the Agency rejected it, stating that the "new evidence" could not be

considered at this stage. *See* USPS Resp. to [redacted] Appeal of Agency's Final Decision (Aug. 15, 2018).[16]

The Agency cites EEOC decisions in previous class actions to set the evidentiary standard for Class Members seeking relief. *See id.* at 5 (citing *Mitchell v. Dep't of Agriculture*, EEOC Nos. 01960816 and 04970021 (1997)). As those previous EEOC decisions make clear, however, the evidentiary burden on class members arises **after discovery** and an opportunity to present evidence before the Administrative Judge or other neutral fact finder. *See Mitchell v. Dep't of Agriculture*, EEOC Nos. 01960816 and 04970021 (1997) (describing process under class settlement for presentation of evidence by both parties to EEOC prior to relief determinations).

The Agency seeks to set a standard that is impossible for any Class Member to reach by withholding relevant evidence from Class Members, and by preventing discovery or fact finding. The Commission must reject the Agency's evasive approach. *See Mitchell, et al. v. Dep't of Agriculture*, EEOC No. 01960816 (July 3, 1997) (reversing agency relief decisions where class members "were stymied by an inability to obtain pertinent information from the agency" and "much of the evidence necessary ... is not available, through no fault of the individual class member.").

[16]Some Class Members, including some who have retained Class Counsel as their representatives, have filed separate appeal notices regarding Agency FADs on claims for individual relief. In each case, the Agency issued an invalid premature FAD. Thus, every appeal involves a similar legal issue for determination by OFO. We request that the Commission consolidate consideration of all Class Member claims for individual relief in which a FAD has been issued, and issue an order regarding the appropriate procedure on remand to the Administrative Judge. Thus, the separately-filed appeals would be consolidated with this class-wide appeal, and would not need to be docketed or considered separately by OFO at this juncture.

4. Agency Attempts to Manipulate Relief Process to Evade Responsibility for Its Class-Wide Discrimination

The Commission found that the Agency engaged in class-wide practices of discrimination, and ordered that a fair process be used to provide relief to harmed Class Members. The Agency cannot be permitted to prevent Class Member discovery, preempt the Administrative Judge's role, and then conduct its own putative fact finding regarding claims for relief . The Agency self-evidently has designed this aberrant relief process in an improper attempt to shield itself from liability and deny relief to individuals who were the victims of its class-wide discriminatory practices.

The Agency's coordinated plan to shield all evidence from Class Members, and then blame the Class Members for not producing that evidence in support of their claims, is precisely the type of conflict of interest prohibited by the Commission's guidance. The Agency's EEO officials have worked with the attorneys defending the Agency in this case to design the aberrant process that led to the invalid FADs. Management Directive 110 dictates that there must be "a clear separation between the agency's EEO complaint program and the agency's defensive function." EEOC Management Directive 110 at Ch. 1 § IV(D).

> There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

Id. In this case, the Agency failed to separate the Agency's defensive representatives from its EEO officials issuing premature FADs denying claims for individual relief. The Agency has admitted to hundreds of communications about this case directly between the attorneys defending the Agency in this case and the Agency's EEO officials. Ex. 4 (referencing over 600

communications). The Agency has refused to produce those communications based on assertions of "attorney-client privilege" and "attorney work product privilege." *Id.* Plainly, the Agency has failed to maintain a "clear separation" as required by EEOC guidance.

Where, as here, the Agency has failed to maintain a firewall between its defensive function and its EEO function, it is particularly important for the EEOC to ensure proper functioning of the relief process. The necessary first step is to reject the Agency's premature FADs, and remand all individual claims for evidentiary development and fact finding guided by an impartial Administrative Judge.

5. Agency Seeks to Further Harm Victims of Discrimination

The Commission's customary process for consideration of class member claims for individual relief must be used in this case. The Commission's Final Order directed that the regular process be used. As the Agency has chosen to dispute every Class Member claim for relief, all claims are under the jurisdiction of the Administrative Judge. The step-by-step process laid out in Management Directive 110 must be followed.[17]

The purported Final Agency Decisions include substantive errors that go beyond the procedural failings. As noted above, the FADs failed to provide evidence supporting the Agency's decision to dispute the Class Member claims. The FADs seek to impose legal standards that conflict with the Commission's Final Order in this case. The FADs use an improper definition of "qualified individual with a disability," directly conflicting with the Commission's prior decisions in this case. The FADs employ a standard for harassment that is

[17]The Commission has employed the standard process in another class action that has reached the stage of claims for individual relief. *See Garcia v. Dep't of Justice*, EEOC No. 570-2015-000037X.

inconsistent with the Commission's Final Order in this case. These legal errors, among others, further demonstrate the need for all disputed claims for individual relief in this case to proceed through the customary fact finding process overseen by the Administrative Judge, in accordance with Management Directive 110. The Administrative Judge can provide clear guidance on, and resolve any disputes regarding, the law and evidentiary standards governing the relief process in this case.

The Agency's gamesmanship cannot be tolerated by the Commission. The Agency seeks to hide all evidence from Class Members by refusing discovery. The Agency seeks to avoid all review by the Administrative Judge by issuing preemptive Final Agency Decisions. The Agency fails to provide any evidence to support its decisions to dispute Class Member claims or in support of its Final Agency Decisions. The Agency then argues that the Class Members' lack of information from discovery is the basis for denying all relief. The Agency is simply refusing to participate in the EEOC process for consideration of disputed relief claims.[18]

Unsurprisingly, the Agency's aberrant approach has the result of denying reasonable relief to any Class Member. It is imperative for the Commission to promptly take control of relief proceedings in this class action. Otherwise, the Commission's important decision on the merits of this case will be for nought, eviscerated through the Agency's procedural manipulation.

[18]The Postal Service's disdain for the EEOC class complaint process has been well documented in the past. *See, e.g.*, Dep't of Justice Office of Legal Counsel Opinion, "Legality of EEOC's Class Action Regulations" (Sept. 20, 2004) (rejecting USPS arguments that EEOC class complaint procedures are "contrary to Title VII"); *Smith, et al. v. U.S. Postal Serv.*, EEOC Nos. 0120081661, 0120081674, 0120081677, 0120081917 (2012) (default judgment entered against USPS where Agency failed to implement class certification decision).

III. EEOC MUST DIRECT INDIVIDUAL RELIEF PROCESS BACK TO PROPER PROCEDURE BEFORE ADMINISTRATIVE JUDGE

The Agency has issued invalid FADs regarding claims for individual relief over which the Administrative Judge still retains jurisdiction. The Commission must reject the Agency's attempt to pervert the individual relief claim process into a mechanism for denying relief to the victims of the Agency's class-wide discriminatory practices. The Agency would force the Commission to docket and consider tens of thousands of appeals of premature, nearly identical Final Agency Decisions, placing an unnecessary and unreasonable burden on OFO. The Commission must redirect this process back to the Administrative Judge level, where discovery can proceed and evidence can be reviewed. The Commission should direct all Class Member claims for individual relief back to the process required by the Commission's regulations and Management Directive 110 for disputed claims.

Unless the Agency has fully accepted the individual claim for relief submitted by a Class Member, the Agency has disputed the Class Member's claim.[19] As 29 C.F.R. § 1614.204(l) and Management Directive 110 make clear, once the Agency disputes any aspect of a claim, that claim is to go before the Administrative Judge for consideration of evidence presented by both parties, and a decision. "At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and

[19]Even a rejection of the monetary award sought by a Class Member constitutes a dispute. *See, e.g., Complainant v. SSA*, EEOC No. 0720130027 (2015) (agency bound by damages award "[s]ince the Agency does not dispute the non-pecuniary compensatory damages"); *Sipriano v. Dep't of Homeland Security*, EEOC No. 0120120264 (2013) (complainant "only disputes the Agency's back pay award," and is therefore bound by agency damages award); *Pritchett v. Dep't of Air Force*, EEOC No. 0720110022 (2012) (damages award at issue because "Agency also disputes the award of compensatory damages").

the agency." EEOC Management Directive 110 at Ch. 8 § XII(C)(4). Then, and only then, may the Agency issue a Final Agency Decision.

The Agency's massive procedural error should be remedied by a simple procedural directive. Rather than compel OFO to docket and process tens of thousands of appeals of prematurely-issued FADs, the Commission should simply direct the Agency to comply with the Final Order in this case, the Commission's class action regulations, and Management Directive 110.[20] The Commission should order the Agency to withdraw all improperly issued Final Agency Decisions (and other dispositive decisions) and delay issuing FADs until after the Administrative Judge permits development of the evidence and issues a decision on individual claims for relief. That is, the Commission should require the Agency to adhere to the individual relief process provided for disputed claims under the Commission's regulations and Management Directive 110.

IV. EEOC SHOULD EXPLICITLY AUTHORIZE USE OF SPECIAL MASTERS TO ASSIST ADMINISTRATIVE JUDGE

The use of Special Masters can assist in the processing of the tens of thousands of Class Member relief claims that have been disputed by the Agency. Particularly in light of the Agency's gamesmanship and attempt to force tens of thousands of unnecessary appeals on the EEOC, the Commission should now explicitly authorize the Administrative Judge to use Special Masters, whose cost would be borne by the Agency. While the Administrative Judge would retain primary responsibility to review the fact finding and decisions regarding claims for relief,

[20]Management Directive 110 is mandatory upon agencies: "federal agencies are responsible for prompt and effective compliance with Commission Management Directives." EEOC Management Directive 110, Transmittal Letter from EEOC Chair (Aug. 5, 2015).

use of Special Masters will assist the Administrative Judge in efficiently reviewing the thousands of claims that have been disputed by the Agency.

Special Masters are commonly used to assist in the relief process in federal court proceedings in Title VII class actions. *See, e.g.*, Newberg & Conte, NEWBERG ON CLASS ACTIONS § 24.122 (3d ed. 1992) (appointment of special master 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."). *See also* Fed. R. Civ. P. 53 (authorizing the use of special masters in civil litigation).

The presiding Administrative Judge should not bear the entire burden of handling all aspects of every individual claim disputed by the Agency. That would be a tall order for any Administrative Judge, or even all of the EEOC Administrative Judges combined. Instead, given that the Agency's class-wide unlawful conduct and the Agency's decision to dispute every one of the tens of thousands of Class Member claims has necessitated the processing of individual claims for relief, it is appropriate for the Agency to bear the expense of Special Masters to assist in effectuating the Phase II individual relief process. *See, e.g., United States v. City of New York*, 847 F. Supp. 2d 395 (E.D.N.Y. 2012) (allocation of cost of special master against employer appropriate in Title VII relief proceedings); *Gary v. Louisiana*, 601 F.2d 240, 245 (5th Cir. 1979) (appropriate to impose cost of special master upon liable defendant). The Agency should be ordered to bear the cost associated with the Special Masters.

The Commission clearly has authority to order the Agency to bear costs associated with Special Masters required to review the Agency's own disputes of claims related to the Agency's class-wide discrimination. *See West v. Gibson*, 527 U.S. 212, 215-18 (1999) (finding EEOC has broad authority to enforce anti-discrimination laws, including forcing federal agencies to pay compensatory damages); *Glynda S. v. Dep't of Justice*, EEOC No. 0120133361 (2016) (EEOC's "inherent authority to enforce" anti-discrimination laws includes ability to order monetary sanctions against federal agencies); *Waller v. Dep't of Transp.*, EEOC No. 0720030069 (2007) (affirming AJ's monetary sanctions order against the agency, rejecting DOJ opinion that would prohibit EEOC monetary sanctions); *Matheny v. Dep't of Justice*, EEOC No. 05A30373 (2005); *Mirta Z. v. SSA*, EEOC No. 0720150035 (2018) ("the Commission has the authority to issue sanctions in the administrative hearing process because it has been granted, through statute, the power to issue such rules and regulations that it deems necessary to enforce the prohibition on employment discrimination"); *Mirabal v. Dep't of Army*, EEOC No. 0720120007 (2012), *req. to recons. den'd*, EEOC No. 0520130236 (2014) (finding Administrative Judges authorized to issue monetary sanctions against federal agency even where discrimination not found).

Further, federal statutes and the Commission's regulations make clear that "governmental agenc[ies have] 'primary responsibility to assure nondiscrimination in employment ....'" *Brown v. GSA*, 425 U.S. 820, 832 (1976) (quoting 42 U.S.C. § 2000e-16(e)). In other words, the Agency has been found to have engaged in class-wide discrimination, the Agency has disputed the Class Member claims, and the Agency therefore bears "primary responsibility" for the costs associated with providing relief to individual Class Members in a fair, efficient, and orderly manner.

In addition, assignment of Special Masters is in accordance with 29 C.F.R. § 1614.204(l)(3), as a means for the Administrative Judge to "otherwise supplement the record on a claim filed by a class member." Moreover, this regulation provides broad authority for the Commission to provide "[r]elief otherwise consistent with this part." Where, as here, the Commission has entered a finding of class-wide discrimination, utilization of Special Masters is properly considered as part of the relief process for individual Class Member claims disputed by the Agency.

Accordingly, the Commission should specifically authorize the Administrative Judge to use Special Masters to assist in the adjudication of disputed Class Member claims for relief, and the Agency should be required to bear the cost of the Special Masters for those services. The Administrative Judge would still preside over the entire fact finding process, but would be assisted in those efforts by the work of Special Masters.

V. CONCLUSION

The Agency seeks to delay the Class Member claims process and overburden OFO by issuing invalid, preemptive Final Agency Decisions. The Commission should direct the Agency to withdraw all prematurely issued Final Agency Decisions (and other dispositive decisions), and not issue FADs until after the Administrative Judge permits development of the evidence and issues decisions on disputed Class Member claims for relief, pursuant to the process outlined in Management Directive 110. Furthermore, the Commission should authorize the Administrative Judge to utilize Special Masters to assist in the review of the disputed relief claims, and the Agency should be required to bear the cost of the Special Masters for those services. A proposed order is attached.